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'C'

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Code of Civil Procedure, 1908- Section 100- Plaintiff claimed to be the owner in possession of the suit land- there is a gali, which is being used an approach to reach the ground floor of the building – the defendants denied any right of the plaintiff to use the gali – the suit was dismissed by the trial Court – an appeal was preferred, which was dismissed- held in second appeal that gali is owned and possessed by defendant No. 1 and owner has right to raise construction over the same – the plaintiff does not have any right to claim the demolition of the wall – plaintiff has an alternative passage to approach his building – appeal dismissed. (Para-9 to 11) Title: Papinder Singh Vs. Gokal Chand (Now deceased) through his LR's and others Page-263

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit for recovery pleading that contract for transportation of rectified spirit was awarded to it – some amount remained unpaid – hence, the suit was filed for recovery – the defendant pleaded that defective spirit was supplied and the amount was adjusted against the losses caused by the plaintiff – the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- it was contended in second appeal that the suit was not maintainable as the plaintiff had failed to plead that partnership was registered- held, that no objection was taken regarding maintainability- it was specifically asserted in the plaint that plaintiff was a partnership concern – registration of the partnership firm was proved- the plea that suit was barred by limitation was also not established- appeal dismissed. (Para- 14 to 18) Title: Himachal Pradesh General Industries Corporation Ltd. Vs. M/s Hari Singh Harpal Singh Page-303

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Code of Civil Procedure, 1908- Section 151- Order 8 Rule 6-A- A counter- claim was filed by the defendants No. 2 to 5- an application was filed by defendant No. 1 for excluding the counter-claim, which was dismissed – held, that if a counter-claim is directed against the plaintiff, a defendant can seek relief against the co-defendant – the counter-claim filed by the defendants No. 2 to 5 was not solely directed against defendant No. 1 but was also directed against the plaintiff – therefore, the Trial Court had rightly dismissed the application for excluding the counter-claim- petition dismissed.(Para-11 to 14) Title: Rakesh Kumar s/o Sh. Bansi Lal Vs. Suman Sharma d/o Sh.Bansi Lal & Others Page-733

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed pleading that the applicant had entered into an agreement to purchase the suit land and is a necessary party – the application was dismissed by the trial Court- held in revision that plaintiff

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Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed pleading that the applicant had entered into an agreement to purchase the suit land and is a necessary party – the application was dismissed by the trial Court- held in revision that plaintiff had not sought any relief against the applicant – applicant has already filed a civil suit, which is pending before High Court- an agreement to sell does not create any right in the property – the order of the trial Court is not perverse and cannot be interfered in exercise of the revisional jurisdiction. (Para-13 to 18) Title: Chander Sen Thakur son of Shri Tikkam Ram Thakur Vs. JiwaNand son of late Shri Ram Chand & others (Civil Revision No. 150 of 2014) Page-468

Code of Civil Procedure, 1908- Order 2 Rule 2- Plaintiff filed a civil suit for recovery of money – he had already instituted a suit in the Court of Civil Judge (Senior Division), Kangra prior to the institution of the present suit – held, that the defendant should not be vexed time and again for the same cause by splitting the claim and causes of action - while determining whether the subsequent suit is barred or not, the Court has to find out whether the claim in the new suit is founded upon a cause of action which was the foundation in the former suit – the burden is upon the defendant to prove the identity of the cause of action in the two suits – plaintiff had filed the earlier suit for declaration and permanent injunction for restraining the defendant from leaving the services of Kangra Valley Hospital in violation of the agreement executed between the parties- the present suit has been filed for damages on the ground of cancellation of the agreement – the plea raised in the suit was available at the time of filing of the earlier suit – the plaintiff had not soughtthe relief, which was available to him and plaintiff is clearly precluded from instituting the suit – the suit is held to be barred by Order 2 Rule 2 and is dismissed. (Para-6 to 35) Title: Inderjit Singh Bawa Vs. Dr. Vani Sharma Page-660

Code of Civil Procedure, 1908- Order 7 Rule 11- A civil suit for declaration was filed challenging the election of various office bearers of the society – an application for rejection of the plaint was filed, which was dismissed – held, that the application was filed belatedly – the time for which the office bearers were elected has lapsed but that is not sufficient to dismiss the suit – the Court has already framed issue regarding the maintainability which is yet to be adjudicated- petition dismissed. (Para-4 to 8) Title: Kewal Ram Siranta & Ors. Vs. HP Voluntary Health Association &Anr. Page-578

Code of Civil Procedure, 1908- Order 9 Rule 4- The suit of the plaintiff was decreed ex-parte – an application for setting aside ex-parte order was filed, which was allowed – aggrieved from the order, present petition has been filed – held, that the defendant had taken a false plea in the application for setting aside exparte order- false claims and defences are serious problems with the litigation – the judicial system has been abused and virtually brought to its knees by the litigants like the defendants No. 1 to 4- one who comes to the Court must come with clean hands – the plea of the defendants was belied by the report on the summons that were received after the service of defendants 1 to 4- petition allowed. (Para-6 to 16) Title: Dinesh Kumar Vs. Jyoti Prakash and others Page-414

Code of Civil Procedure, 1908- Order 17 Rule 1- Five adjournments were granted to the petitioner – he could not produce the evidence on the date fixed as his mother fell ill – his evidence was closed by the order of the Court- held, that time and place of illness cannot be predicted – adjournment was sought on the ground of unavoidable reason – the Court should have been more compassionate - the fact that five adjournments had already been granted should not have been the sole ground to decline the adjournment – petition allowed- the order set

aside on the payment of cost of Rs. 5,000/-. (Para-3 to 8) Title: Karam Chand Vs. Prem Sagar Marwah Page-307

Code of Civil Procedure, 1908- Order 21 Rule 1- It was contended that respondents have not complied with the directions passed by the Court – a contempt petition was filed, in which time was granted to comply with the direction contained in the judgment – respondents directed to file a detailed status report indicating the compliance of direction. (Para-2 to 5) Title: Suman Kumari Vs. State of Himachal Pradesh & another (D.B.) Page-462

Code of Civil Procedure, 1908- Order 21 Rule 1- Section 47- Objections were filed to the execution petition, which were dismissed by the Executing Court – held in revision that Executing Court cannot go behind the decree – plea that provisions of Section 118 of H.P. Tenancy and Land Reforms Act were violated could have been taken in a suit but was not taken – this objection cannot be taken before the Executing Court – Court cannot disturb finding of fact in exercise of revisional jurisdiction- revision dismissed. (Para- 8 to 12) Title: Rajiv Bansal son of late Shri Mohinder Kumar Bansal Vs. Mange Ram Chaudhary son of Shri Prittam Singh & others Page-566

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree for permanent prohibitory injunction was passed- original judgment debtor was stated to have violated the judgement and decree – he died and an application was filed for bringing on record his legal representatives, which was dismissed by the Executing Court- held, that a decree for permanent prohibitory injunction can be executed by the decree holder or his legal representatives against the judgment debtor or his heirs or even the transferee of the judgment debtor, who is the purchaser pendent lite- the order passed by the Trial Court set aside and the application allowed- Court directed to decide the execution petition afresh. (Para-6 to 27) Title: Tara Singh Vs. Govind Singh (deceased) through LRs. Page-888

Code of Civil Procedure, 1908- Order 21 Rule 32- An execution petition was filed, which was dismissed by the Executing Court – held in revision that witnesses of decree holder had deposed that no construction was raised after passing of decree- J.D. No.7 had died and cause of action came to an end on his death- High Court cannot reverse the finding of facts unless the same is perverse- no illegality was committed by the trial Court- revision dismissed. (Para-9 to 14) Title: Lajja Devi wife of Sh Bhagat Ram Vs. Kanshi Ram son of Sh. Gurbax and others Page-616

Code of Civil Procedure, 1908- Order 21 Rule 32- It was pleaded that Judgment Debtor had violated the decree of the Court by alienating suit land and they be detained in civil prison – judgment debtor stated that the sale deed was legal and valid and was executed after taking legal advice – the execution petition was allowed against J.D. 1 to 3- held in revision that undertaking was given before District Judge not to alienate the suit land till partition – the Court ordered that undertaking shall form part of the order – alienation made in spite of undertaking will amount to violation of the order of the Court- judgment debtors were rightly held liable to pay the amount – revision dismissed. (Para- 13 to 18) Title: Roshan Lal son of Shri Nandu and others Vs. Nika Ram son of Budhu& others Page-452

Code of Civil Procedure, 1908- Order 23 Rule 1- Plaintiff filed a civil suit for seeking injunction – parties were directed to maintain status quo – defendants filed an application for initiating criminal proceedings for filing false affidavit, which was dismissed- a petition was filed before High Court and High Court directed to trial Court to consider and decide the application in accordance with law- plaintiff sought withdrawal of the suit- permission was granted and the suit and application were dismissed- held in revision that the allegations were made that plaintiff had filed a false affidavit – the plaintiff had a right to withdraw the civil suit unconditionally – all miscellaneous applications except the counter-claim will become infructuous on dismissal of suit- the order of the trial Court is not perverse- revision dismissed. (Para- 10 to 13) Title: Deepika Vashisht Vs. Rakesh Singh Page-300

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit pleading with the consequential relief of permanent prohibitory injunction- an application seeking interim relief was filed, which was dismissed by the trial Court- an appeal was filed, which was partly allowed and parties were directed to maintain status quo- held in revision that previous suit was dismissed in default and principle of res-judicata was not applicable- dismissal will not affect the present suit- the order of status quo is necessary to preserve the property during the pendency of the suit – revision dismissed. (Para- 7 to 11) Title: Ajit Singh son of Sh. Bidhi Chand Vs. Mukhtiar Singh son of Sh. Bidhi Chand Page-634

Code of Civil Procedure, 1908- Order 41 Rule 22- Limitation Act, 1963- Section 5- The cross-objections are barred by eleven years eight months and 17 days – no actual date of hearing was issued – the Court has discretion to entertain the cross-objections, even after the expiry of 30 days – the objector was not asked to file the cross-objections within 30 days and he being illiterate, rustic and old person could not file them within the period of 30 days- there are sufficient grounds to condone the delay- held, that limitation will start running from the first date of hearing – the date of hearing will start from the day when the objector and his pleader appeared in the Courts- the appeal is yet to be decided and the interest of justice will be served, if the objector is heard on merits- application allowed and the delay in filing the cross-objections condoned.(Para- 7 to 11) Title: Babu Ram Vs. Santokh Singh & another Page-388

Code of Civil Procedure, 1908- Order 41 Rule 25- Matter was remanded by the Appellate Court after framing issues – the order is challenged before the High Court- held, that the Court had not considered the provisions of Order 41 Rule 25 of C.P.C – the Court had erred in framing the issues – the case was pertaining to the execution of the Will and the burden is always on the propounder to establish the same – the order of the Appellate Court set aside and the matter remanded to the Appellate Court for a fresh decision. (Para-7 to 13) Title: Ranjeet Singh Vs. Prithvi Singh &others Page-623

Code of Civil Procedure, 1908- Order 41 Rule 27- A civil suit was dismissed by the trial Court – an appeal was filed during which an application for bringing on record the documents was filed, which was allowed – held, that no explanation was given for non-production of the documents at the time of the trial – further, the application for the additional evidence was to be considered along with the appeal and not in isolation- the order set aside and the case remanded to the Appellate Court with the direction to consider the application along with the main appeal. (Para-7 to 9) Title: Jagdish Raj and another Vs. Dhali Devi Page-261

Code of Civil Procedure, 1908- Order 43 Rule 1- An execution petition was filed, in which an order of sale was passed by the Court – the sale could not be held on the ground that no bids were received in spite of wide publicity – permission was granted to D.H. to get survey zoning and planning of the property done- fresh sale was conducted – six bank drafts were received – efforts were made for re-conciliation, which failed – time was granted to find better buyers- it was ordered that in case of failure the sale would stand confirmed automatically and execution petition will be closed- held, that Judgment Debtors had not questioned the sale – objections were filed subsequently, but they were not pressed- the order dismissing the application for recalling the order is not appealable – judgment debtors are caught by estoppel- inadequacy of consideration is no ground for setting aside the sale- appeal is not maintainable and is dismissed. (Para-31 to 54) Title: M/s United Electronics (India) Ltd. and another Vs. Ajay Kumar and others (D.B.) Page-425

Code of Criminal Procedure, 1973- Section 125- L and her son filed petition seeking maintenance pleading that husband of L started harassing and abusing her – he also demanded Rs. 30,000/- as dowry - L and her son were turned out of the house- the Trial Court granted maintenance of Rs. 1200/- per month to each of the petitioner- a revision was filed, which was dismissed- held, that husband did not appear in the witness box and an adverse inference has to

be drawn – L specifically stated that income of the husband is Rs. 12,000/- per month- no evidence was led in rebuttal – the maintenance of Rs. 1200/- per month each cannot be said to be excessive – evidence of the petitioner proved the ill-treatment and that wife is unable to maintain herself - petition dismissed.(Para-11 to 15) Title: Bhag Singh s/o Sh. Mahantu Ram Vs. Lalita Devi w/o Sh. Bhag Singh and another Page-841

Code of Criminal Procedure, 1973- Section 125- The marriage between the parties was solemnized – the husband started beating the wife – a petition for maintenance was filed and maintenance of Rs.5,000/- per month was awarded by Additional Sessions Judge while reversing the order of Judicial Magistrate- held in revision that the wife had left her matrimonial home and was residing with her parents- the husband had instituted a petition for restitution of conjugal rights but mere institution of the petitionfor restitution of conjugal rights will not have any effect on the proceedings under Section 125 of Cr.P.C – the wife had left the home due to beatings given to her and she had a reasonable cause to reside separately – the income of the wife was not proved – the maintenance was rightly granted. (Para-2 to 9) Title: Suresh Kumar Vs. Mamta Rani Page-528

Code of Criminal Procedure, 1973- Section 294 and 311- An application was filed for seeking permission to tender in evidence certified copies of the judgments passed by the Civil Courts, which was allowed- aggrieved from the order, present petition was filed contending that informant does not have a right to file the application directly without associating public prosecutor- held, that legislature has recognized importance and relevance of victim in the process of investigation, inquiry and trial as well as in appeal, revision etc. – he has a right to engage an advocate of his choice to assist the prosecution - permission was sought to assist the prosecution, which was allowed as not opposed – there is difference between assisting and conducting the prosecution– the permission can be granted by Magistrate to conduct the trial but such permission has to be expressly obtained by filing a written application- the permission was granted to assist the prosecution and therefore, it was not permissible to file the application to place the document on record- petition allowed- order passed by Magistrate set aside, however, liberty granted to file an application for conducting the trial. (Para- 6 to 22) Title: Sateesh Chander Kuthiala Vs. State of Himachal Pradesh and another. Page-366

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Sections 342, 323 and 506 of I.P.C – the accused prayed for pre-arrest bail – held, that considering the nature of the offence, the fact that the petitioner is a permanent resident of the place, he is joining/co-operating in the investigation and is not in a position to flee from justice or to temper with the prosecution evidence, the petition allowed and the petitioner admitted on bail subject to the conditions. (Para-4 to 6) Title: Sanjay Vs. State of Himachal Pradesh Page-712

Code of Criminal Procedure, 1973- Section 439- 30 bottles of Relaxcof were recovered from the possession of the accused, which were containing 100 ml. each codeine phosphate- 60 strips of Tramadol Hydrochloride Paracetamol, each containing 10 tables were also found – two bottles were recovered during investigation- held, that the petitioner is involved in a crime, which affects the society at large – many numbers of cases were registered against the petitioner for the similar offences- hence, the discretion to admit the petitioner on bail cannot be exercised in favour of the petitioner- petition dismissed. (Para-6 to 8) Title: Subhash Chand Vs. State of Himachal Pradesh Page-570

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offence punishable under Section 302 of I.P.C – the petitioner applied for bail- the petitioner was last seen by the witnesses with the deceased – therefore, it is not a fit case, where judicial discretion to admit the petitioner on bail is required to be exercised -petition dismissed. (Para-4) Title: Rajeev Kumar Vs. State of Himachal Pradesh Page-397

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Section 447, 323, 341, 504, 506 of I.P.C and Section 3(1)(g), 3(1)(r) and 3(1)(s) of the Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act, 1989- the petitioner applied for bail- held, that the offence punishable under the provisions of atrocities Act is not against an individual but against the society as a whole- particularly the weaker section of the society- however, considering the age of the petitioner, the bail application allowed subject to furnishing personal and surety of Rs.1 lacs. (Para-1 to 3) Title: Narain Dass Chauhan Vs. State of H.P. Page- 450

Code of Criminal Procedure, 1973- Section 482- Accused V met with an accident and was in a coma for one month – Medical Board concluded that he was unable to defend himself – trial was ordered to be stayed – it was ordered that the accused be examined every three months-aggrieved from the order, father of the accused filed a petition – held, that as per Medical Board V is not showing any sign of improvement – the petitioner submitted that he is incurring expenses on bringing V to the Medical Officer after three months- direction issued to the trial judge to re-consider the period of three months. (Para-8 to 10) Title: Krishan Lal Khimta Vs. State of Himachal Pradesh Page-561

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 279, 337 and 338 of I.P.C – present petition was filed for quashing the FIR and consequent proceedings – held, that the fact whether injured had sustained injuries on account of her own fault or at the time of getting down the bus is a complicated issue of fact which cannot be determined during these proceedings – no findings can be given regarding the affidavit executed by the injured- the permission to compound the offence cannot be granted as the offence punishable under Section 279 of I.P.C is against the public at large- petition dismissed. (Para-5 to 10) Title: Surinder Kumar son of Shri Shesh Ram Vs. State of H.P. and another Page-770

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 341, 323, 324, 307 read with Section 34 of I.P.C – petitioner has filed the present petition for bail- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- the petitioner is a student and is not required for investigation – hence, the petition allowed and the petitioner ordered to be released on bail subject to conditions. (Para-5 to 8) Title: Santosh Kumar s/o Sh. Dharam Singh Vs. State of H.P. Page-878

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 341, 323, 324, 307 read with Section 34 of I.P.C – petitioner has filed the present petition for bail- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- the petitioner is a student and is not required for investigation – hence, the petition allowed and the petitioner ordered to be released on bail subject to conditions. (Para-5 to 8) Title: Saurav s/o Sh. Braham Dass Vs. State of H.P. Page-880

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 341, 323, 324, 307 read with Section 34 of I.P.C – petitioner has filed the present petition for bail- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger

interest of the public and State- the petitioner is a student and is not required for investigation – hence, the petition allowed and the petitioner ordered to be released on bail subject to conditions. (Para-5 to 8) Title:Aadesh Kumar s/o Sh. Rambir Singh Vs. State of H.P. Page-853

Code of Criminal Procedure, 1973- Section 482- Petition has been filed for quashing the charges framed under Sections 302, 212 and 120-B of I.P.C – held, that at the time of framing of charge, the evidence is not to be meticulously judged nor is any weight to be attached to the probable defence of the accused – the Court is to see that there is ground for presuming that accused had committed an offence – the statements of informant and other witnesses show that involvement of the petitioner cannot be ruled out- the Court had meticulously perused the material placed on record and had framed the charge thereafter - petition dismissed. (Para- 3 to 12) Title: Krishna Devi Vs. State of H.P. Page-706

Code of Criminal Procedure, 1973- Section 482- Petitioner was convicted for the commission of offence punishable under Section 325 of I.P.C – an appeal was preferred, which was dismissed – the matter was compromised during the pendency of the revision and a prayer was made for acquitting the accused in view of the compromise – held, that the accused and the informant have stated that the matter has been compromised between them in order of maintain peace and promote good will- the permission granted to compound the offence – revision petition allowed- conviction and sentence imposed upon the accused/convict by both the Courts set aside and the accused/convict is acquitted. (Para-2 to 4) Title: Karan Singh Vs. State of Himachal Pradesh Page-577

Code of Criminal Procedure, 1973- Section 482- Present petition has been filed for quashing the FIR registered for the commission of offences punishable under Sections 336, 337, 427 read with Section 34 of I.P.C- held, that the complicated questions of facts cannot be determined in the proceedings relating to quashing of FIR – the document and the evidence show that there are sufficient grounds to proceed for the commission of offences punishable under Sections 336, 337, 427 read with Section 34 of I.P.C- petition dismissed. (Para-6 to 13) Title: Kuldeep son of late Sh. Ram Lal Vs. State of HP and others Page-834

Code of Criminal Procedure, 1973- Section 482- The revisionist was convicted for the commission of offences punishable under Sections 447, 427, 504 and 506 of I.P.C – an application has been filed for seeking compensation of the offence in view of the compromise between the parties – since, the matter has been compromised, therefore, permission granted and the accused acquitted. (Para-3 to 5) Title: Babu Ram Vs. State of Himachal Pradesh Page-801

Code of Criminal Procedure, 1973- Section 498- An FIR was registered for the commission of offences punishable under Section 498-A and 406 read with Section 34 of Indian Penal Code – the matter has been compromised between the parties- hence, the prayer was made for quashing the proceedings- held that criminal proceedings can be quashed to meet ends of justice - where the Court is satisfied that parties have settled the dispute amicably, FIR, complaint and subsequent proceedings can be quashed – petition allowed and the FIR and subsequent proceedings quashed. (Para-6 to 12) Title: Jagdish Chand and others Vs. State of Himachal Pradesh and another Page-556

Constitution of India, 1950- Article 226 - A lease was granted in favour of the petitioner – the petitioner approached the respondents for renewal of lease – respondents renewed the lease for part of the land – the petitioner failed to get the lease renewed – proceedings were initiated under H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971, which resulted in eviction of petitioner – appeal was dismissed – a writ petition was filed in which a liberty was granted to initiate the fresh proceedings – fresh proceedings resulted in the eviction of the petitioner – an appeal was filed, which was dismissed- matter was remanded to the Appellate Court in the writ

petition- writ petitioner contended that arguments were not marshaled and appreciated by the Appellate Court- held, that Appellate Court had properly appreciated the matter – the petitioner had failed to get the lease renewed and he was in unauthorized possession- the writ Court can only interfere if Appellate Court has wrongly appreciated the facts and evidence and the judgment is illegal - the Appellate Court had thrashed all the facts and the judgment cannot be said to be illegal- appeal dismissed. (Para-6 to 21) Title: Prem Prakash Gupta Vs. State of HP and others Page-759

Constitution of India, 1950- Article 226- A decision was taken to house the corporate office under one roof- in view of this decision, writ petition is disposed of with liberty to challenge the same, if so advised. (Para-2 to 5) Title: Court on its own motion Vs. The Chief Secretary and others (D.B.) Page-271

Constitution of India, 1950- Article 226- A writ petition was filed against the setting up of biomedical waste plant pleading that it would affect the environment – a status quo order was passed by the Court- the application was filed to vary the order – held, that Executive Engineer, I & PH had issued NOC subject to the condition that existing/proposed water supply scheme and irrigation scheme shall not be disturbed – 33 conditions were also imposed – held that petitioner had not shown violation of any mandatory requirement of law, whereas, NOCs had been obtained from all the statutory authorities- in case of failure to abide by the conditions, respondent No. 8 would be liable in accordance with law- Application allowed and interim order vacated with liberty to authority to take action for violation of the condition, if any. (Para- 12 to 14) Title: Manav Kalyan Sanstha Vs. State of Himachal Pradesh and others (D.B.) Page-422

Constitution of India, 1950- Article 226- Applications for allotment of Hydel Project were invited – petitioner filed an application for allotment – documents were found to be deficient and the case of the petitioner was rejected – the capacity of the project was enhanced- a request was made to consider the case of the petitioner, which was again rejected – held, that the fact that the documents were not submitted was not disputed – the rejection was also not in dispute – rejection was conveyed in the year 2006, while the writ petition was filed in the year 2015- ample opportunities were given to bring on record the certificate of registration and when the same was not brought on record, the application was rejected – rejection cannot be said to be arbitrary – the Court has limited power to interfere in the contractual matter – it is the domain of the department to prescribe conditions, factors and guidelines – the petitioner has no right to challenge the same, unless these are contrary to basic principles of law- no reason has been brought on record to interfere with the decision- writ petition dismissed.(Para-15 to 31) Title: M/s.GH Hydro Power Ventures Pvt. Ltd. Vs. State of H.P. & Others (D.B.) Page-77

Constitution of India, 1950- Article 226- DGP was directed to be present in the Court but he did not appear and instead sent ADGP- directions issued to Chief Secretary to ensure that Officers who are required to be present before the Court in terms of the Court's order should remain present. (Para-5 to 7) Title: Court on its own motion Vs. State of H.P. and others CWPIL No.13 of 2015 (D.B.) Page-

Constitution of India, 1950- Article 226- Government issued a notification for opening Government Degree College, which is the subject matter of the writ petition- an application for interim direction was filed, which was allowed and the order was stayed – it was prayed that interim direction be vacated – held, that Government formulates the policy upon number of circumstances based on its resources – it would be dangerous, if the Court is asked to test the utility or beneficial effects of the policy based on the facts set out in affidavit – Court cannot strike down a policy or decision merely because it feels that another decision would have been fairer and more scientific, logical or wiser- the wisdom and advisability are not amenable to judicial review unless the policies are contrary to statutory or constitutional provision or arbitrary or irrational or an abuse of power – the Government has right to frame policy and there is no need to

raise any grievance, if the policy is changed- the policy will not be vitiated merely because it has been changed- the Government has discretion to adopt a different policy to make it more effective – the decision to open a new college is not malicious, arbitrary or whimsical – the matter is also pending before Hon'ble Supreme Court of India- the decision to open the college cannot be stayed indefinitely- prayer allowed and the stay order vacated. (Para-12 to 28) Title: Asha Ram and another Vs. State of Himachal Pradesh & others (D.B.) Page-401

Constitution of India, 1950- Article 226- Land was allotted in consolidation – aggrieved from the allotment, proceedings were initiated before Consolidation Authority – writ petition was filed against the order passed by Consolidation Authority- held, that the land adjoining to the road is commercial- petitioner is claiming land adjoining to the road – the Consolidation Authorities had not taken commercial nature of the land into consideration while passing the order- writ petition allowed- matter remanded with a direction to re-hear the parties and to decide the same afresh. (Para- 6 to 8) Title: Hari Singh Vs. State of H.P. & others Page-419

Constitution of India, 1950- Article 226- One S, son of C, husband of respondent No.3 and father of respondents No.4 and 5 was engaged as work charged mate by PWD- he had gone by bus to the headquarter and while coming back in a private bus met with an accident- accident report was submitted to the authorities and a copy of the same was sent to the Commissioner- compensation along with interest and penalty was awarded by the Commissioner – in the meantime, claimants filed a petition before MACT, which was allowed –separate review petitions were filed before MACT and Employees Compensation Commissioner – claimants exercised an option to get the compensation from MACT- review petition was dismissed by MACT- held, that once a judgment is pronounced or order made, a Court Tribunal or adjudicating authority becomes functus officio – authorities under Workmen Compensation Act and Motor Vehicles Act are exercising statutory power – power of review is not inherent and must be conferred specifically- a claimant can file a claim petition before the Commissioner or MACT but not before both- claimants had not approached the Commissioner for grant of compensation- he started the proceedings after the receipt of the information of accident – claimants had opted to approach the Tribunal for grant of compensation – recording of statement of Commissioner will not make any difference – the insurance company was liable to indemnify the insured and was rightly held liable. (Para-24 to 43) Title: National Insurance Co. Ltd. Vs. State of Himachal Pradesh and Ors. (CWP No. 1283 of 2006) Page-667

Constitution of India, 1950- Article 226- Online item rates/bids were invited from contractor for the various work- the petitioner uploaded his bid before due date – he was found to be the lowest bidder but he was not called for negotiation- held, that the financial bid of the petitioner was opened and he was declared lowest bidder – he should have been called for negotiation before calling the second lowest bidder – however, the bid was rejected on the technical ground and the Court cannot substitute its wisdom for technical opinion of the members of the committee – petition dismissed. (Para- 8 to 17) Title: Rahul Pandey Vs. State of Himachal Pradesh and others (D.B.) Page-764

Constitution of India, 1950- Article 226- Petitioner applied for fair price shop – however, the shop was allotted to respondent No. 4- the allotment was challenged – held, that the petitioner had not annexed any documents with the application while the respondent No. 4 had annexed the requisite documents – a person has to approach the Court with clean hands – a person making false statement or suppressing material facts is not entitled to any relief- the petition dismissed with the cost of Rs. 25,000/-. (Para- 2 to 14) Title: Vikesh Kumar Vs. State of Himachal Pradesh and others (D.B.) Page-851

Constitution of India, 1950- Article 226- Petitioner had filed original application, which was disposed of with the direction to give the appointment of T.G.T. (Arts)- petitioner was appointed in the year 1994- his past services were not counted- he filed another writ petition claiming the

benefit of past services- held, that the petitioner is caught by the principle of Order 2 Rule 2 and also by the doctrine of estoppel and res-judicata – the writ Court had rightly held that reliefs cannot be granted to the petitioner, when they were not granted earlier- appeal dismissed. (Para-2 to 7) Title: Hem Raj Vs. State of Himachal Pradesh and another (D.B.) Page-273

Constitution of India, 1950- Article 226- Petitioner had identified project site and completed the work in furtherance of a scheme floated by Government of India – however, a new notification was issued bringing the work to "big zero causing them lot of financial loss of energy and time spent as the entire work would be utilized by some other persons"- held, that the plea of the petitioner that because of its members had applied for allotment of project pursuant to the scheme notified by Government of India, State had no authority to come with the amended policy and the projects have to be allotted to its members as a matter of right is without any merit- no material was placed on record to show that sites were got inspected with the consent of Government of Himachal Pradesh- issuance of policy was the domain of the State Government and Union of India has no role in this process- scheme floated by Government of India did not confer any indefeasible right upon the members of association for allotment of the project – no holding out was made that the site selected by the members of the association would be allotted to the applicant- simply because a pre-feasibility report has been prepared will not confer any right upon the person to get the project – public largesses should be disputed in a transparent manner by providing an opportunity to all eligible members to participate in the process- mere disappointment of expectation cannot be a ground for interfering with the policy of the State – the legal status of the association was not established – directions issued. (Para-11 to 21) Title: All Himachal Micro Hydel (100 KW) NGOS and Societies Association through its President Sh. Varinder Thakur Vs. State of H.P. through Principal Secretary, Non-Conventional Energy Sources-cum-Secretary Power, Government of H.P. and others (D.B.) Page-856

Constitution of India, 1950- Article 226- Petitioner had taken the loan- loan accounts were declared NPA- notice was issued – proceedings were initiated under Securitization and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 (SARFAESI) Act- possession of the factory land, building, plants, machinery, raw material and finished stocks was taken – held, that the petitioner had not approached the appropriate authority after issuance of the notice- the jurisdiction of the Court was barred under Section 13(2) of SARFAESI Act- the aggrieved person has to approach Debt Recovery Tribunal for the redressal of his grievance – a complete machinery has been provided under the Act- writ Court has no jurisdiction when the matter is covered under SARFAESI Act- writ petition dismissed. (Para-11 to 26) Title: M/s.Bharat Healthcare Limited and Anr. Vs. Authorized Officer, Punjab National Bank & Others (D.B.) Page-51

Constitution of India, 1950- Article 226- Petitioner is aggrieved by the construction of National Highway passing through its land – it was pleaded that there is continuous threat to the life of the people and the building premises due to the construction – respondent pleaded that some part of the land of the petitioner was utilized believing it to be part of acquired land, which error has been rectified -the damaged boundary wall would be restored – the walls would be constructed as per the requirement- continuous mandamus cannot be issued – no grievance was raised regarding the deficiency in the remedial measures- the fact that remedial measures were not to the liking or to complete satisfaction of the petitioner cannot be ground to initiate contempt proceedings- the petitioner had purchased the land despite the knowledge of the construction of National Highway – petition dismissed. (Para-13 to 29) Title: Shivalik Agro Poly Products Ltd. Vs. Union of India and others (D.B.) Page-713

Constitution of India, 1950- Article 226- Petitioner No. 1 is an educational trust having established a senior secondary public school and is also running B.Ed. college- it had applied to introduce diploma in elementary education- permission was rejected- writ petition was filed, in which a direction was issued – affiliation was not granted- it was contended that all the

conditions were met and despite that the permission was not granted – respondents stated that the land is on private lease basis, which is in contravention of the regulation - a complaint was received against the petitioner – held, that the complaint could not have been made basis for rejecting the approval – no inquiry was conducted – copy of complaint was not supplied to the petitioners and opportunity of hearing was not given to them- other institutes were granted 6 months time to get the land transferred in their names- it was a case of hostile discrimination – even Appellate Authority had granted time of six months to get the land transferred – it was not permissible for the respondents to sit over the orders passed by the Appellate Authority- the petitioners have been compelled to approach the Court repeatedly- petition allowed- permission granted subject to transfer of the land within a period of four weeks. (Para- 17 to 25) Title: Shimla Educational Society Trust and Anr. Vs. National Council for Teachers Education &Anr.(D.B.) Page-445

Constitution of India, 1950- Article 226- Petitioner No.2 was owner in possession of the land, which was acquired for Chamera Hydro Electric Project Stage-I- he was given compensation and was granted employment as per re-settlement and rehabilitation Scheme- some other land was acquired for the reservoir of Chamera-2- name of petitioner No.1, son of petitioner No.2 was sponsored for employment- however, the employment was not provided – held, that rehabilitation and re-settlement schemes are different for Chamera-1 and Chamera-2 project – schemes provide for employment of the family member of the oustee – names of the petitioners are recorded in the parivar register showing them to be the member of the same family – it was not permissible for the respondent No.6 to ignore the entry unilaterally – the land was purchased prior to the notification under Section 4 and the petitioners fulfill the criteria laid down in the scheme – writ petition allowed – respondents directed to provide the benefits as per the scheme. (Para-9 to 28) Title: Praveen Singh and another Vs. State of Himachal Pradesh and others Page-694

Constitution of India, 1950- Article 226- Petitioner was appointed as Imam -he submitted his resignation reserving his right to continue as voluntary Imam and to keep the residential accommodation allotted to him -his resignation was accepted on 31.7.2003 -it was resolved to discontinue voluntary Imamat of the writ petitioner and all the facilities -a civil suit was filed for the recovery of possession and use and occupation charges, which was decreed -regular first appeal was filed, which was dismissed - a writ petition was filed for quashing the resolution - various other Civil revisions and Civil Miscellaneous Petitions (CMPMO) were also filed against various orders passed by Wakf Tribunal - all these petitions were taken for decision together-it was held, that Section 6 and 7 of the Wakf Act, 1995 provide for determination of certain disputes regarding wakf property only by Wakf Tribunal -sub Section 9 of Section 83 of the Act provides that no appeal shall lie against any decision or order whether interim or otherwise, passed by the Tribunal established under the Act - still the RFA and Writ Petitions are being filed and entertained by the Court -remedy of revision has been provided by the Act - since revision lies against the order; therefore, writ petition is not maintainable - it was further held that sections 6 and 7 of the Act do not cover the dispute of eviction relating to the immovable property, which is admittedly a Wakf property - such disputes are triable by the Civil Courts - writ petitions and RFAs dismissed as not maintainable - direction issued to treat CMPMO as civil revision. (Para-26 to 44) Title: Mumtaz Ahmed Vs. State of H.P. and others Page-581

Constitution of India, 1950- Article 226- Petitioners had been continuously representing to the Government to construct link road- they also donated their lands by executing gift deeds – no objection certificates were issued by various authorities – family of Pardhan objected to the construction of the road- a notification was issued by the Government proposing to acquire the land for the construction of the road through different village – representations were filed but in vain - respondents stated that two factions of the villagers want the road to be constructed from different areas – it would not be proper to construct the road from the place specified by the petitioners- held, that the Government has issued the instructions that road would be constructed only if the land is donated by the Villagers – Government can deviate from the

instructions on the basis of valid reasons – the decision to construct road from different place was taken to save the trees from being axed, which is in the larger public interest – family of Pardhan was not arrayed as party and no order can be passed without hearing them- the Court cannot examine the correctness of the decision, unless, it is arbitrary or contrary to the statute – the petition has been filed to satisfy the ego and not in the larger public interest- petition dismissed. (Para-9 to 18) Title: Shiv Singh and others Vs. State of H.P. and others (D.B.) Page-266

Constitution of India, 1950- Article 226- Petitioners had done B.Sc. Medical Lab Technology from respondent No.4 – it was mentioned in the prospectus and the notice that students would be eligible for obtaining degree in B.Sc. in para medical – petitioners approached respondent No.2 for registration of their names as medical Lab Technologists, however, respondent No.2 refused to enter their names on the basis that petitioners had not done higher secondary in science stream and they are ineligible for registration- the petitioners had done B.Sc. after fully understanding the fact that they would be registered with respondent No.2- hence, direction issued to respondent No.1 to issue appropriate guidelines –respondent No.2 directed to consider the case of the petitioners in accordance with the guidelines. (Para-9 to 12) Title: Neelam Sharma & another Vs. State of Himachal Pradesh & others Page-563

Constitution of India, 1950- Article 226- Petitioners were working in the health and family welfare department as Computers and Junior statistical Assistants- there was parity with the computers and field investigators in economic and statistical department which was disturbed in the year 1994- representations were made and rejected – a writ petition was filed, which was allowed – respondents were directed to restore the parity- held, that there cannot be a straight jacket formula to hold that two posts having same or similar nomenclature should have same pay scale – merely because two posts have same name does not lead to any inference that posts are identical in every manner – this exercise can be carried out by the pay commission – the job profile and recruitment rules for the posts in two departments are different – principle of equal pay for equal work is applicable only when it is shown that the incumbents in the two posts discharge similar duties and responsibilities – the petitioners had failed to prove this fact- the writ petition was wrongly allowed- appeal allowed and judgment of writ Court set aside. (Para- 15 to 31) Title: State of Himachal Pradesh & Ors. Vs. Amar Chand Thakur & Ors. (D.B.) Page-720

Constitution of India, 1950- Article 226- Respondents 1 to 12 sought a direction to promote them to the post of technical superintendent – the claim was opposed on the ground that diploma obtained by the respondents is through distance learning and for one year - degree in dairy technology/dairy husbandry or diploma in dairy technology/dairy husbandry is required under Rules – the Tribunal allowed the application - held, that respondents possess essential qualification of five years regular service on the post- they had obtained diploma in dairy technology from IGNOU – once diploma has been awarded by IGNOU, it is not open for the federation to say that the same is not equivalent to the diploma of two years awarded by other institutions – the genuineness of the diploma has not been disputed by any authority- the petition is without any merit and the same is dismissed. (Para- 8 to 18) Title: The Himachal Pradesh State Cooperative Milk Producers Federation Limited Vs. Surinder Kumar and others (D.B.) Page-604

Constitution of India, 1950- Article 226- **Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002**- Section 13- Notice was issued under Section 13 of the SRFAESI Act –a writ petition was filed challenging the notice- held, that no representation or reply was filed to the notice – the possession was taken over by the bank and the property was ultimately sold – the remedy under Section 17 lies before Debt Recovery Tribunal – the Writ petition is not maintainable in view of alternative and efficacious remedy available to the petitioner- petition dismissed. (Para- 6 to 14) Title: Bachittar Singh Vs. Central Bank of India and others Page-743

Constitution of India, 1950- Article 226- The workman pleaded that he was not allowed to complete 240 days in the calendar years except 1997 and 1998- his services were disengaged without following the procedure under Industrial Disputes Act – employer contended that the workman was engaged subject to availability of the work and funds – the Tribunal held the workman entitled to re-engagement as fitter Grade-II and issued direction to re-engage him after giving the benefit of seniority and continuity of service – held, that the workmen was engaged as daily wage fitter where he continued to work till 2000, when his services were dis-engaged- State had failed to adhere the principle of 'last come first go' because two persons junior to the workman were retained - the Tribunal had rightly issued the direction of re-engagement – writ dismissed. (Para-9 to 19) Title: The State of H.P. and another Vs. Parveen Kumar Page-207

Constitution of India, 1950- Article 226- Writ Petitioner remained absent and the petition should have been dismissed in default but the Writ Court granted the petition without hearing the petitioner – further, the appointment was quashed after recording the findings that experience certificate does not seem to be genuine- however, no inquiry was conducted to ascertain the facts- hence, appeal allowed, order passed by Writ Court set aside and Case remanded to Administrative Tribunal for a fresh decision. (Para-3 to 7) Title: Uttam Singh Vs. Tej Ram and others (D.B.) Page- 270

Constitution of India, 1950- Article 226- Writ-respondent No. 2 purchased the land vide two sale deeds – mutation was attested in his presence- subsequently an application for the correction of the revenue record was filed pleading that the possession was not correctly recorded – the application was rejected – appeal and revision were dismissed- a second revision was filed, which was allowed- writ court set aside the order passed in the revision petition- held in the appeal that the revisional powers are to be exercised with great care and caution- the revisional authority has to examine the orders on the touch stone of legality and not on the question of facts, unless it is found that orders are perverse and factually incorrect – the revisional Court cannot re-appreciate the evidence and set aside the concurrent findings of the facts, unless the findings are perverse or there has been a non-appreciation or non-consideration of material on record- the revisional power cannot be equated with the power to re-appreciate the evidence- mutation was attested in the presence of respondent No. 2- he had not questioned the findings – the delay was also not explained, which should have been considered- the remedy was to file a civil suit before the Court – Writ Court had rightly passed the judgment – appeal dismissed.(Para-17 to 46) Title: Charan Dass deceased through LRs Vs. Subhadra Devi and others (D.B.) Page-746

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H.P. Town and Country Planning Act, 1977- Section 31(5)- The mother of the petitioner applied seeking planning permission for the construction of commercial building – no intimation was received and the sanction is deemed to have been granted – however, a notice was issued to which a reply was sent – a writ petition was filed, which was disposed of with a direction to pass a speaking order- a detailed order was passed and the appeal was rejected against which a present writ petition has been filed- held, that if no decision is conveyed on the application for reconstruction, sanction is deemed to have been given – documents show that the plan submitted by the mother of the petitioner was not complete and sanction could not have been granted- the case for construction of three storeyed commercial building over existing single storey plus parking was rejected on the ground that proposal falls in the banned area of Shimla and proposed construction would obstruct vision and cause congestion - petitioner failed to reply to the observations made by the respondent and no decision could be taken on the plan- the period of 6 months cannot be counted from the date of submission of original application- the dispute regarding the receipt of the documents cannot be looked in exercise of the writ jurisdiction- petition dismissed. (Para-16 to 48) Title: Surinder Singh Vs. State of Himachal Pradesh and others Page-531

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed on the ground that the tenant is in arrears of rent, premises is in dangerous condition and may collapse at any time, the same is required bonafide for re-construction, which cannot be carried out without vacating the building - the premises, is required bonafide for personal use and the same is required for being demolished at the instance of Municipal Committee, Palampur- the petition was allowed by Rent Controller on the ground of non-payment of arrears of rent- an appeal was filed, which was dismissed- held in revision that Rent Controller had recorded that issue No. 3 was not pressed, however, the Statement of Counsel was not recorded to this effect – Appellate Court held that premises is commercial in nature and cannot be vacated for non occupation- however, the law was amended during the pendency of the proceedings and this ground became available to the landlord – Revision allowed and the case remanded to the Appellate Authority to decide the same afresh in accordance with law. (Para-11 to 15) Title: Khem Chand son of Shri Jagdish Chand Vs. Kuldeep Chand son of Shri Khem Chand Page-392

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed on the grounds of arrears of rent and subletting- the petition was allowed on the grounds of arrears of rent but was dismissed on the ground of subletting- an appeal was filed, which was dismissed- held in revision that relationship of lessor and lessee is to be proved to establish subletting – necessary ingredients to establish subletting were not proved – alleged sub- tenant is the real brother of the tenant who is assisting the tenant in business- this will not fall within the definition of sub-tenant – no official from Sale Tax Office or Labour Department was examined to prove subletting – the petition was rightly dismissed regarding subletting – revision dismissed. (Para-12 to 19) Title: B.R.Sammi son of late Sh Sohan Lal Vs. Narinder Singh son of Niranjan Singh Page-409

Himachal Pradesh Panchayati Raj (Election) Rules, 1994- Rule 96- An election petition was filed by respondent No.3 against the election of respondent No.4 and 5 – the same was listed for announcement of the order when it was withdrawn without issuing notice to any person – held, that the election petition could have been withdrawn by following the procedure laid down in the rules – notice should have been given to the parties after fixing the date of hearing, which is mandatory – there was no application of mind while permitting the withdrawal of the election petition- however, considering the fact that the term of the person whose election was challenged has expired, no order of restoration passed. (Para-7 to 9) Title: Banshi Ram Chauhan Vs. State of Himachal Pradesh and others Page-614

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 65 and 118- Petitioner executed an agreement to sell the land and put one J in possession – inquiry was conducted and it was found that there was violation of Section 118 of the Act- proceedings were initiated, which resulted in confiscation of the land along with the building in favour of the State- an appeal was filed before Divisional Commissioner, which was dismissed – appeal and revision were dismissed – held, that transfer of land by way of sale, gift, will, exchange, lease, mortgage with possession, creation of tenancy or in any other manner is not valid in favour of a person, who is not an agriculturist - there was no bar of transfer by way of an agreement and this bar was created in the year 1994 by amending the Act- the agreement was executed in the year 1990 – the amendment Act is not retrospective- the order passed by the authorities cannot be sustained- petition allowed.(Para-12 to 27) Title: Geeta Devi Vs. State of H.P. & Another Page-90

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 118- An agreement for sale was executed between plaintiff and defendant No.1 through defendant No.2 – plaintiff is a non-agriculturist and cannot purchase the land without prior permission of the State Government – defendants promised to get the permission but failed to do so- plaintiff sought the refund of the earnest money, which was not provided – hence, the suit was filed – the suit was decreed by the trial Court – held in appeal that it is not disputed that sale deed was not executed – plaintiff is a non-agriculturist and permission under Section 118 of the Act was not granted in favour of the plaintiff- the vendor had failed to provide the documents for getting the permission under Section

118 of the Act- the suit was rightly decreed by the trial Court- appeal dismissed.(Para-6 to 10) Title: Rishi Kumar KapilaVs. Surinder Kumar Sharda (since died) through his LRs and another Page-837

Hindu Marriage Act, 1955- Section 5- Plaintiff filed a civil suit pleading that she was entitled to family pension being the legally wedded wife of the deceased- deceased had taken customary divorce from his first wife and had performed the Gandharav marriage and had thereafter solemnized Brahm marriage – the defendants denied the marriage between the plaintiff and the deceased – the suit was dismissed by the Trial Court – an appeal was preferred, which was dismissed – held in second appeal that it was admitted that the deceased had a spouse living at the time of marriage with the plaintiff – any marriage performed during the subsistence of valid marriage is void and will not confer any right upon the second wife – custom was neither pleaded nor proved – hence, the plea of customary divorce is not acceptable - nomination will not alter the succession- appeal dismissed. (Para-7 to 28) Title: Kamla Devi Vs. Union of India and others Page-826

Hindu Marriage Act, 1955- Section 13- Husband pleaded that wife had left her matrimonial home two months after giving birth to a child – she refused to accompany her husband despite requests to do so – she had abandoned the company of the husband without any reasonable cause – wife pleaded that husband had re-married during the subsistence of the marriage- four children were born to the husband from the marriage – husband had turned the wife out of the matrimonial home at the instance of the second wife – the petition was dismissed by the Trial Court- held in appeal that husband had failed to prove the cruelty, rather it was proved that husband had treated the wife with cruelty – documents established the second marriage of the husband – wife has a reason to live separately from the husband as no lady would reside with another lady – the trial Court had properly appreciated the evidence- appeal dismissed. (Para-10 to 13) Title: Bhagat Ram Vs. Kanta Devi Page-131

Hindu Marriage Act, 1955- Section 13- The marriage between the parties was solemnized according to Hindu Rites and Custom- two children were born from the wedlock – husband was posted as a captain in the army – the wife used to leave her matrimonial home on arrival of the husband and used to reside with her parents – wife left matrimonial home without any reasonable cause and did not join despite efforts- the wife pleaded that she was thrown out of her matrimonial home after her parents failed to fulfill the demand of dowry – the husband used to beat the children – the petition was dismissed by the Court- held in appeal that the wife had left her matrimonial home without any reasonable cause and had not returned despite the efforts made by the husband – the relationship between the parties had irretrievably broken down - the wife is not willing to join the company of the husband – therefore, appeal allowed and the marriage between the parties ordered to be dissolved. (Para-9 to 14) Title: Col. Pawan Kumar Sharma Vs. Bhavna Sharma Page-134

Hindu Marriage Act, 1955- Section 13- The marriage between the parties was solemnized in the year 1997 – the wife used to leave her matrimonial home and reside in her parental home – the wife is totally incapacitated from performing sexual intercourse due to structural defect – the petition was dismissed by the Trial Court- held in appeal that husband admitted that wife had resided with him for 8 years – the version that the husband found the medical prescription slip was also not established – the petition was rightly dismissed by the Trial Court- appeal dismissed.(Para-7 to 11) Title: Dharam Prakash Vs. NeelaDevi Page-803

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Indian Forest Act, 1927- Section 41 and 42- **Himachal Pradesh Forest Produce Transit (Land Routes) Rules, 1978**- Rule 20- Accused were found transporting 37 wooden frames of different sizes without any valid permit – accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- the Court can interfere in exercise of revisional jurisdiction

only if the findings are perverse, untenable in law, grossly erroneously, glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously- the prosecution case was for non- cognizable offence- however, police carried investigation without an order of the Magistrate – Courts below failed to appreciate that police officer could not have investigated the case against the accused in absence of the order of the Magistrate and entire proceedings were vitiated – further, there was no reference in the notice of acquisition to the Rule 20 of H.P. Produce Transit (Land Routes) Rules, 1978 and the same was defective- revision allowed and the accused acquitted. (Para-9 to 14) Title: Fateh Singh and others Vs. State of H.P. Page-875

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a scooter in a rash and negligent manner- scooter hit L causing her death - accused was tried and acquitted by the trial Court- an appeal was preferred, which was allowed and accused was convicted – aggrieved from the order, the present revision has been filed-held in revision that Court can interfere in exercise of revisional power only if the findings are perverse, untenable in law, grossly erroneous, glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously – the deceased was aged 80 years and was hard of hearing – the statement of the informant was contradictory - the place of accident was almost mid way between the side of the road and centre of the road, which shows that deceased was walking on the main road- the place of accident was a national highway, which was frequented by many vehicles – the conclusion of the trial Court that prosecution version was not proved beyond reasonable doubt was a reasonable conclusion and should not have been set aside merely because another view was possible- revision allowed and judgment of Appellate Court set aside. (Para- 9 to 13) Title: Mukesh Kumar Vs. State of Himachal Pradesh Page-506

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a bus in a rash and negligent manner and caused death of B – he was tried and acquitted by the trial Court- held in appeal that P was a passenger in the bus she was getting down from the bus, when the bus was started by the accused – all the eye witnesses except PW-8 resiled from their earlier testimonies – record shows that P had tried to get down the bus at a place, which was not a bus stop- thus, the prosecution version that the bus was stopped and thereafter started suddenly is doubtful- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-9 to 12) Title: State of Himachal PradeshVs. Ashwani Kumar Page-376

Indian Penal Code, 1860- Section 279 and 304-A- **Motor Vehicles Act, 1988-** Section 181- Accused was driving a motorcycle and hit A, who died in the hospital – the accident had taken place due to rash and negligent driving of the accused – he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held in revision that post mortem report shows that cause of death was head injury leading to subdural haematoma, which could have been caused by striking with the motorcycle – PW-1 proved that motorcycle was being driven in high speed and on inappropriate side – his testimony was not shaken in cross-examination- the prosecution version was proved beyond reasonable doubt and accused was rightly convicted – revision dismissed.(Para- 9 to 12) Title: Karam Chand Vs. State of H.P. Page- 128

Indian Penal Code, 1860- Section 279 and 337- Accused was driving the car rashly and negligently, which hit the informant causing injuries to her – accused was tried and convicted by the trial Court- an appeal was preferred, which was allowed- held in appeal that the medical evidence does not establish the prosecution version – material witness was not examined – the Appellate Court had rightly acquitted the accused, in these circumstances appeal dismissed.(Para-9 to 12) Title: State of H.P.Vs. Khem Chand Page-456

Indian Penal Code, 1860- Section 279 and 506 – **Motor Vehicles Act, 1988-** Section 181, 184 and 196- Accused was driving a scooter in a rash and negligent manner- he drove the scooter

upon the informant and from the wrong side - when the accused was called to stop the scooter, he abused the informant and B, and intervenor- the accused was tried and acquitted by the trial Court- held, that PW-1 and PW-4 had feigned ignorance regarding the identity of the accused and the registration number plate – police station was at a distance of 15 meters from the place of incident- however, investigating officer visited the site of the occurrence after one day - the site plan prepared by him cannot be relied upon - the Trial Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 11) Title: State of H.P. Vs. Ashwani Kumar Page-476

Indian Penal Code, 1860- Section 279, 337 and 338- Accused N was the conductor of the bus while accused A was the driver of the bus – the conductor did not take precaution to close the door of the bus and the driver drove the bus in a high speed – the driver applied the brakes abruptly- L, who was standing near the door was thrown out of the bus and fell down – the accused were tried and convicted by the trial Court- separate appeals were preferred, which were dismissed- held in revision that eye witnesses had consistently deposed that accident had taken place due to sudden application of brakes and not due to the closing of the door of the bus – the defence version that L was repeatedly opening the door of the bus despite requests not to do so was not established – the prosecution case was proved beyond reasonable doubt in these circumstances and the accused were rightly convicted – the High Court cannot interfere with the findings of facts in exercise of revisional jurisdiction unless, there is an error on point of law – no such error was shown – however, considering the time elapsed since the incident, sentence modified. (Para-8 to 21) Title: Amar Dev Vs. State of Himachal Pradesh Page-609

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a Trolla, which crushed the right foot of the informant – the accident had taken place due to the negligence of the accused- the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed – held, that as per the prosecution case the informant was hit from the rear – she should have sustained injuries on the back but no injury was found on her back – the defence version that the informant was in the process of alighting from the stair case is made probable by the testimony of PW-1 – the prosecution version was not proved, in these circumstances and Sessions Judge had rightly acquitted the accused- appeal dismissed. (Para- 9 to 12) Title: State of H.P. Vs. Ravinder Kumar Page-477

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving Swaraj Majda – he hit his vehicle against the bus due to which occupants of the bus sustained injuries- accused was tried and acquitted by the trial court- held in appeal that the prosecution witnesses deposed that the Swaraj Majda was heavily loaded and was being driven at a slow speed- it was moving upward- the Bus on the other hand was being driven with the high speed and on the inappropriate side of the road- the prosecution version was not proved, in these circumstances – appeal dismissed. (Para-9 to11) Title: State of H.P. Vs. Kheera Mani Page-475

Indian Penal Code, 1860- Section 302 and 392 read with Section 34- An information was received that a woman had been stabbed by some unknown persons – dead body of woman was found – her husband reported that two persons had injured the woman and had stolen the cash lying in the cash box – the accused were arrested- recoveries were effected on the basis of disclosure statements made by them- the accused were tried and convicted by the trial Court- held in appeal that the evidence of the witnesses cannot be discarded on the ground that they are related to each other, if their testimonies are found to be truthful and reliable - the presence of the accused was established by the statements of the witnesses- all the witnesses to the incident are not to be examined – mere failure to conduct test identification parade will not result in the acquittal- minor discrepancies need not be given undue importance- the accused had given beatings to PW-6 and had snatched his mobile – mobile was sold to PW-21- testimony of hostile witness cannot be discarded on the ground that he has turned hostile – the prosecution case was proved beyond reasonable doubt and the accused were rightly convicted- appeal dismissed.(Para-59 to 94) Title: Gaurav Rana Vs. State of Himachal Pradesh Page- 317

Indian Penal Code, 1860- Section 324 and 506- **Protection of Children from Sexual Offences Act, 2012-** Section 4-The prosecutrix went for grinding maize along with her brother – accused came and gave money to the brother of the prosecutrix to bring some sweets from the shop - when he refused, the accused slapped him on which brother of the accused went to the shop while crying -the accused bolted the door of the Gharat and raped the prosecutrix – the accused threatened to do away with the life of the prosecutrix – the accused was tried and convicted by the trial Court- held in appeal that the prosecutrix was proved to be aged 13 years at the time of incident – prosecutrix and her parents had not supported the prosecution version – her statement was recorded under Section 164 Cr.P.C in which she had narrated the incident – the medical evidence also supported the prosecution version – the prosecution case was proved beyond reasonable doubt and the accused was rightly convicted- appeal dismissed. (Para-9 to 12) Title: Des Raj @ Raj Kumar Vs. State of Himachal Pradesh Page-314

Indian Penal Code, 1860- Section 324, 325 and 341 read with Section 34- Informant along with P was attending the marriage - when they were coming out of the hotel, 5-6 boys who were drunk started abusing them – P inquired as to why they were abusing on which they starting beating P- informant tried to rescue P on which he was beaten - R was identified at the spot- R was convicted while other accused were acquitted- an appeal was preferred, which was allowed- held, that medical evidence proved that informant had sustained grievous injuries – mere fact that independent witnesses had not supported the prosecution version is not sufficient to discard the same- PW-3 had supported the prosecution version, which was duly corroborated by his previous statement – the recovery memo of weapon of offence was also proved - Appellate Court had wrongly acquitted the accused- appeal allowed – judgment of Appellate Court set aside and that of the trial Court restored. (Para-10 to 20) Title: State of H.P. Vs. Rajesh Kumar @ Bati Page-290

Indian Penal Code, 1860- Section 336 and 304-A- Accused were posted as linemen and junior engineer they were entrusted with a duty to maintain 33 KV Rohtang- Keylong electricity line – one wire of the line fell on the vehicle due to which two persons got electrocuted – the accused were tried and acquitted by the Trial Court- held in appeal that prosecution evidence does not establish that accused had failed to rectify the fault despite knowledge rather it is established that accused were maintaining the tower and line efficiently – maintenance register was also not produced before the Court and an adverse inference has to be drawn – the trial Court had rightly appreciated the evidence – appeal dismissed. (Para-9 to 12) Title: State of H.P. Vs. Piar Chand & another Page-626

Indian Penal Code, 1860- Section 341, 323, 506 and 376 read with Section 511- Prosecutrix was going home from School after appearing in examination – the accused caught her, dragged her inside a maize field and started kissing her – he put his hand on the string of her salwar- prosecutrix raised hue and cry on which PW-7 arrived at the spot- the accused was tried and acquitted by the Trial Court- held in appeal that there is discrepancy in the name of the accused- prosecutrix mentioned that she was restrained by B, son of N, whereas, the name of the accused is P, son of H - prosecutrix admitted in cross-examination that the name of the boy who assaulted her was not known to her – the photographs of the spot do not corroborate the prosecution version- the age of the prosecutrix was not properly proved – the Trial Court had rightly acquitted the accused- appeal dismissed. (Para-7 to 12) Title: State of Himachal Pradesh Vs. Paramjeet Singh @ Bangu(D.B.) Page-379

Indian Penal Code, 1860- Section 341, 325, 323 and 506read with Section 34- Accused restrained the informant and caused simple and grievous hurt to her and simple hurt to her daughter- the accused were tried and acquitted by the trial Court- held in appeal that informant admitted the pendency of the Civil litigation - PW-2confined the incriminatory role to accused T only –PW-3 improved upon his version – the prosecution version was not proved beyond reasonable doubt - appeal dismissed.(Para-9 to 12) Title: State of H.P. Vs. Tej Ram & others Page-186

Indian Penal Code, 1860- Section 363, 376, 342 and 506- Accused kidnapped the minor prosecutrix from the lawful guardianship of her parents and she was taken to a hotel, where she was subjected to sexual intercourse- she was threatened by the accused- the accused was tried and acquitted by the trial Court- held in appeal that the prosecutrix was 18 years and 8 months old at the time of making the application – the school certificate is not admissible because no evidence was led to prove the source on the basis of which the date of the birth of the prosecutrix was recorded – the entries in the parivar register are not primary evidence regarding the birth of the person- it was admitted that there were over writing and cutting in the birth register, which makes it difficult to rely upon the entries in the same – the person at whose instance the entries were recorded was not produced in evidence – the radiological age of the prosecutrix was 15½ to 17 years which could be 3-4 years more or less on either side – the prosecutrix admitted that she used to talk with the accused for 15 minutes to 1 hour, this shows that prosecutrix and accused were acquainted with the each other – she was taken from Solan to Deonghat in a broad day light – she had not raised any hue and cry, which shows that she was a consenting party – on other occasion also she had not raised hue and cry, although the incident had taken place in thickly populated area- prosecution case was not proved beyond reasonable doubt and the accused was rightly acquitted- appeal dismissed. (Para-6 to 23) Title: State of Himachal Pradesh Vs. Vijay Kumar (D.B.) Page-479

Indian Penal Code, 1860- Section 376- Prosecutrix was grazing her goats in a jungle- juvenile came and raped her – he was tried and acquitted by Juvenile Justice Board- held in appeal that the prosecutrix had stated that she had no knowledge about the identity of the person – eye witness did not corroborate the testimony of the prosecutrix- in these circumstances, juvenile was rightly acquitted – revision dismissed. (Para-9 to 11) Title: State of H.P. Vs. Sandeep Kumar Page-308

Indian Penal Code, 1860- Section 379 read with Section 34- **Indian Forest Act, 1927-** Section 41 and 42- A nakka was laid and a Tractor carrying 20 quintals fuel wood of different specis was recovered- no permit for transporting the same was produced – it was found on investigation that fuel wood was stolen from khasra No.326 – the accused were tried and acquitted by the Trial Court- held in appeal that PW-11 and PW-13 made contradictory statements regarding place of recovery – no disclosure statement was made prior to the discovery of the place from where the recovery was effected – the prosecution case was not proved beyond reasonable doubt and the accused were rightly acquitted by the trial Court- appeal dismissed. (Para- 9 to 11) Title: State of H.P. Vs. Parveen Kumar and another Page-459

Indian Penal code, 1860- Section 409, 420, 467, 46 and 471- PW-7 had invested a sum of Rs. 40,000/- for a period of three years in TD Account and entrusted this amount to the accused who was posted as Branch Post Manager (BPM)- PW-7 produced the pass-book before PW-1 who found on verification that pass-book was issued against vague and fictitious amount- no opening form was filed nor any receipt was issued – the accused was tried and acquitted by the Trial Court- held in appeal that PW-7 had not supported the prosecution version regarding entrustment of money to the accused in the month of July, 2002- he did not support the prosecution version that pass-book was handed over by the accused to him- the specimen handwriting was obtained during the investigation and not during the trial – therefore, the same is not admissible – the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-9 to 14) Title: State of Himachal Pradesh Vs. Devi Lal (D.B.) Page-310

Indian Penal Code, 1860- Section 420- **Prevention of Corruption Act, 1988-** Section 13(d)(ii)- The land belonging to accused No. 4 and D (since deceased) relatives of accused No. 3 got washed away – they applied for grant of two biswas land – accused No. 3 was posted as patwari/nautor clerk and he got manipulated a false report from accused No. 1 and 2 – two Biswas of land was allotted in favour of accused No. 4 and D -subsequently order was reviewed and FIR was registered- the accused No. 4 was convicted while other accused were acquitted- held in appeal

that accused No. 4 had not prepared any document or report – he was not a recommending authority – recommendations were made by the Competent Authority on the basis of reports prepared by accused No. 1 and 2- PW-13 had made an improvement in her statement- recommending authority was Tehsildar a Gazetted Officer who remains uninfluenced by the fact that accused No. 4 and D were close relatives of accused No. 3 – sanctioning authority was Deputy Commissioner who had applied his mind prior to the sanction of nautor – no person had deposed that accused No. 3 had influenced the sanctioning of the land – the Trial Court had wrongly convicted the accused- appeal allowed – judgment of the Trial Court set aside. (Para-7 to 22) Title: Pavinder Singh Vs. State of Himachal Pradesh Page-620

Indian Penal Code, 1860- Section 457 and 380- Petitioner was convicted and sentenced by the trial Court- an application was filed for taking a lenient view in sentencing the petitioner – sentence was reduced by Learned Additional Sessions Judge- held, that Additional Sessions Judge duly considered mitigating circumstances and had reduced the sentence- no ground for further reduction is made out- benefit of Probation of Offenders Act cannot be granted as the same is not applicable, in view of the fact that maximum sentence is more than seven years- revision dismissed. (Para- 3 to 5) Title: Manju @ Maju Vs. State of H.P. Page-72

Indian Penal Code, 1860- Section 457 and 380- Petitioner was convicted and sentenced by the trial Court- an application was filed for taking a lenient view in sentencing the petitioner – sentence was reduced by Learned Additional Sessions Judge- held, that Additional Sessions Judge duly considered mitigating circumstances and had reduced the sentence- no ground for further reduction is made out- benefit of Probation of Offenders Act cannot be granted as the same is not applicable, in view of the fact that maximum sentence is more than seven years- revision dismissed. (Para- 3 to 5) Tiitle: Satnam @ TituVs. State of H.P. Page-74

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to the accused- she committed suicide by consuming poison- her father lodged a report with the police stating that the accused were harassing her without any reason, which led to her suicide – the accused were tried and convicted by the trial Court- held in appeal that father of the deceased has not narrated about the nature of ill-treatment – PW-2 improved upon her version – the deceased had visited her parental home with her husband and had not stated anything about the ill-treatment – the Trial Court had not properly appreciated the evidence – appeal allowed and accused acquitted. (Para-10 to 15) Title: Chaman Lal and others Vs. State of H.P. Page- 157

Indian Penal Code, 1860- Section 498-A and 307- The marriage between the deceased and accused No. 1 was solemnized in the year 2007 –accused used to harass her for not bringing sufficient dowry – accused No. 1 pushed her in the well – the accused were tried and acquitted by the Trial Court- held in appeal that the testimonies of prosecution witnesses are contradicting each other – PW-1 to PW-4 are closely related to each other - the Trial Court had recorded the finding of the acquittal after taking into consideration all the facts- the view taken by the Trial Court was a reasonable view- appeal dismissed. (Para-7 to 19) Title: State of Himachal Pradesh Vs. Firoj Khan and another (D.B.) Page-844

Indian Penal Code, 1860- Section 498-A and 506- Informant was married to the accused- the accused demanded Rs.4 lacs and gave her beatings- the accused threatened to throw her in Pandoh dam, in case of non-payment of dowry– the accused was tried and convicted by the trial Court- an appeal was preferred, which was allowed- held, that the marriage was not disputed- informant had not disclosed the beatings to any person- medical examination was not conducted to corroborate her version – material witnesses were not examined- the accused was rightly acquitted by the Appellate Court- appeal dismissed. (Para-9 to 15) Title: State of H.P. Vs. Sukh Dev Page-398

Indian Penal Code, 1860- Section 500- A criminal case was instituted against the petitioner, which resulted in his acquittal – an appeal was preferred, which was dismissed- the petitioner filed a complaint for defamation on the basis of news items – Magistrate ordered the summoning of the accused- a revision was preferred, which was allowed and the summoning order was set aside – held in revision that a period of three years has been prescribed for filing the complaint for the commission of offence punishable under Section 500- present complaint was filed after more than three years – defamation is not a continuing wrong – the petitioner has also instituted a suit for malicious prosecution – the complaint to the police is privileged and no action lies on the same – the Magistrate had wrongly summoned the accused and the order was rightly set aside by the Additional Sessions Judge- revision dismissed.(Para- 5 to 10) Title: Dr. Dev Raj Vs. Sandhya Sharma Page-188

Indian Succession Act, 1925- Section 63- Plaintiff claimed that she is legally wedded wife of P who died without executing any Will- the Will set up by the defendant is forged and fictitious document - the defendant pleaded that the plaintiff had taken divorce from the deceased and had contracted second marriage- he had executed a Will on being satisfied by the services rendered by the defendant – the suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held in second appeal that plaintiff has not disputed the execution of the Will but has pleaded the same to be the result of fraud and undue influence – no specific particular of fraud or undue influence were given and a general plea is not sufficient to amount to a plea of fraud- the pleas of fraud, undue influence, coercion etc. are to be proved by the person taking the plea – once a doubt is created regarding the free will of the deceased, the burden shifts upon the propounder to dispel the doubt - the Will is registered one and there is presumption of its valid execution- the court should not start with the presumption that Will is not genuine or that it is fraudulent – the conduct of the person who raises the ground for suspicion is also to be looked at in order to judge the credibility of the ground of suspicion- it was proved that plaintiff was married to P, when she was 10 years of age and had not resided with P thereafter - in these circumstances, it was possible for P to execute a Will disinheriting the plaintiff - the suit was rightly dismissed by the Courts- appeal dismissed.(Para-10 to 35) Title: Soma Devi Vs. Mast Ram Page-596

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit claiming that he is the owner in possession on the basis of the Will executed by G – the Will propounded by defendant No. 1 is the result of mis-representation, deception, undue influence and fraud – the revenue entries on the basis of the same are illegal, null and void- the suit was dismissed by the trial Court- an appeal was preferred, which was dismissed – held in second appeal that the Will propounded by the plaintiff was held to be shrouded in suspicious circumstances – plaintiff was not able to dispel those circumstances – the defendant No. 1 was able to prove the execution of the Will by the deceased- no fault can be found with the judgment of Appellate Court- appeal dismissed. (Para-15 to 19) Title: Revti Devi Vs. Hari Singh &Anr. Page-176

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit pleading that D had not executed any Will and the Will propounded by defendant No. 1 is a forged document – the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that execution of the Will was proved by marginal witnesses and the scribe – the Will was duly registered and was read over and explained to the deceased – testimonies of the witnesses were not shaken in the cross-examination – Sub Registrar proved the endorsement – Courts had wrongly discarded the Will – appeal allowed- judgments of Courts set aside.(Para-7 to 11) Title: Chhabi Ram since deceased through LRs Vs. Narudhma Devi and others Page-498

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that suit land was earlier owned by his mother V – she had executed a Will in favour of the plaintiff and defendant No.1- the other land was given to proforma defendants No. 2 and 3- defendant taking advantage of the absence of the plaintiff got executed a gift deed – the suit land was ancestral in the hands of V – the

defendant pleaded that the Will and gift deed were executed in a free and disposing state of mind – the suit was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held in second appeal that the execution of the Will was not disputed – the gift deed was executed after the execution of the Will- the gift deed was registered and there is presumption of its due execution – however, it was recorded by the revenue officer that possession was delivered after receiving an amount of Rs.5,000/- - therefore, it has not been proved that the gift was executed without any consideration- the donee had failed to prove that no undue influence was exercised by him upon the donor – further, the scribe and the witnesses were common – the Sub Registrar was also not examined – the Courts had not properly appreciated the evidence – appeal allowed- judgments of the Courts below set aside and the suit of the plaintiff decreed. (Para-7 to 14) Title: Satish Chander Vs. Jagdish and others Page-143

Indian Succession Act, 1925- Section 63- Plaintiffs pleaded that J was the owner of the suit land who died intestate - Will propounded by the defendants is wrong – the defendants pleaded that J had executed a Will in favour of defendants No. 1 and 2 in his sound disposing state of mind – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed- held in second appeal that finger print expert had stated that the thumb impression on the Will was different from the admitted thumb impression of the deceased – the Appellate Court had rightly allowed the appeal- appeal dismissed.(Para-7 to 9) Title: Des Raj and another Vs. Krishan Lal and others Page-730

Industrial Disputes Act, 1947- Section 17(B)- Writ Court had fallen in error in granting the wages from 16.8.2012 as they were to be granted from the date of filing of the affidavit as per the judgment of the Supreme Court in **Uttaranchal Forest Development Corporation Versus K.B. Singh, (2005) 11 SCC 449**- however, the writ petition has already been dismissed and the benefits are to be granted as per the order of the Labour Court- writ petition dismissed as infructuous. (Para-2 to 4) Title: State of H.P. and another Vs. Rakesh Kumar (D.B.) Page- 569

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged by the respondent as Beldar- his services were terminated without assigning any reason- the Tribunal allowed the reference and the petitioner was ordered to be reinstated with seniority but without back wages- held, that the plea of the petitioner was not supported by documents- the plea of the respondent that the petitioner had left the job on his own was not supported by the repeated requests for re-engagement- the case was dismissed in default and the workman had not taken steps to get the same restored- the order was passed rightly by the Industrial Tribunal-cum-Labour Court- appeal dismissed.(Para-6 to 13) Title: Udham Singh Vs. Himachal Pradesh State Electricity Board Limited and others Page-574

Industrial Disputes Act, 1947- Section 25- The workman had joined the service in the month of June, 1989 and continued till 19.1.1999, when his services were terminated without resorting to the provisions of the Act – Departmental proceedings were initiated against the petitioner but the proceedings were not fair – proper opportunity was not granted to the petitioner to defend himself- Industrial Tribunal directed the reinstatement of the workman in service with seniority and continuity along with back wages from the date of illegal termination- Tribunal concluded that proper opportunity of cross-examination of the witnesses was not afforded to the workman- an opportunity to defend his case throughdefence assistance was also not afforded – proceedings were conducted in English and there is no evidence that petitioner knew English language- other infirmities were also pointed out in the proceedings – held, that Tribunal had fallen in error in pointing out the irregularities in the cross-examination- workman had not objected to the appointment of the Inquiry Officer or conducing the proceedings in English – Workman had not requested for the appointment of the defence assistance- the provisions of the Indian Evidence Act are not applicable in the domestic inquiry – the order passed by Tribunal set aside- however, compensation of Rs.1.5 lacs ordered to be paid in lieu of 10 years service rendered by him.(Para-10 to 43) Title: M/s.Cosmo Ferrites Ltd. Vs. State of H.P. & Others Page-98

Industrial Disputes Act, 1947- Section 25- The workman was engaged as beldar – he was given fictional break and his services were terminated orally on the pretext that funds were not available and he would be re-engaged on the availability of the funds- the reference petition was allowed by the Industrial Tribunal –workman was ordered to be re-engaged with seniority and continuity in service - direction was issued for regularization of the services –held in writ petition, the engagement of the workman was not disputed – it was admitted that no notice was issued to the workman – plea of abandonment of the service is not acceptable in absence of notice – workman had completed 240 days – new person was appointed after terminating the services of the workman – the Tribunal had rightly ordered the re-engagement- petition dismissed. (Para- 6 to 11) Title: The Executive Engineer, HPSEB Electrical Division, Joginder Nagar Vs. Jagdish Chand Page-571

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Limitation Act, 1963- Section 5- An application for condonation of delay in filing the appeal was filed pleading that the husband of the applicant was not party to the suit or in the appeal- an amount of Rs.1,40,004/- has been ordered to be recovered from him- held, that the husband of the applicant was not arrayed as a defendant in the suit – the suit was dismissed by the Trial Court- an appeal was preferred and the suit was decreed- the decree was passed against department of I & PH but the department was left free to recover the amount from the husband of the applicant- the explanation furnished by the applicant is plausible – the application allowed and the delay condoned. (Para-4) Title: Aruna Bedi Vs. Subhash Kapil and others Page-742

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Motor Vehicles Act, 1988- Section 149- Claimants specifically pleaded that deceased had gone with his truck for carrying the cement - this fact was not denied by the respondents- the deceased was travelling in the vehicle as a gratuitous passenger and not as the employee of the owner- the insured had committed the breach of the terms and conditions of the insurance policy and insurer was rightly absolved of its liability – however, rate of interest reduced to 7.5% from 9%. (Para- 8 to 14) Title: Oriental Insurance Company Ltd. Vs. Bhuvneshwari Devi and others Page-692

Motor Vehicles Act, 1988- Section 149- Driver had a valid licence to drive light motor vehicle – offending vehicle was a tempo, which falls within the definition of Light Motor Vehicle – the Tribunal had wrongly held that driver did not possess a valid licence – the deceased was a photographer, who had gone to a Mela and was returning in the offending vehicle – he was rightly held to be a gratuitous passenger- the insurer directed to satisfy the award with the right to recovery. (Para- 5 to 15) Title: Kashmiri Lal Vs. Rajni Devi and others Page-355

Motor Vehicles Act, 1988- Section 149- Driver had two licences at the time of accident- however, it is not the case that driver was not having a valid and effective licence at the time of accident- insurer had not proved that insured had committed willful breach of the terms and conditions of the policy – insurer was rightly saddled with liability – appeal dismissed. (Para-11 to 15) Title: United India Insurance Co. Vs. LokeshawarNarah and others

Motor Vehicles Act, 1988- Section 149- Driver was having a license to drive light motor vehicle – he was driving a three wheelers, which falls within the definition of light motor vehicle- no endorsement of PSV was required- the Tribunal fell in error in concluding that the Driver did not have a valid licence at the time of accident- appeal allowed – award modified and the insurer saddled with liability. (Para- 5 to 15) Title: Inder Kaur & others Vs. Shanti Devi & others Page-656

Motor Vehicles Act, 1988- Section 149- Insurance is not disputed- claimant is a third party – her claim cannot be rejected on flimsy ground – insurer has to prove the breach of the terms and

conditions of the policy – Insurer was rightly saddled with liability. (Para-11 to 16) Title: National Insurance Company Ltd. Vs. Mukta Sharma and another Page-513

Motor Vehicles Act, 1988- Section 149- Insurer was directed to satisfy the award with the right to recovery- held, that insurer has to satisfy the award with the right to recovery from the owner/insured – appeal dismissed. (Para-4 to 6) Title: United India Insurance Co. Ltd. Vs. Sita Devi and others Page-824

Motor Vehicles Act, 1988- Section 149- It was contended that the driver did not have a valid and effective driving licence at the time of accident- Insurer had not led any evidence to prove this plea- the burden of proving the breach of the terms and conditions of the policy was upon the insurer- the insurer was rightly saddled with liability, in these circumstances - appeal dismissed. (Para-13 to 17) Title: Oriental Insurance Company Ltd. Vs. Jai Kumar and others Page-361

Motor Vehicles Act, 1988- Section 149- It was contended that the driver did not have a driving licence at the time of accident- insurer had not led any evidence to prove that driver did not have a valid and effective driving licence and the owner had committed willful breach – RW-1 proved that driver had driving licence issued by R & LA, Bilaspur, which was renewed by R & LA, Sarkaghat after getting confirmation from R & LA, Bilaspur- the insurer had failed to discharge the onus placed upon it and was rightly saddled with liability- MACT had awarded interest @ 9% per annum, which is reduced to 7.5% per annum. (Para- 4 to 13) Title: The New India Assurance Company Vs. Urmila Devi and others Page-385

Motor Vehicles Act, 1988- Section 149- It was for the insurer to plead and prove that driver was not having a valid and effective driving licence and the owner had committed willful breach- no evidence was led to prove that deceased were gratuitous passengers – in these circumstances, the insurer was rightly held liable. (Para-9 to 13) Title: Oriental Insurance Co. Ltd. Vs. Savitra Devi and others Page- 686

Motor Vehicles Act, 1988- Section 149- MACT held that licence was not in the name of respondent No. 2 but renewal was in his name- therefore, respondent No. 2 did not have a valid driving licence- the owner had committed willful breach of the terms and conditions of the policy – insurer was absolved of the liability – held, that it is not the case of the insurer that owner knew the driving licence was not issued in the name of respondent No. 2 and despite this fact he had engaged respondent No. 2 as driver – the vehicle was being plied with all the requisite documents- the insurer directed to satisfy the award. (Para-7 to 14) Title: Rajinder Singh Vs. Kirpal Singh and others Page-811

Motor Vehicles Act, 1988- Section 149- No evidence was led by the respondents and the evidence led by the claimant remained unrebutted – it was for the insurer to plead and prove that the insured had committed willful breach of the terms and conditions of policy – drivinglicence was exhibited and no objection was raised at the time of exhibition – the issues were rightly decided against the insurer – appeal dismissed. (Para- 11 to 19) Title: The New India Assurance Company Limited Vs. Resha Devi and others Page-547

Motor Vehicles Act, 1988- Section 149- Offending vehicle was a JCB, which was being driven by the driver in a rash and negligent manner – JCB falls within the definition of motor vehicle – the unladen weight of JCB was 7460 kg. and falls within the definition of light motor vehicle – there is no requirement of PSV endorsement – JCB falls within the definition of non-transport vehicle – insurer had failed to plead and prove that there was violation of the terms and conditions of the policy – the insurance is admitted – therefore, insurer was wrongly absolved of the liability – appeal allowed and insurer saddled with liability. (Para-5 to 22) Title: Jagmohan Singh and another Vs. Meera Devi and others Page-806

Motor Vehicles Act, 1988- Section 149- Tribunal held that driver was not having a valid and effective licence at the time of accident – licence was in the name of J and not in the name of S – there was no evidence that the owner had taken due care and caution while engaging the driver – held, that Tribunal had rightly recorded the findings- the driver was not having a valid and effective drivinglicence at the time of accident and the owner insured had committed willful breach- appeal dismissed.(Para-14 and 15) Title: Avtar Singh Vs. Tilak Raj & another Page-486

Motor Vehicles Act, 1988- Section 163-A and 167- Deceased was in the employment of owner/insured – claimants have right to claim compensation in terms of Workm Compensation Act- they had an option to file the claim petition either before the Commissioner or MACT – the claim petition was maintainable- however, the driving licence is not on record – case remanded for adjudication of the dispute afresh. (Para-9 to 11) Title: Rameshwar and another Vs. Reshmi Devi and another Page-364

Motor Vehicles Act, 1988- Section 163-A- It was contended that claim petition was not maintainable as the claimants had claimed the income of the deceased to be Rs.8,000/- per month- held, that the claim petition under Section 163-A was not maintainable as the income was more than Rs.40,000/- per annum- however, the claim petition can be treated to be filed under Section 166- the deceased was driving the vehicle himself as per the FIR- 50% of the amount has been released to the claimants with interest – therefore, the same ordered not to be recovered from them in the interest of justice- appeal disposed of. (Para-4 to 16) Title: United India Insurance Company Limited Vs. Mohan Lal and others Page-704

Motor Vehicles Act, 1988- Section 166- Claimant had suffered 100% disability – he remained admitted in the hospital from the date of accident till discharge – he had spent Rs. 2,28,176/- on medical treatment which is awarded to him- Rs. 2 lac was awarded for future treatment- Rs. 1 lac was awarded for loss of expectation and Rs. 20,000/- awarded for attendant charges- Rs. 15,000/- awarded on account of travelling allowances- the income of the claimant was assessed as Rs. 3200/- per month- injured was 29 years of age at the time of accident and multiplier of 16 is applicable- thus, claimant is entitled to Rs. 3200 x 12 x 16= Rs. 6,14,400/- - Rs. 15,000/- were rightly awarded on account of boarding and lodging at Chandigarh- Rs. 10,000/- awarded on account of physiotherapist – Rs. 50,000/- awarded on account of mental shock – Rs. 1 lac awarded under the head pain and suffering and Rs. 1 lac awarded under the head loss of amenities of life – thus, total compensation of Rs. 14,52,576/- awarded. (Para 15 to 24) Title: Rajinder Singh Vs. Kirpal Singh and others Page-811

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 50% disability, which is permanent in nature and is in regard to whole body- the claimant was an advocate by profession – the disability suffered by him has shattered his physical frame- he would not be in position to do the job of an advocate as he was doing prior to the accident- his income can be taken as Rs.10,000/- per month – considering the permanent disability, it can be safely held that the claimant had lost 20% earning capacity and loss of earning capacity will be Rs.2,000/- per month – the age of the claimant was 49 years and multiplier of 13 is applicable – thus, the claimant is entitled to Rs.2000 x12 x 13= Rs. 3,12,000/- under the head loss of earning capacity – the claimant remained admitted for over one month in the hospital and he would have taken some time in recuperation – hence, the loss of income can be assessed as Rs. 10,000 x 6= Rs. 60,000/- Rs. 50,000/- each awarded under heads painand suffering and loss of amenities of life – the claimant would have spent Rs.100/- per day or Rs.3,000/- per month on account of special diet- hence, the claimant is held entitled to Rs.3000 x6= Rs.18,000/- under the head special diet – Rs.20,000/- awarded under the medical expenses and Rs.10,000/- awarded under the head future medical treatment – the attendant charges for six months come to Rs.18,000/-- the claimant is held entitled to Rs.3000/- under the head transportation charges- the claimant was occupant of the car and the insurance policy shows the sitting capacity as 1 + 3- no breach of

terms and conditions was proved – hence, insurer directed to satisfy the award.(Para-11 to 36) Title: Desh Raj Sharma Vs. Chitra Rai and others Page-640

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 50% permanent disability- he was treated as a skilled labourer earning Rs.5,000/- per month -at the relevant time labourer would have been earning Rs.4000/- per month by guess work – considering the disability, the loss of income can be taken as Rs.2000/- per month – the claimant was 25 years of age at the time of accident – claimant was entitled to Rs.2,000 x 12 x 15= Rs.3,60,000/- under the head loss of future income- the tribunal had rightly awarded Rs.75,000/- on account of cost of medical treatment past and prospective, Rs.5,000/- on account of travel expenses, Rs.20,000/- on account of attendant charges for six months, Rs.10,000/- on account of physical pain and shock and Rs.50,000/- for the loss of amenities of life - thus, total compensation of Rs.5,20,000/- awarded with interest @ 7.5% per annum. (Para- 9 to 17) Title: ICICI Lombard General Insurance Co. Ltd. Vs. Ram Prakash and others Page-650

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injury in a motor vehicle accident- he was aged 27 years at the time of accident- he remained in hospital for a period of about 2 months- he was coming up for follow up after every 4-6 weeks – he is having difficulty in walking and speaking and he has lost all charms of life- he had spent Rs.1,94,428/- on his treatment- the Tribunal had rightly awarded the compensation- appeal dismissed. (Para- 12 to 16) Title: H.R.T.C. through its Managing Director and another Vs. Sanjay Kumar and another Page-648

Motor Vehicles Act, 1988- Section 166- Claimant sustained injuries in an accident – MACT awarded compensation of Rs.5,60,000/- to him – held in appeal that Medical Officer stated that left leg of the claimant had become short by 1½ inch – he had suffered muscular injury to the left leg, right patella and right ankle – the petitioner shall not be able to commute long distance and carry weight – the Tribunal had rightly taken the disability to the extent of 25% to 35% - compensation of Rs. 2,75,000/- cannot be said to be excessive – the MACT had not awarded any interest – hence, interest awarded @ 7.5% per annum. (Para-9 to 12) Title: Balkar Singh Vs. Babar and others Page-217

Motor Vehicles Act, 1988- Section 166- Compensation of Rs. 87,200/- was awarded along with interest @ 7.5% per annum- a sum of Rs. 1 lac awarded in lump sum in addition to the amount already awarded by the Tribunal with the right to recovery. (Para-3 to 4) Title: Manoj Kumar Vs.Ghanshayam Thakur and others Page-811

Motor Vehicles Act, 1988- Section 166- Condition of the claimant was critical – injury has affected her brain- initially, her disability was quantified at 20% - subsequently, her condition deteriorated and the disability was found to be 50% - claimant remained admitted in the hospital for 25 days –the claimant was an advocate and would not be able to act as an advocate after the accident – claimant pleaded that she was earning Rs.20,000/-per month prior to accident and by guess work the income of the injured can be treated to be Rs.10,000/- per month – the claimant is entitled to Rs.10,000 x 7= Rs.70,000/- under the head loss of earning during treatment - claimant lost earning capacity to the extent of 50% and the loss of income will be Rs.5,000/- per month- claimant was aged 50 years at the time of accident and multiplier of 11 is applicable, thus, claimant is entitled to Rs.5,000 x 12 x 11= Rs.6,60,000/- under the head loss of income – the claimant is also entitled to Rs.1 lac under the head pain and suffering- Rs. 1 lac under the head loss of amenities of life – the claimant would have spent Rs.100/- per day or Rs.3,000/- per month during the period of treatment and is entitled to Rs.3,000 x 7= Rs.21,000/- under the head special diet- Rs.20,000/- awarded under the head future medical treatment – rate of interest reduced to 7.5% per annum. (Para- 17 to 47) Title: National Insurance Company Ltd. Vs. Mukta Sharma and another Page-513

Motor Vehicles Act, 1988- Section 166- Deceased was 59 years of age at the time of incident – deceased was earning Rs.25000/- per month by maintaining accounts of various firms- he was also earning Rs.5,000/- per month from agricultural activities- MACT had treated the income of the deceased as Rs.10,000/- per month or Rs.1,20,000/- per annum - after deducting 1/3rd the loss of dependency will be Rs.80,000/- per annum- multiplier of 8 was applied by the Tribunal, whereas multiplier of 6 is applicable- thus, claimants are entitled to Rs.80,000 x 6= Rs.4,80,000/- under the head loss of dependency – claimants are also entitled to Rs.10,000/- each under the head loss of love and affection, loss of estate, funeral expenses and loss of consortium- thus, claimants are entitled to Rs.4,80,000 +Rs. 40,000= Rs.5,20,000/-. (Para-9 to 13) Title: Devinder Singh Vs. Geetan Devi and others Page-646

Motor Vehicles Act, 1988- Section 166- Deceased was a government employee and was drawing salary of Rs. 37,279/- - he was aged 57 years at the time of accident and was to retire within one year – compensation is to be assessed keeping in view this fact and that after retirement, he would be receiving pension and would be doing some part time job- 1/3rd was to be deducted towards personal expenses and the loss of dependency will be Rs. 25,000/- per month- multiplier of 7 is applicable out of which multiplier of 1 was to be applied on the salary and multiplier of 6 was to be applied on the pension- loss of dependency for one year will be 25,000/- x 12 x 1= Rs. 3,00,000/-- the deceased would have been receiving pension to the extent of 50% of the basic pay plus dearness allowance, which comes to Rs. 18,500/- - 1/3rd is to be deducted towards personal expenses and loss of dependency will be Rs. 12,500/- - claimants have lost source of dependency of Rs. 12,500/- X 12 X 6= Rs. 9,00,000/- - the deceased would have worked for sometime after getting part time job and the monthly income would not be less than Rs. 6,500/- per month- 1/3rd was to be deducted and the loss of dependency will be Rs. 4,500 x 12 x 6= Rs. 3,24,000/-, in addition to this, claimants are entitled to Rs. 10,000/- each under the heads loss of love and affection, loss of estate, funeral expenses and loss of consortium – thus, the claimants are entitled to Rs. 3,00,000/-+Rs. 9,00,000+ Rs. 3,24,000/- + Rs. 40,000/-.= Rs.15,64,000/-, with interest at the rate of 7.5%. (Para-16 to 26) Title: ICICI Lombard General Insurance Co. Ltd. Vs. Satya Devi and others Page-342

Motor Vehicles Act, 1988- Section 166- Deceased was drawing salary of Rs.10,050/- per month- hence, the monthly income of the deceased can be taken as Rs.10,000/- - deceased was bachelor at the time of accident – 50% has to be deducted towards personal expenses and loss of dependency will be Rs.5,000/- per month- deceased was 26 years at the time of accident – Tribunal had wrongly applied multiplier of 14, whereas, multiplier of 16 was applicable- thus, claimants are entitled to Rs.5,000 x 12 x 16= Rs.9,60,000/- under the head loss of dependency- claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of estate and funeral expenses- thus, claimants are entitled to Rs.9,90,000/- along with interest @ 7.5% per annum from the date of filing of claim petition till deposit. (Para-16 to 21) Title: United India Insurance Co. Vs. Lokeshawar Narah and others Page-699

Motor Vehicles Act, 1988- Section 166- It was contended that Tribunal fell in error in accessing compensation under the head loss of earning/future income and in granting interest from the date of filing of the claim petition- the injured was a student aged 14 years – he had sustained 15% permanent disability – his right leg was operated – it can be safely held that after attaining the age of majority, he would have earned atleast Rs.4,000/- per month- he is working as a driver and his income can be taken as Rs.6,000/- per month- the loss under the future head will be Rs.600/- per month – multiplier of 12 is applicable and claimant is entitled to Rs.600 x 12 x 15= Rs. 1,08,000/- under the head loss of earning/future income- Rs.10,000/- awarded under the head medical expenses for the future medical treatment- interest awarded on all heads except the future income from the date of claim petition and on the future income from the date of the award. (Para-6 to 18) Title: ICICI Lombard General Insurance Company Ltd. Vs. Rakesh Kumar @ Suresh Kumar & others Page-654

Motor Vehicles Act, 1988- Section 166- MACT dismissed the petition on the ground that rashness and negligence were not proved – held, that the rashness and negligence were not specifically denied by the respondents – witnesses consistently stated that accident was the outcome of rash and negligent driving of the driver – rapat was proved on record – merely because FIR was not lodged cannot lead to the dismissal of the petition- MACT should not succumb to the niceties and hyper technicalities of law – the driver had a valid licence at the time of accident – the vehicle had all the documents and there was no breach of terms and conditions of the policy- claimant had sustained 15% disability – Rs.35,000/- awarded under the head pain and suffering – Rs.35,000/- awarded under the head loss of amenities of life – Rs.5,000/- awarded under the head attendant charges- Rs.10,000/- awarded under the head future medical treatment- Rs.30,000/- awarded under the head medical expenses – Rs.5,000/- awarded under the head special diet. (Para- 5 to 23) Title: Daulat Ram Vs. Krishan Lal and others Page-502

Motor Vehicles Act, 1988- Section 166- Number of claimants are three, therefore, 1/3rd was to be deducted from the monthly income towards personal expenses – Tribunal had fallen in error in deducting 1/4th – monthly income of the deceased was Rs.4,000/- and after deducting 1/3rd loss of dependency comes to Rs.2700/- per month – total loss of source of dependency is Rs.2700 x 12 x 16= Rs.5,18,400/-. (Para- 4 to 6) Title: National Insurance Co. Ltd. Vs. Saroj Kumari and others Page- 512

Motor Vehicles Act, 1988- Section 166- The claim petition was dismissed on the ground that claimant had failed to prove that driver was driving the vehicle in a rash and negligent manner- held, that it was specifically pleaded in the claim petition that the accident was outcome of rash and negligent driving of the driver – FIR was also registered against him- therefore, there was prima facie evidence regarding rashness and negligence – the claimant has to prima facie prove that accident was the outcome of rashness and negligence of the driver- MACT had not returned any findings on issues No. 2 to 4 - the award set aside with the direction to return findings on issues No. 2 to 4. (Para- 7 to 16) Title: Raksha Devi Vs. Pradeep Kumar & others Page-817

Motor Vehicles Act, 1988- Section 168- A claim petition was filed, which was allowed subject to the production of disability certificate, which he failed to do – claimant filed an execution petition, which was also dismissed – he filed a fresh claim petition, which was allowed – held, that second claim petition is not maintainable in view of bar of res-judicata – however with the consent of the parties compensation of Rs. 2 lacs awarded in favour of the claimant. (Para-3 to 7)Title: United India Insurance Company Ltd. Vs. Lal Chand & others Page-825

Motor Vehicles Act, 1988- Section 173- Insurer contended that the vehicle was being driven by S and not by M – held, that the insurer had not taken permission to contest the claim on all grounds and cannot question the adequacy of compensation – moreover, the MACT had rightly made the discussion and no interference is required with the same- however, the rate of interest reduced to 7.5% per annum from 9%. (Para- 6 to 15) Title: Oriental Insurance Company Vs. Santosh w/o Late Sh. Lekh Ram &Ors. Page-520

Motor Vehicles Act, 1988- Section 173- Insurer had limited grounds available to file an appeal – it can seek permission to contest the claim petition on all the grounds after seeking permission under Section 170 of the Act- no such permission was granted by the Insurer and appeal cannot be filed on the ground of adequacy of compensation. (Para-3 to 10) Title: The New India Assurance Co. Ltd. Vs. Kamlesh Kumari and others Page-383

Motor Vehicles Act, 1988- Section 173- The insurer challenged the award on the quantum of compensation – held, that Insurer has to seek the permission to contest the claim petition on all the grounds available to it and in case permission has not been sought and granted, it is precluded from questioning the award on the ground of adequacy of compensation – it can challenge the award only on the grounds, which are available to it- no permission was sought to

contest the claim petition on all grounds and therefore the appeal by the insurer is not maintainable -otherwise also, the compensation is meager and the same has not been questioned by the claimants- hence, the same is reluctantly upheld. (Para-11 to 18) Title: Oriental Insurance Company Limited Vs. Dila Kumari & others Page-688

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N.D.P.S. Act, 1985- Section 20- Accused K and M were found in possession of 2.5 k.g and 2.2. kg. charas, respectively – accused K had facilitated transportation of charas by accused M and accused S had facilitated transportation of charas by other accused - accused were tried and acquitted by the trial Court- held in appeal that acquittal was recorded on the basis of omissions, procedural irregularities and contradictions – the prosecution version was proved by the testimonies of the police officials- recovery was effected from the bag and there was no need of compliance with Section 50 of N.D.P.S. Act – I.O. should have filled NCB form separately but no such guidelines were formulated at the time of recovery and the omission to do so will not make the prosecution case doubtful- I.O. specifically stated in cross-examination that he had prepared only one NCB form- the link evidence was proved- merely, because the parcels were not marked will not lead to the acquittal of the accused – the defence version was not probable – any defect in the investigation will not result in the acquittal of the accused- no evidence was brought on record to show that accused S had facilitated the transportation of charas – appeal allowed- accused K and M convicted for the commission of offence punishable under Section 20 of N.D.P.S. Act.(Para-12 to 34) Title: State of Himachal Pradesh Vs. Kamlesh Kumar & others (D.B.) Page-198

N.D.P.S. ACT, 1985- Section 20- Accused was found in possession of 3 kg. charas- he was tried and convicted by the trial Court- held in appeal that accused had admitted the presence of police party in the bus, search of the bag and recovery of charas – he claimed that bag did not belong to him but was unclaimed – independent witnesses did not support the prosecution version but that by itself is not sufficient to discard the prosecution version – testimonies of police officials can be relied upon if supported by other materials- the testimonies cannot be discarded on the ground that police officials are interested in the success of their cases- police officials consistently proved the prosecution version – there are no contradictions in their testimonies- police has no enmity with the accused - link evidence was proved - non-production of malkhana register to establish the movement of contraband from the FSL to Police Station and thereafter to Court will not make the prosecution case doubtful in absence of any prejudice- similarly, absence of reference in NCB form, sample seal and the road certificate will not render the prosecution case doubtful; when there is no discrepancy regarding the number and nature of seal or that they were tempered or broken- non-production of seal will also not make the prosecution case suspect – recovery was effected from the bag and there was no necessity to comply with Section 50 of N.D.P.S. Act- the prosecution version was proved beyond reasonable doubt- appeal dismissed. (Para-16 to 74) Title: Sohan Lal Vs. State of Himachal Pradesh (D.B.) Page-274

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 230 grams charas – he was tried and convicted by the trial Court- held in appeal that independent witness was not associated, although witnesses were available- the charas was found to be in the form of sticks and one ball in FSL but was found in the form of sticks in the Court- the prosecution version is doubtful, in these circumstances- appeal allowed- accused acquitted. (Para-9 to 13) Title: Bakhtawar Singh Vs. State of Himachal Pradesh Page- 297

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1 kg. charas- he was tried and convicted by the trial Court- held, in appeal that prosecution version regarding the recovery was duly proved by oral testimonies and the documents – minor contradictions in the testimonies of the prosecution witnesses are not sufficient to discard them- link evidence is also established – recovery was effected without any prior information and provision of Section 42 is

not applicable – charas was found to be 920 grams in the FSL, which is less than commercial quantity – sentence modified – proceedings ordered to be initiated against the conductor for making a false statement in the Court.(Para-12 to 24) Title: Arun Kumar Vs. State of Himachal Pradesh (D.B.) Page-117

'P'

Partition Act, **1893**- Section 4- A Local Commissioner was appointed to partition the property in accordance with the preliminary decree- another Local Commissioner was appointed to sell the property – Local Commissioner sold the property but the parties were not willing to pay 50% increase – property in Himachal could not be partitioned due to non-corporative attitude of the parties- a fresh Local Commissioner was appointed – objections were filed to his appointment- objections dismissed as baseless – Local Commissioner directed to partition the property in accordance with the preliminary decree. (Para-2 to 15) Title: Rajinder Kumar VermaVs. Anita Verma & ors. Page-440

Prevention of Food Adulteration Act, 1954- Section 16(1)(a)(i)- Samples of glucose biscuits were taken, which were found to be misbranded- accused were tried and acquitted by the trial Court – held in appeal that Food Inspector deposed about the taking of the sample and completion of codal formalities – his testimony was not shaken in cross-examination- respondent No. 1 had purchased the food item from respondent No. 3, who had died during the pendency of the appeal- respondent No. 1 and 2 were convicted of the commission of offence punishable under Section 16(1)(a)(i) read with Section 7(ii) of Prevention of Food Adulteration Act. (Para-10 to 14) Title: State of H.P. Vs. Chaman Lal and another Page-182

Punjab Excise Act, 1914- Section 61(i)(a)- Accused were found in possession of 6 bags containing 4 boxes each and one box containing two boxes of country liquor each, box was containing 50 pouches each of 180 ml. liquor- accused were tried and convicted by the trial Court- an appeal was preferred, which was allowed and the accused were acquitted- held in appeal that the prosecution version was proved by the official witnesses – report of CTL proved that pouches were containing country liquor in them – simply because independent witnesses had not supported the prosecution version is not sufficient to record acquittal especially when he had admitted his signatures on the seizure memo - he was estopped from denying his signatures in view of bar contained in Sections 91 and 92 of Indian Evidence Act – Appellate Court had wrongly acquitted the accused- appeal allowed- judgment of Appellate Court set aside and that of the Trial Court restored. (Para-9 to 13) Title: State of H.P. Vs. Sanjeev Kumar Page-821

Punjab Excise Act, 1914- Section 61(i)(c)- Accused had set up an apparatus for production of illicit liquor- 10 liters illicit liquor and 100 liter drum containing lahan were found – the accused was tried and convicted by the trial Court- an appeal was filed, which was dismissed- held in revision that no independent witnesses were associated by the police party as the recovery was effected during the night time – the conviction can be placed upon the statements of the official witnesses subject to careful and cautious scrutiny of their statements – there are over writings in the daily diary at two places regarding the time , which makes the prosecution version doubtful – recovered illicit liquor was never produced before the Court -considering the fact that prosecution is relying upon the testimonies of official witnesses – the contradictions become significant – revision allowed and accused acquitted of the charge framed against him.(Para-6 to 14) Title: Girdhari Lal Vs. State of H.P. Page-75

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Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989- Section 3(1)(x)- Informant stated that accused called him Chamar and Dagi in presence of many people – the accused was tried and acquitted by the trial Court- held in appeal that the informant and PW-2 had a grouse against the accused and the motive to implicate the accused falsely– there was a delay of 32-34 days in reporting the matter to police, which makes the prosecution case suspect-

the trial Court had rightly acquitted the accused- appeal dismissed. (Para-10 to 14) Title: State of H.P. Vs. Santosh Kumar Page-550

Specific Relief Act, 1963- Section 5- Plaintiff filed a suit for possession and mesne profit – it was pleaded that L, previous owner of the property had executed a lease in favour of the defendants – she had executed a Will in favour of plaintiff No.2- plaintiff No.2 created a trust – defendant No.1 was asked to attorn in favour of plaintiff No.2 – but he asked the plaintiff No.2 to get his title cleared from the Court- the defendant failed to hand over the possession after expiry of the lease and threatened to raise construction forcibly – the suit was dismissed by the Trial Court – appeal was filed, which was allowed – held in second appeal that a notification was issued during the pendency of the proceedings bringing the area in the limits of M.C. Shimla- however, the defendants do not fall within the definition of the tenants under Section 2(j) of H.P. Urban Rent Control Act and the plea regarding the applicability of Rent Act to them is not acceptable – defendants were held to be in unauthorized possession by the Appellate Court- the issue of title, execution of Will and creation of trust were decided in a previous judgment – therefore, the judgment is relevant in this case- the Appellate Court had rightly placed reliance upon the same- appeal dismissed.(Para- 27 to 91) Title: M/s.Byford Private Ltd.& Others Vs. AjitLajwantiGujral Trust & Another Page-6

Specific Relief Act, 1963- Section 20- Defendant No.1 had agreed to sell half share of his land to the plaintiff for a sum of Rs.20,000/- - an amount of Rs.19,000/- was paid as earnest money- the balance amount was to be paid at the time of execution and registration of the sale deed – defendant assured to execute the sale deed after his return from abroad - when the plaintiff asked the defendant to execute the sale deed, defendant No.1 told him that sale deed was registered in favour of defendant No.2, which is illegal- hence, the suit was filed for seeking specific performance – the defendants denied the execution of the agreement – the suit was partly decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that no evidence was led to prove that the defendant No.2 is bonafide purchaser for consideration – no evidence was led to prove that the compromise between the plaintiff and defendant No.1 was collusive in nature – the Trial Court and Appellate Court had ignored the material evidence- hence, appeal allowed and the suit of the plaintiff decreed for specific performance. (Para-8 to 10) Title: Paras Ram alias GovindVs. Jasmati and others Page-194

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit seeking specific performance of the agreement executed by defendant No.1- it was pleaded that possession was handed over after receiving sale consideration of Rs.10,000/- - the land was a tenancy land and therefore, sale deed could not be executed – it was agreed that sale deed would be executed on the conferment of proprietary rights – defendant No.1 failed to execute the sale deed and after the receipt of the notice, executed a gift deed in favour of defendant No.1- the defendant No.1 denied the execution of the agreement - the suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal that marginal witnesses to the agreement were not produced- there were contradictions regarding the name of the person in whose presence the money was paid- sale deed was executed on the same day, which probablized the version that the agreement was got executed by way of misrepresentation- the delivery of possession was also not established- the suit was rightly dismissed by the Court- appeal dismissed. (Para- 11 to 16) Title: Bhawani Devi Vs. Deo, S/o Gainda and others Page-869

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit, which was compromised – a mutation was sanctioned on the basis of compromise – an appeal was filed, which was dismissed – a civil suit was filed against these orders – the suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held in second appeal that the jurisdiction of the Civil Court to go into the question, where adequate remedy has been provided under the H.P. Land Revenue Act is barred – a remedy of approaching Financial Commissioner was available to the plaintiff – the Appellate Court had wrongly discarded this reasoning of the trial Court- appeal allowed – the

judgment of the Appellate Court and that of the trial Court restored. (Para- 7 and 8) Title: Tikka Maheshwar Chand Vs. Ripudaman Singh Page-214

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that the land is wrongly recorded to be in joint ownership of the parties – it has been partitioned in a family partition- the deceased plaintiff was taken to document writer and was told to sign on the papers for correcting the revenue entries and in this manner his signatures were obtained on the gift deed – the suit was filed to set aside the gift deed- the suit was dismissed by the trial Court- an appeal was preferred and the case was remanded – the suit was again dismissed by the trial Court- judgment and decree were partly modified in appeal- held in second appeal that no document regarding the family partition was placed on record – partition was also not recorded in the revenue record – it was proved by the evidence that gift deed was got executed by representing it to be a document of family partition – the evidence was rightly appreciated by the Courts - no relief of possession was sought and could not have been granted – appeal dismissed. Title: Dola Ram & others Vs. Ganga Singh & others Page-220

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit seeking declaration that the suit land is in possession of the plaintiff as tenant on the payment of the rent – he has become owner by operation of H.P. Tenancy and Land Reforms Act – he and his predecessor were never evicted – the entry in favour of the defendant is wrong – the civil suit was decreed by the Trial Court – an appeal was preferred, which was allowed- held in second appeal that predecessor-in-interest of the plaintiff was recorded but defendants No.1 , 2 to 4 have been recorded to be in possession as gairmaurusidoem while predecessor-in-interest of the plaintiff has been recorded as gairmaurusiavwal- the plaintiff admitted that entries were existing since 1979 – the suit was filed after 11 years – the witness of the plaintiff admitted that shops were constructed by the defendants – defendants proved that suit land is in their possession and they have constructed shops over the same- a road has also been constructed by PWD- the entries were changed during consolidation and correction was carried out as per the position on the spot- land is not under cultivation – no document was brought on record to show that the plaintiff was inducted as gairmaurusi tenant whereas, the defendants were able to prove that they were inducted as tenants over the suit land by the original owner- Trial Court had wrongly concluded that plaintiff is in possession of the suit land and entries were wrongly changed in favour of the defendants- on the other hand, the Appellate Court had rightly concluded that change in entries was in accordance with the procedure and the factual position at the spot – appeal dismissed.(Para-13 to 32) Title: KartaraVs. Sinno Devi & Others Page-346

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit that the entry showing D to be gairmaurusi are incorrect – no Will was executed by D – permissive possession of D came to an end on her death – defendant pleaded that D was a tenant who became the owner on the commencement of H.P. Tenancy and Land Reforms Act- she had executed a Will – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that The Appellate Court had held that J appeared to have died in the year 1976 as mutation of inheritance was sanctioned on 11.3.1976 - the Will was executed when proprietary rights were not conferred upon D – Appellate Court had drawn the conclusion on the basis of presumption/conjecture and surmises without any ground of appeal- appeal allowed – the case remanded to the Appellate Court for a fresh decision. (Para-11 to 17) Title: Khem Chand Vs. Gopal Singh Page-772

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that she was taken for securing bank loan – some documents were executed under the influence of liquor- it was found that power of attorney was got executed, which was got revoked – a sale deed was executed in the meantime on the basis of power of attorney – the suit was dismissed by the Trial Court – an appeal was preferred, which was allowed- held in second appeal that plaintiff had failed to prove that power of attorney was got executed as a result of fraud – while the evidence of the defendant that the

power of attorney was executed voluntarily was satisfactory - however, the sale deed was executed after the revocation of the power of attorney- therefore, the sale deed is not valid – the Appellate Court had rightly reversed the judgment of the trial Court- appeal dismissed.(Para-10 to 21) Title: Vidya Devi Vs. Hem Raj Page-1

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit in representative capacity – the judgment and decree dated 9.12.1959 were obtained by playing a fraud in connivance with Ex-Sarpanch of the village – the suit was decreed by the trial Court- an appeal was preferred, which was allowed- held in second appeal that the suit land had vested in the gram Panchayat – previous suit was filed seeking declaration regarding the possession – Pardhan was authorized to defend the suit but he compromised the suit without any authorization to do so- Gram Panchayat filed a civil suit to set aside the decree but the suit was withdrawn by Pardhan – customary right was established by the plaintiffs- land had vested in Gram Panchayat- mere fact that some of the plaintiffs had died during the pendency of the suit will not result in the dismissal of the same, but the abatement shall be partial – the suit was rightly decreed by the trial Court- appeal dismissed. (Para-9 to 13) Title: Sita Devi and others Vs. Lekh Ram and others Page-149

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit seeking declaration that they are owners in possession of the suit land – the suit land was wrongly recorded to be in possession of defendants No.1 to 3- AC 1st Grade had wrongly declared the defendants to be the owners in possession of the suit land – defendants claimed that suit land was in possession of their predecessor-in-interest as non-occupancy tenant- plaintiffs had purchased the suit land in the year 1965-66 but the tenancy was prior to the sale – defendants had become the owners after the commencement of H.P. Tenancy and Land Reforms Act- the suit was decreed by the Trial Court- an appeal was preferred, which was allowed- held in second appeal that in the present case defendants had filed counter-claims, which were dismissed by the Trial Court – the suit of the plaintiff was decreed- Counter-claim is in the nature of a cross suit – a separate decree should have been prepared in the counter-claim- Appellate Court should not have been entertained composite appeal – appeal allowed – judgment of the Appellate Court set aside and that of the Trial Court restored.(Para-21 to 46) Title: Piar Chand & Others Vs. Ranjeet Singh & Others Page-34

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit pleading that the possession of plaintiffs over the suit land is open, peaceful, hostile continuous without interruption to the knowledge of the defendants from January, 1960 and has matured into title- plaintiffs have become the owners by way of adverse possession – defendants No.1 and 2 had obtained a collusive judgment from Assistant Collector, Sarakaghat which does not affect the right of the plaintiffs- the suit was decreed by the Trial Court- an appeal was preferred, which was partly allowed- held in second appeal that proceedings were initiated by Assistant Collector for evicting the deceased defendant – the bartandarans were not impleaded and the suit was decreed in their absence- this shows that the judgment was passed by A.C. 1st Grade collusively and without following the principle of natural justice- the Courts below had passed the judgments rightly – appeal dismissed.(Para-9 to 13) Title: Roop Singh (since dead) through LRs & Ors. Vs. Prabha Ram &Ors. Page-591

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit pleading that they were co-owners in possession of the suit land – D had executed sale of his share but mutation could not be attested- the sale deed was mistakenly executed regarding the whole land, which was not permissible- revenue entries were not correctly recorded- defendants started digging the suit land to raise structure over the same- suit was decreed by the trial Court- an appeal was filed, which was allowed- held in second appeal that copy of jamabandi shows that D was co-sharer to the extent of 1/4th share – revenue record does not substantiate the fact that entire land was exclusively owned and possessed by D- therefore, he could not have parted with more land than was owned by him- the plea that defendants had become owners by way of adverse possession

was not proved as no evidence was led that D was in possession of the entire land to the exclusion of the other co-owners - it was also not proved that D had denied the title of the other co-owners – appeal allowed- judgment and decree passed by District Judge set aside. (Para-12 to 27) Title: Pratap Singh and others Vs. Ram Rattan, son of Shri Lachhmi Singh Page- 166

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs pleaded that revenue entries were changed in their absence – a sale deed was executed and a mutation was attested on the basis of the wrong entries- plaintiffs sought declaration and injunction – the suit was decreed by the trial Court- an appeal was filed, which was dismissed – held, in second appeal that the plaintiffs are the legal heirs of deceased R, who was the previous owner of the property – succession certificate was also granted in their favour – the plea of adverse possession was not established – the suit was rightly decreed by the Courts- appeal dismissed.(Para-7 to 19) Title: Shankar Lal (through LRs) Vs. Ramesh Chander (through LRs) and others Page-736

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs pleaded that suit land was jointly possessed by S and D as tenants – it was succeeded by the plaintiffs after the death of S and D- proceedings for ejectment were initiated against the plaintiffs on the basis of ejectment order passed by SDO (Civil) against D- the order was a nullity as no notice was issued to D – the defendants pleaded that the suit land was granted to S and D but the allotment was cancelled on the ground that land was not utilized for the purpose for which it was granted- suit was dismissed by the Trial Court- an appeal was preferred, which was allowed – held in second appeal that the possession of the plaintiffs and the fact that ejectment proceedings were initiated against the plaintiffs were not disputed – plaintiffs were not parties to the earlier ejectment proceedings- even if the plaintiffs are tress passers, they cannot be ejected except in accordance with law- Appellate Court had rightly restrained the defendants from ejecting the plaintiffs – appeal dismissed.(Para-11 to 14) Title: State of Himachal Pradesh and another Vs. Shakuntla Devi and others Page-883

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that he is a co-sharer in the suit land – he had improved the suit land by spending considerable amount- defendants threatened to construct a road through the suit land – hence, the suit was filed – the suit was decreed by the trial Court- an appeal was preferred, which was allowed- held in second appeal that it was duly proved that suit land was allotted to the plaintiff and was made cultivable by the plaintiff and his brothers- plaintiff is recorded to be the owner in possession of the suit land- no material was brought on record to controvert the revenue entries- no plea was taken that defendants were entitled to use the passage in exercise of easementary and customary rights – the defendants had failed to prove the existence of passage over the suit land- the Appellate Court had wrongly allowed the appeal- appeal dismissed. (Para- 10 to 26) Title: Shambhu Ram Vs. Lakhu and others Page-65

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that defendant is obstructing the passage to his house and is not allowing him to carry the construction material – defendant denied the existence of the passage- the suit was decreed by the Trial Court- an appeal was preferred, which was allowed- held in second appeal that plaintiff had proved the existence of the path by the spot map, oral testimony and the revenue record- however, no satisfactory evidence was led by the defendant- the Appellate Court had wrongly discarded the evidence on the ground that no demarcation was conducted- however, the demarcation was not required- appeal allowed- judgment of Appellate Court set aside and the suit of the plaintiff decreed. (Para-8 to 11) Title: Chattar Singh Vs. Gauri Singh and others Page-492

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land – defendants threatened to interfere in the suit land and to demolish the Chhapar situated over the same without any right to do so – defendants pleaded that they were licencees and had constructed a chhapar under the licence – suit was decreed by the trial Court – an appeal was

preferred, which was allowed- held in second appeal that findings were recorded by Appellate Court on the basis of conjectures and not on the basis of the facts- the Court can record the findings on the basis of the facts and not on the basis of presumption- it was obligatory for the Appellate Court to take into consideration the reasoning of the trial Court and thereafter to record its own findings- appeal allowed – case remanded to the Appellate Court for a fresh decision. (Para- 10 to 15) Title: Kewal Krishan and others Vs. Surjeet Singh and another Page-161

Specific Relief Act, 1963- Section 38- Plaintiff was owner in possession of the suit land- land was given to defendant No.1 on payment of rent of Rs.1 per annum- the defendant No.1 constructed a house on the suit land – the lease was terminated and an agreement was executed- plaintiff paid Rs.300/- to defendant No.1, defendant No.1 removed the material of the house from the suit land and shifted to Village B- the defendant No.1 sold the suit land in favour of defendant No.2 and defendant No.2 is threatening to interfere in the possession of the plaintiff- the suit was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held in second appeal that plaintiff has admitted that construction raised by him was demolished – the document required registration and could not be looked into in absence of the registration – khasragirdawari was not produced – plea of adverse possession was also not established- the suit was rightly dismissed by the Trial Court- appeal dismissed. (Para-7 to 10) Title: Chaudhari Ram since died through LRs. Vs. Nathu Ram and another Page-495

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for fixation of boundary and for relief of possession and injunction – it was pleaded that plaintiffs are owners in possession of the suit land- defendants are strangers who threatened to interfere with the suit land – they were found to be encroachers on the portion of the suit land – they were requested to deliver possession but in vain- the suit was decreed by the trial Court- an appeal was filed, which was dismissed- held in second appeal that parties are adjacent owners - the demarcation report shows that defendants have encroached upon a portion of the suit land - however, the demarcation was not conducted in accordance with the binding instructions – the plea of adverse possession was not established satisfactorily – matter remanded to the Appellate Court to appoint a Local Commissioner and thereafter to decide the matter afresh. (Para-7 to 11) Title: Shankari Devi and another Vs. Inder Jeet Singh and another Page-524

Specific Relief Act, 1963- Section 5 or 38- Plaintiff pleaded that he had given four rooms to the defendants as licencee- he demanded the possession but the defendants threatened to demolish the rooms – defendants pleaded adverse possession – the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal that the evidence in support of adverse possession was not satisfactory – the ingredients of adverse possession were not established – plaintiff is recorded to be the owner in the copy of jamabandi, which carries with it a presumption of correctness- the suit was maintainable without joining the co-owners – the evidence was properly appreciated by the Courts – appeal dismissed.(Para-7 to 12) Title: Bimla and others Vs. Saroj Rani Page- 488

'T'

Transfer of Property Act, 1882- Section 60- Plaintiff pleaded that he is mortgagor of the shop, which was redeemed in favour of the defendant on the payment of Rs.5,000/-- he requested the defendant to receive the money and to redeem the property but defendant refused- defendant denied the relationship of mortgage and mortgagee and pleaded that he was inducted as tenant on the rent of Rs.200/- per month – the suit was decreed by the trial Court- an appeal was preferred, which was dismissed – held in second appeal that plaintiff had proved the mortgage – the execution of the mortgage deed was admitted by the defendant in cross-examination – mortgage was duly recorded in the rapatroznamcha – the Courts had rightly decreed the suit- appeal dismissed.(Para- 14 to 22) Title: Om Prakash Chand Vs. Parkash Chand Page-46

Transfer of Property Act, 1882- Section 106- Plaintiff pleaded that tenancy of the defendant was terminated by issuing a notice – the possession of the defendant was unlawful – hence, the mesne profit were sought along with the interest- the suit was decreed by the trial Court- an appeal was filed, which was dismissed – held in second appeal that mesne profit is to be determined on the basis of cogent and credible evidence like recent registered lease deeds of the locality – plaintiff had not brought on record lease deed or registered documents showing the rent of the similar premises – the findings recorded by the Court cannot be said to be perverse- appeal dismissed.(Para- 12 to 17) Title: Braham Dev Sood Vs. JugalKishore Page-636

'W'

Workmen Compensation Act, 1923- Section 4- Claimant was engaged as driver – he sustained 40% disability when the truck being driven by him met with an accident – the claim petition was dismissed by Workmen Compensation Commissioner- held, that the claimant had sustained injuries in an accident - disability certificate shows 40% disability of right ankle due to which he would not be able to work as driver – disability certificate was prepared after five years of the incident – the Doctor who issued the MLC was also not examined – the claim petition was rightly dismissed, in these circumstances- appeal dismissed. (Para- 3) Title: Surinder Singh Vs. New India Assurance Company Ltd. and another Page-294

Workmen Compensation Act, 1923- Section 4- Deceased died during the course of the duties- a claim petition was filed, which was allowed – held, that Workmen Compensation Commissioner had taken the wages of the deceased as Rs.7,000/- - the employer did not file the wages register to prove the exact income – insurance cover was not adduced in the evidence – however, the penalty reduced from 25% to 5% of the compensation amount- appeal partly allowed. (Para- 2 to 5) Title: Oriental Insurance Company Vs. Ram Prashad&Anr. Page-295

Workmen Compensation Act, 1923- Section 4- Deceased was a driver who died in an accident – compensation was awarded by the Commissioner- it was contended that the deceased was son of the owner and therefore it cannot be accepted that the deceased was employed by the owner – held, that there is no principle of law that a father cannot employ his son as a driver – it was duly proved that the owner had employed the deceased as driver on a monthly salary of Rs.2,600/- per month- receipts were also produced to this effect- therefore, Commissioner had rightly awarded the compensation- however, the interest was to be levied from the one month after the accident. (Para-2 to 6) Title: New India Assurance Company Ltd. Vs. Lakshmi Devi & Others Page-359

Workmen Compensation Act, 1923- Section 4- Deceased was electrician and he died during the course of his duty- compensation of Rs.3,38,880/- was awarded by the commissioner with interest @ 12% per annum- held in appeal that interest is to be awarded from one month after the fatal accident- an amount of Rs.25,000/- was deposited which is not sufficient considering that ultimately an amount of Rs.3,38,880/- was awarded- therefore, employer is liable to pay the penalty on the awarded amount – the amount of Rs.40,000/- imposed as penalty. (Para-4 to 7) Title: Vijaya Devi and others Vs. Resident Engineer Page-463

Workmen Compensation Act, 1923- Section 4- Deceased was engaged as a cleaner- he died in an accident- a claim petition was filed for seeking compensation- an amount of Rs.6,71,389/- was awarded along with interest @ 12% per annum- held in appeal that Commissioner had taken the income of the deceased as Rs.3,000/- per month- PW-1 had stated that deceased was earning Rs.3,000/- per month and Rs.50/- per day as diet money- therefore, income of Rs.3,000/- per month cannot be said to be excessive - driving licence remains effective for a period of 30 days from the date of expiry- therefore, it cannot be said that licence was not valid- appeal dismissed. (Para-4 to 6) Title: National Insurance Company Ltd.Vs. Puran Dei and others Page-140

Workmen Compensation Act, 1923- Section 4- Son of the claimant died in the course of performing his duties as a labourer – claimant filed a claim petition and a compensation of Rs. 4,45,000/- was awarded to the claimant – held in appeal that no objection regarding limitation was taken in the reply – Commissioner had power to condone the delay on sufficient cause being shown by the Claimant – monthly wages of the deceased could be quantified at Rs. 2,591.72/- - 50% of the amount is to be deducted in accordance with Section 4- therefore, the claimant is entitled to Rs. 222.71 x 1295.86= Rs. 2,88,600.98/- along with interest @ 12% per annum- penalty of Rs. 20,000/- also imposed upon respondents No. 2 and 3. (Para-3 and 4) Title: United India Insurance Company Vs. Dhananjoy Dass and others Page-630

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

Smt.Vidya Devi ....Appellant-Defendant
Versus
Shri Hem Raj ....Respondent-Plaintiff

Regular Second Appeal No.462 of 2007.
Date of decision: 09.09.2016

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that she was taken for securing bank loan – some documents were executed under the influence of liquor- it was found that power of attorney was got executed, which was got revoked – a sale deed was executed in the meantime on the basis of power of attorney – the suit was dismissed by the Trial Court – an appeal was preferred, which was allowed- held in second appeal that plaintiff had failed to prove that power of attorney was got executed as a result of fraud – while the evidence of the defendant that the power of attorney was executed voluntarily was satisfactory - however, the sale deed was executed after the revocation of the power of attorney- therefore, the sale deed is not valid – the Appellate Court had rightly reversed the judgment of the trial Court- appeal dismissed.(Para-10 to 21)

For the Appellant: Mr.R.L. Chaudhary, Advocate.
For Respondent: Mr.Digvijay Singh, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellant-defendant against the judgment and decree dated 11.11.2004, passed by the learned Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P., reversing the judgment and decree dated 25.5.2000, passed by the learned Sub Judge Ist Class, Court No.1, Mandi, District Mandi, whereby the suit filed by the respondent-plaintiff has been dismissed.

2. The brief facts of the case are that the plaintiff-respondent *(herein after referred to as the `plaintiff'),* filed a suit for declaration and injunction against the appellant-defendant *(hereinafter referred to as the `defendant')* stating therein that he is joint owner in possession alongwith other co-sharers and having 1/48th share in the suit land comprised in Khata Khatauni No.488/803 to 806, Khasra Nos.220, 227, 276, 278, 281, 279, 280, Kittas 7, measuring 177.88 Sq.Meters, situated in Mauja Bhagwahan/366/4, Tehsil Sadar, District Mandi, H.P. *(hereinafter referred to as the suit land).*

3. It has been averred by the plaintiff that the defendant, who is government employee and known to him since long, allured him for securing some bank loan for him so as to start some business and for that purpose she asked him to go to Tehsil Office with her for execution of some documents and under this impression he joined her and went to Tehsil Office on 20.11.1995, but on the way, she provided liquor to him and under the influence of liquor she got signed some documents from him. It has further been averred by the plaintiff that on the next day i.e. 21.11.1995, he narrated the whole story to his brother Ramesh, who went to Tehsil Office with him and made enquiries. The plaintiff has averred that he came to know from Tehsil Office that the defendant has got executed power of attorney from him qua his share in the suit land in favour of her brother Padam Nabh. The plaintiff has further averred that on 21.11.1995 itself, he got the power of attorney revoked in the presence of the defendant and her witnesses. The plaintiff has further averred that on 27.5.1996, the defendant came to his house and asked him for delivery of possession of his 1/48th share in the suit land and only then he came to know that mutation qua suit land had been sanctioned in favour of the defendant qua the suit land on 15.2.1996 as per sale deed No.358. It is further averred by the plaintiff that he had neither sold

the suit land to the defendant nor had he received any consideration from her and that he had not delivered the possession of the suit land to the defendant. It is also averred by the plaintiff that his share in the suit land was already mortgaged with one Jagdish against a sum of Rs.10,000/- and, in view of this also no sale deed of the share of the plaintiff could have been executed in favour of the defendant. It is alleged by the plaintiff that neither he had received any consideration nor he had executed any sale deed in favour of the plaintiff. Hence, the plaintiff filed a suit in the trial Court seeking declaration that the sale deed dated 15.2.1996 and mutation attested in consequence thereof dated 3.4.1996 are wrong, illegal, null and void and not binding upon the plaintiff and the revenue entry to the contrary is also null and void with consequential relief of restraining the defendant from interfering in the suit land.

4. Defendant, by way of filing written statement, raised preliminary objections on the grounds of maintainability, locus standi, cause of action, estoppel and valuation for the purpose of court fee and jurisdiction. On merits, the defendant has averred that the plaintiff has already sold his entire share from the suit property prior to filing of the suit and therefore, he is no more owner in possession of the suit land and it is the defendant who is co-sharer in the suit land along with other co-sharers and that Khasra No.227, does not belong to the parties to the suit. Defendant has further averred that in fact the plaintiff had agreed to sell his entire share vide an agreement to sell dated 9.12.93 to one Sh.Sohan Lal S/o Sh.Karam Chand for a consideration of Rs.20,000/- and the brother of the plaintiff namely; Ramesh, had also agreed to sell his entire share in the suit land. Defendant has further averred that the plaintiff vide an agreement to sell dated 9.12.1993 had agreed to sell his entire share in the suit land to said Sh.Sohan Lal, for a consideration of Rs.20,000/- in the presence of the witnesses and both of them delivered the possession of the suit property to Sohan Lal, who further sold the share of the plaintiff and his brother in the suit land in her favour by delivery of possession to her. It has further been averred by the defendant that out of the total sale consideration of Rs.30,000/-, an amount of Rs.20,000/- had been received by the plaintiff and his brother Ramesh Kumar from said Sh.Sohan Lal at the time of execution of the agreement and the remaining amount of Rs.10,000/- had been agreed to be received at the time of execution and registration of sale deed. Defendant has further stated that, in between, said Sh.Sohan Lal, sold the suit property to her and she had paid the remaining amount to the plaintiff and his brother Ramesh Kumar. It has been averred by the defendant that the plaintiff had demanded Rs.5000/- from her, which had been paid by her and in lieu of that the plaintiff had agreed to execute the registered sale deed in her favour, which could not be registered. But at the same time, the plaintiff got his general power of attorney executed in favour of Padam Nabh, and he had got the sale deed qua the suit land executed in her favour after getting the remaining balance amount of Rs.5000/-, the possession of the suit land had also been delivered to the defendant. Defendant has denied the revocation of general power of attorney of the plaintiff on 21.11.1995 and stated that the sale deed had been executed and registered on 24.11.1995 on the basis of the general power of attorney of the plaintiff and in consequence thereto the mutation had also been entered and accepted. It has further been averred by the defendant that she is now owner in possession of the suit land qua 1/48th share of the plaintiff and prayed for dismissal of the suit filed by the plaintiff.

5. The plaintiff has not filed any replication to the written statement.

6. The learned trial Court, on the basis of pleadings, settled inasmuch as 8 issues and except Issue No.8, decided all the issues in favour of the defendant and accordingly dismissed the suit of the plaintiff.

7. Feeling aggrieved and dis-satisfied with the judgment and decree dated 25.5.2000, the plaintiff filed an appeal before the learned District Judge, which was allowed by the learned Presiding Officer, Fast Track Court, Mandi, District Mandi by holding that the suit of the plaintiff is decreed and the sale deed No.358 dated 15.3.1996 executed in favour of the defendant and mutation No.924 dated 3.5.1996 attested in consequence thereof are declared to

be illegal, null, void and not binding upon the plaintiff and further the entries in the revenue record to the contrary are also declared to be null and void.

8. This second appeal was admitted on 19.3.2009 on the following substantial question of law:

> *"(1) Whether the first appellate court has misread and misinterpreted documentary as well as oral evidences led by the defendants?*
>
> *2. Whether the plaintiff is liable under law to execute sale deed in favour of the defendant in the event if his General Power of attorney was not legally empowered to execute the said deed, in view of the fact that the plaintiff has received the full consideration, handed over the possession and agreed to execute sale deed?"*

9. Perusal of Ex.DC and Ex.PA i.e. copies of Jamabandi for the year 1991-92, clearly suggests that plaintiff was having 1/48th share in the suit property. Similarly, it duly stands proved on record that on the strength of power of attorney executed by the plaintiff in favour of P.N. Sharma, P.N. Sharma sold the share of plaintiff in the suit property, as mentioned above, to the defendant and on the basis of same, mutation was also attested in favour of defendant. Plaintiff by way of suit sought declaration and injunction restraining the defendant qua the suit land, description whereof has been given hereinabove, by stating that suit land was duly owned and possessed by him alongwith other co-sharers and he is having 1/48th share of that property. He also claimed that defendant under the influence of liquor got some document signed by him, which she lateron used for getting the suit land transferred in her name. Plaintiff further stated that on 21.11.1995, he narrated the whole story to his brother who alongwith him went to Tehsil Office and on inquiry found that defendant got power of attorney executed from him qua his share in the suit land in favour of her brother P.N. Sharma. Accordingly, on 21.11.1995, he got the power of attorney revoked in the presence of the defendant and her witnesses. He also claimed that when defendant came to his house on 27.5.1996 and asked for delivery of the possession of 1/48th share of suit land, only then he came to know that she has become owner of the suit land in terms of sale deed dated 15.2.1996. Plaintiff also claimed that neither he sold the suit to the defendant nor he had received any consideration from her and he never delivered the possession of the suit land to the defendant.

10. Careful perusal of evidence led on record clearly suggests that the plaintiff was unable to prove on record that power of attorney Ex.PA, executed by him in favour of P.N. Sharma authorizing him to sell his 1/48th share in the suit property, was a result of fraud upon him by the defendant. To the contrary defendant, while leading cogent and convincing evidence, was able to prove on record that power of attorney dated 11.4.2000 was duly executed by plaintiff, whereby he had authorized P.N. Sharma i.e. DW-4 to sell his share in the suit property.

11. Close scrutiny of record of the Courts below suggests that there is overwhelming evidence adduced on record by the defendant to prove that power of attorney Ex.DA and receipt Ex.D1, whereby plaintiff had received total consideration, was executed by the plaintiff after fully understanding the contents of the same. DW-2 has specifically stated that the plaintiff had agreed to sell his suit property for Rs.20,000/- and hence for the same she paid an amount of Rs.20,000/- to the plaintiff on 20.11.1995 and thereafter plaintiff got scribed power of attorney in Tehsil Office in the presence of Som Nath, Advocate, Sohan Lal and Harish Kumar, but fact remains that the same was lateron registered in favour of P.N. Sharma. Accordingly, on 24.11.995, P.N. Sharma, in terms of power of attorney Ex.DA, executed sale deed in her favour.

12. Similarly, perusal of DW-3, DW-4 and DW-5 clearly proves on record that plaintiff had executed a power of attorney in favour of Shri P.N. Sharma in Tehsil Office and no liquor was served to the plaintiff at the material time and P.N. Sharma executed the sale deed Ex.DB on the basis of power of attorney. Hence, this Court, after perusing the overwhelming evidence adduced on record by the defendant, sees no reason to interfere in the findings recorded by both the Courts below that power of attorney Ex.DA was executed by the plaintiff in favour of

P.N. Sharma authorizing him to sell his share in the suit property in favour of defendant. Defendant was also able to prove her case by placing on record receipt Ex.D1, whereby the plaintiff had received an amount of Rs.20,000/- on account of consideration qua the suit land which was sold by P.N.Sharma, being power of attorney holder of the plaintiff.

13. Similarly, DW-1 i.e. the then Sub Registrar also supported the case of the defendant that the power of attorney Ex.DA was executed by the plaintiff in his presence after fully understanding its contents and same were admitted by the plaintiff before him at the time of its registration.

14. Now, question, which remains to be determined by this Court, at this stage, is, *"whether at the time of alleged execution of sale deed, P.N. Sharma was authorized to effect the sale, if any, in favour of defendant on the strength of power of attorney Ex.DA?"* Plaintiff also claimed that sale deed is null and void since he had revoked the power of attorney allegedly executed by him on 21.11.1995, whereby he had allegedly authorized P.N. Sharma to effect sale, if any, of his share in favour of defendant.

15. Plaintiff, while appearing as PW-1, has stated on oath that he revoked the power of attorney on subsequent day. He stated that on 20.11.1995 he was taken to Tehsil Office by defendant under the pretext to prepare some papers for obtaining bank loan and where he was provided liquor by the defendant to considerable extent and as such under the influence of liquor defendant got executed some papers from him. He also stated that on 21.11.1995, when he came to Tehsil Office alongwith his brother, he came to know that power of attorney has been got registered by the defendant qua his share in favour of her brother namely P.N. Sharma. However, close scrutiny of examination-in-chief and cross-examination conducted on PW-1 nowhere suggests that any suggestion worth the name was put to him by the defendant with regard to revocation of power of attorney, if any, allegedly executed by him in favour of P.N. Sharma. Plaintiff also placed on record revocation deed Ex.PK, wherein it finds mention that power of attorney executed by the plaintiff in favour of P.N. Sharma on 20.11.1995 stands revoked by a deed of revocation Ex.PK. Candid admission made by DW-1 in his cross-examination fully corroborates the statement given by PW-1 i.e. plaintiff wherein he stated that he had revoked power of attorney allegedly executed by him on 21.11.1995 in favour of P.N. Sharma authorizing him to effect sale of his share in the suit land in favour of defendant. If cross-examination conducted on these material witnesses PW-1 and DW-1 is seen, it clearly emerge from their admission that plaintiff had revoked power of attorney Ex.D2 by executing revocation deed Ex.PK. Hence, this Court finds considerable force in the findings returned by the Court below that the plaintiff was able to prove on record that power of attorney Ex.D2, allegedly executed by him in favour of P.N. Sharma, was revoked by revocation deed, which was got registered in the office of Sub Registrar on 21.11.1995. Perusal of Ex.PK i.e. revocation deed dated 21.11.1995, clearly suggests that power of attorney executed by the plaintiff in favour of P.N. Sharma on 20.11.1995 was revoked by the plaintiff for all intents and purposes and as such P.N. Sharma had no authority, whatsoever, after 21.11.1995 to execute the sale deed in favour of defendant on the strength of power of attorney Ex.D2. It also emerged from the record that the learned trial Court though was fully convinced with the evidence led on record by the plaintiff that he had revoked power of attorney Ex.DB executed in favour of P.N. Sharma vide revocation deed dated 21.11.1995, but the same was discarded/rejected solely on the ground that no notice of revocation of the power of attorney was ever given to DW-3 P.N. Sharma by the plaintiff prior to execution of the sale deed and as such sale deed was declared legal. In this regard learned first appellate Court rightly concluded that registration of the deed of revocation itself can be safely deemed to be a notice to the persons subsequently acquiring the property comprised in the instrument.

16. Careful perusal of revocation deed, which stands duly proved on record, clearly suggests that after 21.11.1995 P.N. Sharma had no right/authority to sell the property on behalf of the plaintiff. In the instant case, it also stands proved on record that sale deed Ex.DB was executed on 24.11.1995, but undoubtedly on that day P.N. Sharma, power of attorney holder of

plaintiff, had no authority, whatsoever, to effect sale, if any, in favour of defendant on the strength of power of attorney Ex.D2 which stood revoked w.e.f. 21.11.1995. Revocation Deed Ex.PK stands duly proved on record. Since P.N. Sharma had no authority to effect sale, if any, after 21.11.1995, on the strength of power of attorney, sale deed Ex.DB executed by him on 24.11.1995 is not binding upon the plaintiff and as such learned first appellate Court rightly concluded that the trial Court has committed grave illegality while holding sale deed Ex.DB to be legal and binding upon the plaintiff.

17. Now, question which remains to be seen, "whether plaintiff is liable to execute sale deed qua his share in the suit land in favour of defendant on account of sale consideration, which he allegedly received vide Ex.D1? In the present case, it is own case of the defendant that sale deed Ex.DB was executed in favour of defendant by P.N. Sharma, who was given power of attorney Ex.DA by the plaintiff. But once it stands proved on record that Ex.DA was revoked by the plaintiff vide revocation deed Ex.PK, P.N. Sharma, power of attorney of plaintiff, had no authority to execute sale deed in favour of defendant after 21.11.1995. Moreover, defendant has nowhere led any evidence on record to prove that plaintiff had agreed to execute sale deed, if any, in favour of defendant. Rather, plaintiff was able to prove on record that power of attorney, executed by him in favour of P.N. Sharma, was revoked on 21.11.1995 i.e. definitely before execution of sale deed dated 24.11.1995 Ex.DB. Similarly, perusal of Ex.D1 i.e. receipt allegedly issued by the plaintiff to the defendant, while selling his share in the suit land i.e. Khata Khatauni Nos.481/803,803, 806, nowhere suggests that plaintiff had received an amount of Rs.20,000/- in terms of sale deed Ex.DB, which came to be registered on 15.2.1996. Rather, perusal of aforesaid receipt suggests that on 20.11.1995 plaintiff sold land, as described above, for a consideration of Rs.20,000/- to the defendant, possession whereof was also delivered on the same day and more interestingly, there is no mentioning, if any, with regard to execution of sale deed i.e. Ex.D1, from where it can be inferred that pursuant to receipt of consideration, as referred in Ex.D1, plaintiff had undertaken before defendant to get the sale deed executed in her favour through his power of attorney, P.N. Sharma.

18. Perusal of Ex.D3 reveals that present plaintiff alongwith his brother; namely; Ramesh had already sold land, which is subject matter of the present suit, to one Shri Sohan Lal vide agreement to sell dated 9.12.2003, but defendant, while leading cogent evidence on record, neither by leading convincing evidence on record nor by putting specific suggestion to the plaintiff, was able to prove on record that he had not sold suit land to Sohan Lal on 9.12.1993. Leaving everything aside, as has been discussed in detail, it stands duly proved on record that power of attorney Ex.DB, executed by the plaintiff in favour of P.N. Sharma, stood revoked vide revocation deed dated 21.11.1995 i.e. Ex.PK and as such power of attorney holder Mr.P.N. Sharma had no authority to effect sale, if any, in favour of defendant on the strength of power of attorney Ex.DB allegedly executed by the plaintiff on 20.11.1995. Moreover, careful perusal of written statement filed by defendant itself suggests that at first instance vide agreement to sell dated 9.12.1993, plaintiff sold suit land to one Shri Sohan Lal for a consideration of Rs.20,000/- and the possession of said property to the extent of his share was delivered to said Shri Sohan Lal and lateron said Shri Sohan Lal sold this property vide agreement to sell dated 19.10.1995 to the defendant and was also delivered the possession of the property. As per plaintiff, on 9.12.1993 plaintiff and his brother had agreed to sell entire property to Shri Sohan Lal for a total consideration of Rs.40,000/-, out of which Rs.30,000/- were received by the plaintiff and his brother Ramesh Kumar from said Shri Sohan Lal, at the time of execution of agreement and remaining amount of Rs.10,000/- was agreed to be received at the time of execution and registration of sale deed. Defendant has specifically stated that said Shri Sohan Lal sold this property to her and she paid remaining amount to the plaintiff and his brother Ramesh Kumar, accordingly, on 20.11.1995, she requested the plaintiff to execute the registered sale deed qua her share.

19. Close scrutiny of written statement, especially para-2, itself suggests that it is admitted case of defendant that she had purchased suit land from Shri Sohan Lal in whose favour plaintiff had already effected agreement to sell as stated by him in the plaint as well as in

deposition made before the Court. Plaintiff has specifically stated in his statement that since he had already sold his share in the suit land in favour of Shri Sohan Lal, there was no occasion for him to effect sale, if any, qua the similar piece of land in favour of defendant. Aforesaid assertion made by the plaintiff in plaint stands duly corroborated by the reply given by the defendant in para-2 of the written statement, where she admitted that she purchased suit land from Shri Sohan Lal and paid remaining amount to the plaintiff and his brother Ramesh Kumar. It clearly emerge from aforesaid admission made by the defendant in written statement that amount of consideration, if any, qua the suit land was paid to Shri Sohan Lal. Though defendant has stated that remaining amount was paid to the plaintiff, but while making deposition before the Court below while contesting the suit, defendant made an whole hearted attempt to prove on record that entire consideration was paid to the plaintiff.

20. Hence, in view of above, specifically when it stands duly proved on record that Shri P.N. Sharma had no authority after 21.11.1995 to execute sale deed, if any, in favour of defendant on the strength of power of attorney Ex.DA allegedly executed in his favour by the plaintiff, this Court sees no illegality and infirmity in the judgment passed by the first appellate Court, wherein it decreed the suit of the plaintiff declaring sale deed No.358 dated 15.3.1996 and mutation No.924 dated 3.4.1996 null and void and not binding upon the plaintiff. Substantial question of law is answered, accordingly.

21. Since this Court, while exploring answer to aforesaid question of law perused the entire evidence led on record by the parties, it cannot be said by any stretch of imagination that learned first appellate Court below misread, misinterpreted and mis-appreciated the documentary as well as oral evidence led by the defendant. Rather, first appellate Court, while deciding actual controversy involved in the matter, dealt with each and every aspect of the matter very meticulously and this Court sees no reason to interfere in the same. Hence, substantial question No.2 is answered accordingly.

22. In view of the detailed discussion made hereinabove, this appeal is dismissed. The judgment passed by the learned first appellate Court below is upheld and that of the learned trial Court is set aside and the suit filed by the plaintiff is decreed. There shall be no order as to costs.

23. Interim order, if any, is vacated. All miscellaneous applications are disposed of.

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

M/s.Byford Private Ltd.& Others ….Appellants-Defendants
Versus
Ajit Lajwanti Gujral Trust & Another ….Respondents-Plaintiffs

Regular Second Appeal No.487 of 2005.
Judgment Reserved on: 09.08.2016.
Date of decision: 16.09.2016

Specific Relief Act, 1963- Section 5- Plaintiff filed a suit for possession and mesne profit – it was pleaded that L, previous owner of the property had executed a lease in favour of the defendants – she had executed a Will in favour of plaintiff No.2- plaintiff No.2 created a trust – defendant No.1 was asked to attorn in favour of plaintiff No.2 – but he asked the plaintiff No.2 to get his title cleared from the Court- the defendant failed to hand over the possession after expiry of the lease and threatened to raise construction forcibly – the suit was dismissed by the Trial Court – appeal was filed, which was allowed – held in second appeal that a notification was issued during the pendency of the proceedings bringing the area in the limits of M.C. Shimla- however, the defendants do not fall within the definition of the tenants under Section 2(j) of H.P. Urban Rent Control Act and the plea regarding the applicability of Rent Act to them is not acceptable –

defendants were held to be in unauthorized possession by the Appellate Court- the issue of title, execution of Will and creation of trust were decided in a previous judgment – therefore, the judgment is relevant in this case- the Appellate Court had rightly placed reliance upon the same- appeal dismissed.(Para- 27 to 91)

Cases referred:

Srinivas vs. Narayanan, AIR 1954 SC 379
Tirumala Tirupati Devathanams vs. K.M. Krishnaiah, AIR 1998 SC 1132
R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami V.P. Temple and another, AIR 2003 SC 4548
S.P.E. Madras vs. K.V. Sundaravelu, AIR 1978 SC 1017
State of Bihar and others vs. Sri Radha Krishna Singh and others, AIR 1983 SC 684
Rajan Rai vs. State of Bihar, (2006)1 SCC 191

For the Appellants:	Mr.Ajay Kumar, Senior Advocate with Mr.Dheeraj Vashisht, Advocate.
For Respondents No.1 and 2.:	Mr.Bhupinder Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate.
For Respondents No.3 and 4.:	None.

The following judgment of the Court was delivered:

<u>Sandeep Sharma, J.</u>

This appeal has been filed by the appellants-defendants against the judgment and decree dated 16.08.2005, passed by the learned Additional District Judge, Fast Track Court, Shimla, District Shimla, H.P., reversing the judgment and decree dated 7.9.1999, passed by the learned Sub Judge Ist Class, Court No.2, Shimla, whereby the suit filed by the respondents-plaintiffs has been decreed.

2. Briefly stated fact as emerged from the record are that the plaintiffs filed a suit for possession of three plots of land measuring 1.3 bighas comprised in Khasra Nos. 670/1, 672 and 674, Khewat No.50, Khatauni No.62, of Jamabandi for the year 1986-87, situated at village Badhal, Tehsil and District Shimla alongwith the construction standing thereupon and for recovery of Rs.19,000/- on account of mesne profits for the last three years/use and occupation charges and future mesne profits at the rate of Rs.6000/- per month from the date of filing of the suit. Plaintiffs set up a case that late Smt.Lajwanti Gujral wife of Sardar Ajit Singh being owner of the suit property and several other properties, situated in village Badhal created a lease for 20 years in respect of suit property in favour of appellants-defendants M/s. Byford Private Limited. In the year 1970 Smt.Lajwanti Gujral expired but during her life time she had executed a Will with respect to her entire property including suit property, whereby she bequeathed entire property in favour of plaintiff No.2. It was averred in the plaint that Smt.Lajwanti Gujral and her husband late Sardar Ajit Singh wanted to create some charitable Trust qua some part of property. Accordingly, plaintiff No.2 solely with a view to honour their wish created a Trust; namely; Ajit Lajwanti Gujral Trust, Kachi Ghati, Tara Devi, Shimla, after becoming the owner of the entire property of Smt.Lajwanti Gujral on the basis of will executed by her. Aforesaid Trust was created by plaintiff No.2 in the year 1982 and as such, immediately after the death of Smt.Lajwanti Gujral, plaintiff No.2; namely; Rajindr Singh asked defendant No.1 who was a lessee under Lajwanti Gujral, to attorn in his favour. But, defendant No.1 instead of accepting title of plaintiff No.2 asked him to get his title cleared from the Court. It also emerged from the plaint that rest of the property of Lajwanti Gujral was illegally occupied by the persons namely; Nanak Singh and Parveen Singh.

3. Plaintiffs also filed a suit in this Court against the aforesaid Nanak Singh and Parveen Singh for possession of rest of the property. Similarly, Nanak Singh also filed a suit claiming himself to be President of some Society known as Gurdwara Lal Ajit Sabha, but plaintiff in the plaint claimed that aforesaid suits have no bearing on the case in hand, since the status of the defendants was only that of the lessees under Lajwanti Gujral and after her death under the plaintiff. Plaintiff also alleged that the lease created by Smt.Lajwanti Gujral, in favour of defendant No.1, was expired on 10.7.1989 and the plaintiffs thus, became entitled to recover the possession of the suit property from defendants. Plaintiff also claimed that defendants not only refused to handover the possession of the suit property after expiry of lease but also started collecting material for the construction of some structure on the suit land unauthorisedly.

4. Record reveals that only defendants No.1 to 3 contested the suit, whereas remaining defendants were proceeded ex-parte. Defendants No.1 to 3 by way of written statement denied the claim of the plaintiff put forth in the plaint by stating that suit was liable to be stayed under Section 10 of the Code of Civil Procedure *(for short `CPC')* because of previously instituted two civil suits i.e. one suit filed by the plaintiff against Nanak Singh and Parveen Singh and another suit filed by Nanak Singh against the plaintiffs in this Court, which were pending at that relevant time. Defendants also stated that plaintiffs were estopped to sue by their acts, deeds and conduct. On merits, defendants admitted that Lajwanti Gujral had created a lease for 20 years on monthly rent at the rate of Rs.500/- in favour of defendant No.1 in the year 1969 and that the lease was for a fixed term of 20 years, but defendants stated that Lajwanti Gujral was not the absolute owner of the property and she was only given a life estate by her husband late Sardar Ajit Singh. As per defendants late Sardar Ajit Singh provided in will that on her death the entire property, including the suit property would go to a charitable Trust and as such Lajwanti Gujral was not competent to execute will bequeathing the property to anybody. However, defendants in alternative denied that Lajwanti Gujral made any will in favour of plaintiff No.2. Defendants claimed that they rightly refused to pay the rent to the plaintiff No.2 after the death of Lajwanti Gujral since they were considering themselves to be the owners of the property and so that they had become the owners by way of adverse possession. Defendants, in the alternative, also pleaded that they had become the owners of the suit land by operation of Section 104 of the H.P. Tenancy and Land Reforms Act *(hereinafter referred to as the ` H.P. Tenancy Act').*

5. Learned trial Court vide judgment and decree dated 7.9.1999 dismissed the suit of the plaintiff by holding that the plaintiffs are not owners of the suit property or entitled to recover the possession of the same as prayed for. Learned trial Court also not held plaintiffs entitled to use and occupation charges. Similarly, learned trial Court, while dismissing the suit of the plaintiffs, also held that the defendants have not become the owners of the suit property as claimed by way of adverse possession or conferment of proprietary rights.

6. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, plaintiffs filed an appeal before the learned Additional District Judge, Fast Track Court, Shimla, who vide impugned judgment and decree dated 16.8.2005 allowed the appeal, whereby plaintiffs were held entitled for possession of the suit property. Learned first appellate Court, while accepting the appeal, held that appellants had been successful in establishing the title and possession of appellant No.1 in the suit property. Learned first appellate Court specifically returned the findings that the possession of respondents became unauthorized after 10.7.1989 and as such besides holding plaintiff entitled for possession also held entitled to fair rent from 1.4.1990.

7. In the aforesaid background, present appellants-defendants, being aggrieved and dissatisfied with the impugned judgment and decree dated 16.8.2005 passed by learned Additional District Judge, Fast Track Court, Shimla, filed instant Second Appeal, which was admitted by this Court vide order dated 20.9.2003 on the following substantial questions of law:-

> *"1. Whether the findings of the courts below are result of misreading and misinterpretation of law?*

> 2. *Whether a suit can be maintained against a Trust in the absence of trustee?*
> 3. *Whether a judgment, which is not inter-se between the parties, can form basis of a decree on the ground of resjudicata?"*

8. At this stage, it may be noticed that present appellants-defendants, during the pendency of present appeal, moved an application bearing No.***CMP No.9199 of 2015*** under Order 41 Rules 27 and 33 read with Section 151 CPC, praying therein for placing on record copy of notification dated 2.8.2006, issued by Government of Himachal Pradesh including area wherein tenanted premises are situated, in the limits of Municipal Corporation, Shimla. However, this Court vide order dated 1st October, 2015 ordered that application referred hereinabove would be considered at the time of final hearing. Similarly, present appellants-defendants also moved ***CMP No.3363 of 2016*** under Section 100 CPC read with Order 42 Rule 2 and Section 151 CPC, praying therein for amendment of existing substantial questions of law as well as framing of additional substantial question of law.

9. Shri Ajay Kumar Sood, learned Senior Counsel, representing the appellants, vehemently argued that the impugned judgment passed by the learned Additional District Judge, Shimla, is not sustainable in the eye of law since same is not based upon correct appreciation of evidence adduced on record by the respective parties. Mr.Sood contended that bare perusal of impugned judgment itself suggests that the learned appellate Court has erred gravely and acted with material illegality, irregularity and impropriety in passing the impugned judgment and decree merely on the basis of conjectures and surmises.

10. Mr.Sood further contended that learned first appellate Court has erred gravely and acted with material illegality and irregularity by misinterpreting the law as applicable to the facts of this case. During arguments having been made by him, Mr.Sood, made this Court to travel through the issues framed by the learned trial Court to suggest that suit of the plaintiff was dismissed by the trial court on merits by deciding issues No.1 to 5 against the plaintiffs after critical analysis of the evidence of the parties, whereas learned first appellate Court simply based his entire decision on document Ex.PW-1/S, i.e. common judgment and decree dated 16.1.1998, passed by learned Additional District Judge, Shimla, in two Civil Suits i.e. ***Civil Suit No.38-S/1 of 95/81, titled: Shri Gurudwara Laj Ajit Memorial Sabha through its President Shri Nanak Singh vs. Shri Gurudweara Singh Sabha, Cart Road, Motor Stand, Shimla through its President Shri Baldev Singh*** and ***Civil Suit No.6-S/1 of 96/83, titled: Ajit Lajwanti Gujral Trust & Others vs. Shri Nanak Singh Gandhi & Others*** *(hereinafter referred to as `Ex.PW-1/S')*, which was, admittedly, not a judgment and decree inter-se parties. Learned first appellate Court instead of analyzing the evidence adduced on record by both the parties solely relied upon Ex.PW-1/S i.e. judgment and decree passed in some other case where present appellants were not party and such grave illegality has been committed by learned first appellate Court while passing the impugned judgment and decree and as such same deserves to be quashed and set aside.

11**.** Mr.Sood argued with full vehemence that learned first appellate Court, while holding present appellants in un-authorised possession of the suit property after 10.7.1989, failed to address the actual controversy involved in the suit because at no point of time learned first appellate Court referred to evidence led on record by the parties qua the issues framed by learned trial Court. Mr.Sood, while referring to the impugned judgment, passed by learned first appellate Court, stated that Court below not bothered or cared to address the facts of the case or the evidence on the case file and the issues involved in the present suit and whether the plaintiffs had been able to prove any of the issue by leading proper and legal evidence in the matter and as such he prayed for setting aside of the impugned judgment, which, as per him, was illegal and erroneously decided by learned first appellate Court in absence of any proof on any of the issues. Mr.Sood forcefully contended that Ex.PW-1/S was not inter partes and as such it was neither admissible in evidence in the present case nor it could be operated as a res judicata between the parties under Indian Evidence Act, 1872 *(for short `Evidence Act').*

12. Mr.Sood further contended that aforesaid judgment Ex.PW-1/S has no relevance in the present case and plaintiffs were required to prove its case on its own fact since Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case where the parties are not the same. Mr.Sood also argued that the learned first appellate Court failed to take note of the accepted legal proposition that a judgment is not admissible or relevant unless it fulfills the mandatory requirements of Sections 40 to 43 of the Evidence Act and as such judgment, which is not inter partes, could be made basis by the learned first appellate Court for deciding the appeal at hand. Mr.Sood further contended that the judgment, which was not inter partes, could not operate as res judicata and could not be made sole basis of deciding a suit of title and possession, especially when plaintiffs miserably failed to lead evidence to prove the issue involved in the present case, though Mr.Sood, fairly conceded that Ex.PW-1/S was further upheld by the Hon'ble High Court and Hon'ble Apex Court. While concluding his arguments, Mr.Sood, persuaded this Court to peruse evidence led on record by plaintiffs to demonstrate that the plaintiffs miserably failed to prove that it was a legally and validly constituted Trust. Similarly, Mr.Sood made this Court to peruse evidence adduced on record by the plaintiffs to demonstrate that at no point of time plaintiffs were able to prove will of late Smt.Lajwanti Gujral on the basis of which they claimed title of the suit property. Lastly, Mr.Sood stated that it is ample clear from the judgment passed by learned trial Court that the plaintiffs were not able to prove creation of Trust, if any, because at no point of time PW-1 was able to place on record Trust Deed, authorization letter authorizing him to file suit on behalf of Trust and will, if any, executed by late Smt.Lajwanti Gujral.

13. At this stage, Mr.Sood, apart from making aforesaid arguments, invited the attention of this Court to CMP No.9199/2015 filed by appellants under Order 41 Rules 27 and 33 read with Section 151 CPC for placing on record additional documents and prayed that the same may be decided at first instance before adverting to the merits of the case since documents intended to be placed on record would have great bearing on the merits of the case.

14. Mr.Sood stated that during the pendency of the suit, State of Himachal Pradesh vide notification dated 2.8.2006 included certain new areas in Municipal Limits of Municipal Corporation, Shimla. Mr.Sood, while referring to para-3 of the application, submitted that area in question, where suit property is situated, has also been included in the limits of Municipal Corporation, Shimla vide aforesaid notification. As per Mr.Sood, with the inclusion of the suit property in the Municipal Corporation area, suit itself has become infructuous and as such in view of subsequent development, the application may be allowed and they be permitted to place on record copy of notification.

15. Similarly, Mr.Sood also invited the attention of this Court to CMP No.3363 of 2016 filed by appellants under Section 100 read with Order 42 Rule 2 and Section 151 CPC for amendment and reframing of substantial questions of law.

16. Mr.Sood, while making arguments, also invited the attention of this Court to the substantial questions of law framed on 20.9.2005, whereby question No.2 was framed by this Court as under:-

> *2. Whether a suit can be maintained against a Trust in the absence of trustee?*

17. As per Mr.Sood, keeping in view the controversy at hand, aforesaid issue should have been framed as under:-

> *"2. Whether a suit can be maintained by a Trust in the absence of Trustees?"*

Since suit was filed against the appellants by an alleged Trust, Mr.Sood stated that there appears to be typographical mistake while framing the said question of law and as such it needs to be re-framed accordingly.

18. Mr.Sood, while referring to para-4 of the aforesaid application, also stated that in the instant case, judgment passed in some other case and exhibited as Ex.PW-1/S, has been

relied upon by the learned first appellate Court for passing impugned judgment against the appellants, which was not admissible in evidence under Sections 40 to 43 of the Indian Evidence Act and could not be made basis for passing impugned judgment by the learned first appellate Court and as such substantial question No.3 requires to be recast and substantial questions No.3 to 5 as submitted with the grounds of appeal required to be reframed. He also submitted that now since the suit property has come in the limits of Municipal Corporation of Shimla, another substantial question of law requires to be framed as under:-

> *"What is the legal effect on the present suit after the inclusion of the suit property in the urban limits of Municipal Corporation, Shimla during pendency of this RSA?"*

19. Mr.Sood in support of aforesaid contentions placed reliance on the judgments passed by Hon'ble Apex Court as well as by this Court in ***Sunder Dass vs. Ram Parkash 1977(2) R.C.R. 143, Mani Subrat Jain vs. Raja Ram Vohra, AIR 1980 SC 299, Lakshmi Narayan Guin and others vs. Niranjan Modak, AIR 1985 SC 111, Anthony vs. K.C. Ittoop & Sons and Others, (2000)6 SCC 394, Vishwanath Sitaram vs. Sau.Sarla Vishwanath Agrawal, AIR 2012 SC 2586. Sunit Kumar vs. Laxmi Chand, 2009(2) Shim.L.C. 448 and Shyam Sunder Lal vs. Shagun Chand, AIR 1987 Allahabad 214.***

20. Mr.Bhupender Gupta, learned Senior Counsel, supported the judgment and decree passed by the learned first appellate Court. Mr.Gupta, while referring to the impugned judgment, vehemently argued that bare perusal of same suggests that same is based upon correct appreciation of the evidence as well as law and as such no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case. Mr.Gupta, strenuously argued that there is no illegality, infirmity and perversity in the impugned judgment passed by the learned first appellate Court, rather same is based upon the correct appreciation of facts as well as law.

21. Mr.Gupta, while refuting the contention put forth on behalf of learned Senior Counsel representing the appellants, submitted that learned first appellate Court rightly placed reliance upon Ex.PW-1/S because, admittedly, vide Ex.PW-1/S, Court below held plaintiff No.2 Rajinder Singh Gujral to be the owner of the suit property pursuant to will executed by late Smt.Lajwanti Gujral. Mr.Gupta, while inviting the attention of this Court to judgment Ex.PW-1/S, strenuously argued that bare perusal of the said judgment Ex.PW-1/S suggests that will executed by late Smt.Lajwanti Gujral was held to be valid one and for all intents and purposes plaintiff No.2 Rajinder Singh was held to be owner of the suit property on the basis of will executed by late Smt.Lajwanti Gujral. Mr.Gupta, forcefully contended that bare perusal of the written statement filed by appellants clearly suggests that rent was denied to plaintiff No.2 solely on the ground that at first instance he should prove his title.

22. Mr.Gupta, invited the attention of this Court to the written statement filed by defendants, wherein it was stated that two civil suits were pending; meaning thereby that defendants were denied rent as well as acknowledging plaintiff No.2 to be owner for want of title, which issue was ultimately decided vide Ex.PW-1/S, wherein plaintiff No.2 was held to be owner of the suit property pursuance to will executed by late Smt.Lajwanti Gujral, which was also held to be valid. Mr.Gupta invited the attention of this Court to the admission made on behalf of defendants in the written statement that they had procured legal opinion of Mr.K.D. Sood, Advocate, wherein he advised that they should wait for outcome of both the afore-mentioned Civil Suits.

23. In the aforesaid background, Mr.Gupta, forcefully contended that learned trial Court had fallen in grave error while not acknowledging Ex.PW-1/S, which could be material document to decide the controversy at hand. Mr.Gupta, refuted the contention put forth on behalf of counsel representing the appellants that learned first appellate Court failed to take note of the mandatory requirements of Sections 40 to 43 of the Evidence Act by stating that judgment Ex.PW-1/S had direct bearing upon the present suit because in that case issue with regard to title of suit property was decided. As per Mr.Gupta, once defendants specifically raised the issue

of title, learned trial Court while deciding the controversy at hand ought to have relied upon Ex.PW-1/S with a view to go to the root of the controversy. With a view to substantiate the aforesaid arguments, Mr.Gupta invited the attention of this Court to Section 13 of the Evidence Act. Mr.Gupta, while refuting the arguments made by Mr.Sood that the plaintiffs led no evidence to prove that it was a legally and validly constituted Trust, submitted that had learned trial Court taken cognizance of Ex.PW-1/S, wherein issue of execution of will by late Smt.Lajwanti Gujral as well as constitution of Trust by plaintiff was specifically dealt with by the trial Court, all objections/contentions raised/made by appellants-defendants would have answered automatically.

24. Mr.Gupta also stated that learned trial Court below miserably failed to appreciate the evidence led on record by the plaintiffs, wherein, PW-1 Baldev Singh categorically stated that property earlier belonged to Sardar Surjeet Singh, who made will in favour of Smt.Lajwanti in the year 1970. He also stated that Smt.Lajwanti made a will in favour of plaintiff No.2 Shri Rajinder Singh, as a consequent of that, mutation was attested in favour of plaintiff No.2 vide Jamabandi Ex.PW-1/A to E. He categorically stated that Chairman, Gurudwara Singh Sabha was ex-officio Chairman and there were six trustees. PW-1 Baldev Singh also stated that Trust was made in the year 1982, copy of which is mark `A'. Mr.Gupta, further contended that if, for the sake of arguments, it is conceded that PW-1 Baldev Singh was not able to prove validity of constituted Trust, learned trial Court could not dismiss the suit on that ground, especially when PW-2 Rajinder Singh, who became owner of the property, was one of the plaintiff. Mr.Gupta, also invited the attention of this Court to the statement of PW-1 wherein he stated that PW-2 Rajinder Singh Gujral issued notice to defendants after becoming owner; meaning thereby that the suit at hand was instituted by PW-2 also and as such learned trial Court below could not dismiss the suit on the ground that plaintiffs were not able to prove that they were owners of the suit land and entitled to recover the possession of the suit land. While concluding his arguments in the case, Mr. Gupta vehemently argued that had trial Court below placed reliance upon Ex.PW-1/S, judgment dated 16.1.1998 would not have been passed by learned trial Court because all issues pertaining to execution of will, title and creation of Trust were decided in that judgment which has been upheld up to Hon'ble Apex Court.

25. Mr.Gupta, while opposing the prayer made in the applications moved under Order 42 Rule 2 read with Section 151 CPC and Order 41 Rules 27 & 33 read with Section 151 CPC filed on behalf of the appellants, stated that there is no subsequent development which may defeat the decree passed by the appellate Court in favour of plaintiffs. Mr.Gupta, stated that merely the fact that the property is located in the area which stands included in the Municipal Corporation would not give any right to the appellants to submit that the suit has become infructuous, rather applicants-appellants solely with a view to defeat the mandate of impugned judgment are trying to misrepresent the true facts by placing reliance upon notification issued by State of Himachal Pradesh including area of suit property in Municipal Corporation, Shimla. Mr.Gupta, with a view to refute the aforesaid contention put forth on behalf of counsel representing the appellants, forcefully argued that relationship of landlord and tenant was not at all admitted by the appellants in the written statement and as such appellants are estopped from contending that the suit has become infructuous and the provisions of H.P. Urban Rent Control Act, 1987 *(hereinafter referred to as `H.P. Rent Act')* are applicable. With a view to substantiate his aforesaid arguments he invited the attention of this Court to the written statement filed by the appellants-defendants, wherein appellants claimed title to the suit property by claiming ownership on the ground of adverse possession. Mr.Gupta also persuaded this Court to peruse the impugned judgment to demonstrate that even at the stage of first appellate Court appellants made submissions with regard to application of provisions of H.P. Rent Act in the controversy at hand which was dismissed by the Court by returning findings that possession of the applicants over the suit property was unauthorized after 10.7.1989 and as such suit was decreed. Mr.Gupta, contended that once it stands proved on record that possession of appellants was unauthorized after 10.7.1989, they cannot be termed as *`tenants'* in any capacity so as to invoke the provisions of H.P. Rent Act. He further contended that it is well settled law that the suit for

possession can always be filed against an unauthorized occupant and there is no legal impediment to pass the decree in favour of the owners and as such application filed during the pendency of present appeal, which is nothing but a ploy to delay the proceedings, is absolutely untenable and such additional or alternative plea is not available to the appellants-applicants at this stage.

26. Mr.Gupta, while opposing the applications, as referred above, stated that in view of his aforesaid arguments, there is no need, if any, for framing of additional substantial question as prayed in CMP No.3363 of 2016. Mr.Gupta, opposed the prayer of appellants for placing on record additional documents as well as framing of issues as prayed for in the aforesaid application on the ground that there is no explanation worth name with regard to delay in filing the present application. Mr.Gupta strenuously argued that when this notification had come in existence on 2.8.2006, what prevented the present appellants to move this application in the year 2015 i.e. after 9 years of issuance of this notification. Similarly, Mr.Gupta argued that why appellants failed to move an application for recasting of issues, if any, for almost 10 years. Otherwise also notification had come in existence on 2.8.2006 and as such any application for re-casting issues in light of issuance of notification after 10 years cannot be allowed at this stage because same has been filed solely with a view to delay the proceedings and defeat the mandate of impugned judgment.

27. Before resorting to explore the answer to substantial question of law, it would be appropriate for this Court to decide both the aforesaid applications at first instance. Perusal of the averments contained in the aforesaid applications as well as reply thereto clearly suggests that vide notification dated 2.8.2006 area in question, where the property, subject matter of the suit, is situated, stands included in the limits of Municipal Corporation, Shimla.

28. In view of above, now this Court needs to ascertain that *"what would be the effect of issuance of notification dated 2.8.2006 on the suit filed by the plaintiff for possession of suit property against present appellants-defendants?"* Admittedly, when the suit for possession was filed, property in question was not governed by H.P. Rent Act. Though record reveals that during the pendency of trial, defendants had moved an application under Order 7 Rule 11 CPC to show that w.e.f. 11.1.1997 area became part of Municipal Corporation, Shimla, and as such they claimed themselves to be tenants holdings over even after termination of tenancy and as such they claimed that they cannot be ejected by way of civil suit and relief, if any, can be claimed against them under H.P. Rent Act which would govern the relationship between landlord and tenant. But, it appears that thereafter area in question was again excluded from the limits of Municipal Corporation, Shimla, which was again included vide aforesaid notification dated 2.8.2006.

29. As per Mr.Sood, notification dated 2.8.2006 has direct bearing upon the present case because once property in question stands included in Municipal Area, same would be governed with the provisions of H.P. Rent Act. As per Mr.Sood, admittedly, when suit was filed, suit property was not within the limits of Municipal Corporation but during the pendency of present appeal it has been included in the Corporation and as such present suit cannot be allowed. Since property is located within the Municipal Corporation, plaintiffs have remedy, if any, under the H.P. Rent Act for eviction of the tenanted premises.

30. Since, appellants-defendants, in view of notification dated 2.8.2006 issued by State of Himachal Pradesh, wherein suit property has been included in the limits of Municipal Corporation, Shimla, claimed that they being tenants over holdings can only be evicted by resorting to the provisions of Rent Act. It would be appropriate to refer the definition of *"tenant"*, as provided in sub-section (j) of Section 2 of H.P. Rent Act, which is as under:

> *"2(j) "tenant" means any person by whom or on whose account rent is payable for a building or rented land and includes a tenant continuing in possession after termination of the tenancy and in the event of the death of such person such of his heirs as are mentioned in Schedule-I to this Act and who were ordinarily residing*

with him at the time of his death, subject to the order of succession and conditions specified, respectively in Explanation-I and Explanation-II to this clause, but does not include a person placed in occupation of a building of rented land by its tenant, except with the written consent of the landlord, or a person to whom the collection of rent or fees in a public market, cart-stand or slaughter house or of rents for shops has been farmed out or leased by a municipal corporation or a municipal committee or a notified area committee or a cantonment board."

31. Perusal of definition, as reproduced above, suggests that any person by whom or on whose account rent is paid of residential or non-residential building or rented land and includes a tenant continuing in possession after termination of the tenancy.

32. Section 14 of H.P. Rent Act provides the provisions of `Eviction of Tenants', which reads as under:-

"Section 14(1) A tenant in possession of a building or rented land shall not be evicted there from in execution of a decree passed before or after the commencement of this Act or otherwise, whether before or after the termination of the tenancy, except in accordance with the provisions of this Act."

33. To initiate proceedings, if any, under Section 14 of the H.P. Rent Act, landlord at first instance is under obligation to prove that occupant of premises, which is being sought to be evicted by resorting to provisions of Section 14, is a *"tenant"* within the meaning of Section 2(j) as reproduced hereinabove.

34. In view of detailed discussion made hereinabove, by no stretch of imagination appellants-defendants can claim themselves to be *"tenants"* in terms of Section 2(j) of the H.P. Rent Act and as such plea advanced on their behalf with regard to application of H.P. Rent Act for eviction of suit property is baseless and same deserves to be rejected out rightly.

35. In the present case, undisputedly present appellants were inducted as lessee in the year 1969 by late Smt.Lajwanti Gujaral for 20 years i.e. up to 10.7.1989 and after expiry of lease, plaintiff No.2 filed suit for possession. As per Mr.Sood proceedings arising out of Civil Suit No.411/1 of 95/90 is still in continuation in the shape of present appeal and as such still relationship of landlord and tenant exists between the parties. As per appellants-defendants, they enjoy the status of `tenants holding over' qua the premises even after termination of lease dated 10.7.1989 and as such eviction, if any, can be effected by resorting to the provisions of H.P. Rent Act. Whereas, as per Mr.Gupta, since relationship of landlord and tenant was not admitted by appellants at any stage, rather, appellants claimed themselves to be owners by way of adverse possession and as such plea, if any, of applicability of H.P. Rent Act cannot be allowed to raise at this stage.

36. Apart from above, learned appellate Court, while accepting the appeal of plaintiffs, specifically held the possession of appellants over the suit property as unauthorized after 10.7.1989, meaning thereby that there was no relationship of landlord and tenant after 10.7.1989.

37. Close scrutiny of factual matrix available on record suggests that admittedly appellants were inducted as tenants in the suit property by predecessor-in-interest of plaintiffs and for vacation of tenanted premises, proceedings at first instance were initiated by the plaintiffs by way of filing suit for possession, which was dismissed by learned trial Court by holding that the plaintiffs are not the owners of the suit property and as such they are not entitled for recovery of possession. But in appeal, first appellate Court upset the findings of the trial Court and held plaintiff No.2 to be the owner of the suit property by holding present appellants in unauthorized possession of the suit property after 10.7.1989. At this stage, this Court needs to examine that what is the status of appellants, after 10.7.1989 i.e. date of expiry of lease; first, whether he is a trespasser or he is tenant in terms of Section 14 of the H.P. Rent Act. It is undisputed that plaintiffs filed suit against present appellants on 5.4.1990 i.e. after expiry of lease by late

Smt.Lajwanti Gujral in the year 1969. It is also not disputed that late Smt.Lajwanti Gujral had created lease for 20 years on monthly rent of Rs.500/- in favour of defendant No.1 in the year 1969 and lease was on fixed term of 20 years and as such same was to be expired on 10.7.1989.

38. At this stage, it would be apt to reproduce following paras of plaint filed by the plaintiffs:

> *"5. That the property mentioned in para 4 above is owned by Plaintiff No.2 through its trustees, namely, President, Shri Gurdwara Singh Sabha, Shimla, S.Jagat Singh, Plaintiff No.2, and Proforma-Defendants 5 to 7.*
>
> *6. That Smt.Lajwanti the owner of the aforementioned property known as Rockdene Estate, Tara Devi, through deed of lease duly executed by her on 30.8.1967 granted lease of 3 Plots of land measuring 1 Bighas 3 Biswas comprised in Khasra No.670/1, 672 and 674 entered at Khewat No.50, Khatauni No.62 of Jamabandi for the year 1986-87, situated at Mauza Badhal, Tehsil and District Shimla alongwith building standing thereupon for commercial purposes to Defendant No.2 for a period of 5 years, which deed of lease was got duly registered with Sub Registrar, Kasumpti in the then Mahasu District on 30.8.1967.*
>
> *7. That before the expiry of the term of lease, due to the change in the name of the lessee, namely, Defendant No.2 and due to the other circumstances, earlier lease created on 30.8.1967, was revoked with effect from 11.7.1969 and a fresh lease was made by Smt.Lajwanti on 11.7.1969 with respect to the same property namely, 4 Plots of land measuring 1 Bighas 3 Biswas comprised in Khasra Nos.670/1, 672 and 674 entered at Khewat No.50, Khatauni No.62 of Jamabandi for the year 1986-87, alongwith building standing thereupon in favour of Defendant No.1 through its Managing Director, Shri Bhupinder Sahni. The period of this lease was fixed at 20 years expiring on 10.7.1989.*
>
> *8. That Plaintiff No.2, who acquired all rights, title and interest held by Smt.Lajwanti in the property known as Rockdene Estate, Taradevi, in connection with his service had been on foreign assignment with United Nations Development Programme and it has not been possible for him to properly look after and manage his property. Plaintiff No.2 had been getting looked after and managed the property through Care Takers, but with a view to protect the property and fulfil the wishes of late S.Ajit Singh and Smt.Lajwanti, created a trust of the property i.e. Plaintiff No.1. Plaintiff No.2, after death of Smt.Lajwanti, contacted the Managing Director of Defendant No.1 and requested him to pay to him the rent of the property leased out to Defendant No.1, but Defendant No.1, instead of making payment of the rent, wanted Plaintiff No.2 to get his title cleared from Court of law and asked Plaintiff No.2 that he will pay the rent of the property only when title of Plaintiff No.2 is cleared from a competent court of law. That Plaintiff No.2 got served notice upon Defendant No.1 calling upon Defendant No.1 to pay rent, yet because of his engagement, he could not take any action in the matter. It may further be submitted that Civil Suit No.44 of 1983 has been instituted by Plaintiffs 1 & 2 in the Hon'ble High Court of Himachal Pradesh in which Plaintiffs have claimed decree for possession with respect to the rest of the property in occupation of one S.Nanak Singh and S.Parveen Singh, who are claiming to have acquired titled in part of Rockdene Estate, Taradevi, i.e. agricultural portion of the land, other than the land, which is the subject-matter of this suit. The said suit is still pending in the Hon'ble High Court. In Civil Suit No.13 of 1981 has also been instituted by Shri Nanak Singh Gandhi claiming himself to be the President of one Society known as Gurdwara Lal Ajit Sabha, who are claiming title to only a part of the Rockdene Estate other than the property, which is the subject-matter of this Civil Suit, as such, pendency of these Civil Suits has no bearing on the present suit.*

9. That Defendant No.1 has been in occupation of the property as a lessee on the basis of deed of sale executed on 11.7.1969 by Smt.Lajwanti. Defendant No.1 has failed to pay the agreed rent i.e. Rs.500/- per month to Plaintiff No.2. Nothing has been paid since the month of August, 1970 till date.

10. That Plaintiff has also come to know that Defendant No.1 has sublet part of the leased property in favour of Defendant No.4 without the written consent of the Plaintiff.

11. That period of lease has since come to an end on 10.7.1989.

12. That the lease granted by Smt.Lajwanti, predecessor of Plaintiffs in favour of Defendant No.1 now stands determined by efflux of time. Defendant No.1 has no right to continue occupying the property. There is also forfeiture of lease due to non-payment of arrears of rent since the month of August, 1970 by Defendant No.1 to Plaintiff No.2 and thereafter to Plaintiff No.1. As the tenancy stands determined by efflux of time and by forfeiture, therefore, there was no necessity to have served a notice terminating the lease. Moreover, it may be submitted that Defendant No.1 has either sublet or assigned his rights in the lease in a portion of the property in favour of Defendant No.4, therefore also, there is breach of an express condition of the lease under which Defendant No.1 was prohibited not to transfer or sublet his rights under the lease without the written consent of the lessor. Defendant No.1 appears to have also created some interest in favour of Defendant No.3. Plaintiffs are not aware of the exact constitution of Defendant No.3, but Plaintiffs have come to know that Defendant No.3 is also a sister concern of Defendant No.1."

39. Careful perusal of contents of the plaint, as referred hereinabove, clearly suggests that plaintiffs specifically claimed that lease granted by Smt.Lajwanti Gujral, predecessor-in-interest of plaintiff No.2, in favour of appellant-defendant No.1 stands determined by efflux of time and defendant has no right to continue occupying the property. Plaintiffs specifically averred in the plaint that there is forfeiture of lease due to non-payment of arrears of rent since month of August, 1970 by defendant No.1 to plaintiff No.2 and as such tenancy stands determined by efflux of time and by forfeiture. Plaintiffs further stated in plaint that defendants have no right to change the nature of property or to raise any construction thereupon, especially when the period of lease has expired and plaintiffs have no intention either to extend the period of lease or to have the property occupied by defendants. As such, defendants were requested to handover the possession of the property to the Plaintiffs on the expiry of the lease.

40. It clearly emerge from the plaint filed by the plaintiffs that suit was filed for recovery of possession specifically stating therein that lease granted in favour of defendant No.1 stands determined by efflux of time and plaintiffs have no intention either to extend the period of lease or to have the property occupied by defendants; meaning thereby that after expiry of lease on 10.7.1989, the relationship of tenant and landlord, if any, stood terminated.

41. Though, defendants resisted the claim of the plaintiffs on various grounds, especially title of plaintiff No.2, but it remains fact that at no point of time lease executed by late Smt.Lajwanti Gujral was renewed after 10.7.1989. Since appellants-defendants disputed the claim of plaintiff No.2 of having acquired the status of owner in terms of will executed by late Smt.Lajwanti Gujral, defendants claimed themselves to be owners by way of adverse possession. Perusal of written statement filed by the defendants further reveals that defendants-appellants claimed ownership by way of Section 104 of H.P. Tenancy Act also.

42. At this stage, it would be profitable to reproduce relevant paras of written statement filed on behalf of defendants No.1 to 3:-

"Preliminary Objections:-

1. That the present suit is liable to be stayed under Section 10 of the Code of Civil Procedure for the reasons that the matter in issue in the present suit is also directly and substantially in issue in previously instituted two civil suits with respect to the

same property between the plaintiffs on the one hand and Nanak Singh Gandhi, Parveen Singh, and Gurudwara Lal Ajit Sabha, Kachi Ghati, Shimla on the other hand in Civil Suit No.44 of 1983 titled Ajit Lajwanti Gujral Trust vs. Nanak Singh Gandhi and others and civil suit No.12 of 1981 titled Gurudweara Lal Ajit Memorial Sabha v/o Gurdwara Singh Sabha etc. In the said suits pending before the Hon'ble High Court of Himachal Pradesh, Shimla, the parties are claiming title to the properties of Shri Ajit Singh.

As such the dispute with respect to the title of the suit property and estate of Shri Ajit Singh original owner is subjudice before the Hon'ble High Court of Himachal Pradesh, Shimla, between the plaintiffs on the one hand and aforesaid persons on the other hand. Therefore, the present suit is directly hit by Section 10 CPC and is liable to be stayed till judicial finding is given regarding title of the suit property.

Written Statement on Merits:-

1. *Contents of para No.1 of the plaint, as stated, are incorrect and, therefore, the same are denied by the replying defendants. To the best of the information of the replying defendants late Sardar Ajit Singh s/o Sardar Sobha Singh, husband of Smt.Laj Wanti, was the absolute owner of the property in question. He had granted life estate in favour of Smt.Laj Wanti with right of maintenance etc. during her life time from the suit property and as per his Will Shri Ajit Singh had created a trust and after the death of Smt.Laj Wanti the trust was to be dissolved and the entire property owned by him was to be donated to a Charitable Institution. So far as Smt.Lajwanti is concerned, she did not have ownership rights in the suit property. She had only a life estate in the said property and could create lease for her maintenance. She could not alienate or dispose of the suit property.*
2. *Contents of para No.2 of the plaint, as stated, are absolutely wrong, false and baseless to the very knowledge of the plaintiffs and, therefore, denied by the replying defendants. It is denied that Smt.Lajwanti was the sole owner of the property. It is also denied that after her death the property has allegedly devolved upon the plaintiff No.2. It is also denied that Smt.Lajwanti executed any so-called Will on 2.2.68 or on any other date in favour of plaintiff No.2. To the best of the information of the replying defendants, she did not execute any alleged Will. Moreover, as submitted above Smt.Lajwanti could not make any Will as she did not have any such right to make any disposition or alienation of the suit property by Will. In fact, the legality and validity of so-called Will of Smt.Lajwanti which is the basis of suit is being hotly contested in the High Court of Himachal Pradesh, Shimla, in Civil Suit No.13 of 81 and Civil Suit No.44 of 83. The present suit is also not competent and maintainable unless and until the plaintiffs obtain probate or letters of administration with respect to alleged Will u/s 214 of the Indian Succession Act or until and unless they establish their title to the suit property in a competent court of law.*
3. *Contents of para No.3 of the plaint are absolutely wrong, false and baseless to the very knowledge of the plaintiffs and as such the same are emphatically denied and repudiated by the replying defendants. Title to the property of late Shri Ajit Singh s/o Shri Sobha Singh is under dispute in the aforesaid two civil suits pending in the Hon'ble High Court of Himachal Pradesh, Shimla. It is denied that the plaintiff No2 has been coming in actual possession of any part of the property of late Ajit Singh. In case he is in possession of any property of late Sardar Ajit Singh, the same is unlawful and as a trespasser and usurper.*
4. *Contents of para No.4 of the plaint, as stated, are wrong, and therefore, the same are denied by the replying defendants. The question of transfer of properties mentioned in para No.4 of the plaint in favour of so-called plaintiff No.1 trust does*

not arise at all because the plaintiff No.2 was at no point of time owner of the suit property. The properties have never been transferred to the so-called trust. The existence, legality and validity of plaintiff No.1 Trust is also denied and disputed by the replying defendants. There does not exist any such trust as claimed by the plaintiffs. The so-called Trust does not exist in the eyes of law secondly there has been no proper, legal or valid transfer of the suit property in favour of so-called trust. Therefore, the present suit is neither competent nor maintainable on behalf of the present plaintiffs against the replying defendants. There does not exist any legally constituted Trust. Plaintiff No.1 has got nothing to do with the suit property.

8. Contents of para No.8 of the plaint as stated, are absolutely wrong, false and baseless and, therefore, the same are emphatically denied and repudiated by the replying defendants. After the death of Smt.Lajwanti, the plaintiff No.2 did serve a notice on the replying defendants but he was asked by the replying defendants because to the information of the replying defendants Sardar Ajit Singh had made a Will whereby he had created a Trust and life estate in favour of Smt.Lajwanti and after her death had Willed away the suit property to be donated to some charitable institution. Otherwise also, the plaintiffs on the one hand and one Gurudwara Lal Ajit Memorial Sabha through its president Shri Nanak Singh Gandhi and others are involved in litigation in the High Court of Himachal Pradesh, Shimla, in Civil Suit No.13 of 1981 and 44 of 83 claiming title to the suit property and others properties of late Sardar Ajit Singh. In the said suits the so-called Will of Smt.Lajwanti on the basis of which plaintiff No.2 is claiming title to the suit property is also under dispute. In view of the matter being subjudice before the Hon'ble High Court, the present suit is liable to be stayed, because any finding given in this suit will effect the aforesaid two civil suits pending in the High Court. It may also be submitted that if plaintiff No.2 has succeed in manipulating in getting some entries made in the revenue records in his favour on the basis of so called Will of Smt.Lajwanti the same are not binding on the replying defendants. Such entries also do not confer any ownership right or title in the plaintiff No.2 because the very basis of such entries, the so-called Will of Smt.Lajwanti, is a fictitious bogus and illegal document. The plaintiff No.2 could not inherit any property from Smt.Lajwanti nor she was competent to make any Will qua the suit property. Otherwise also, the genuineness authenticity or validity of the so-called Will is denied and disputed by the replying defendants. The plaintiffs be put to strict proof thereof.

11. Contents of para No.11 of the plaint are admitted in so far as they pertain to matters of record. Rest of the allegations which are contrary to the record are denied. However, it is further submitted that after the death of Smt.Lajwanti, the replying defendants stopped making payment of rent in the absence of any lawful claimant. They started treating themselves as owners of the suit property. They have acquired ownership rights in the suit property by way of adverse possession as they have openly been holding themselves out as owners of the said property after August 1970. In any case, it is further submitted in the alternative, the ownership rights qua the said property have vested in the replying defendants by virtue of the provisions of Himachal Pradesh Tenancy and Land Reforms Act, 1972. By operation of law, the replying defendants have become owners of the suit property as they were tenants in the suit property on the date of coming into operation of the said Act. Ownership rights have vested in the replying defendants as per provisions of Section 104 of the said Act.

15. Contents of para No.15 of the plaint are absolutely wrong, false and baseless and, therefore, denied by the replying defendants. The plaintiffs have no locus standi to claim possession. Therefore, the question of payment of rent or use and occupation

charges does not arise at all. The defendants have become owners of the suit property by adverse possession or by operation of law as submitted above."

43. Aforesaid stand taken by the defendants itself suggests that defendants were aware of the fact that after 10.7.1989, they were ceased to be tenants over the suit property and as such claimed ownership by way of adverse possession or H.P. Tenancy Act. Since suit for possession was filed after expiry of lease i.e. 10.7.1989 by the plaintiffs terming defendants in unauthorized occupation in leased premises, defendants challenged the title of the plaintiffs in garb of Civil Suits No.38-S/1 of 95/81, titled: Shri Gurudwara Laj Ajit Memorial Sabha through its President Shri Nanak Singh vs. Shri Gurudwara Singh Sabha, Cart Road, Motor Stand Shimla & Another and Civil Suit No.6-S/1 of 96/83 titled: Ajit Lajwanti Gujral Trust & Others vs. Shri Nanak Singh Gandhi & others, allegedly filed by Nanak Singh and Parveen Singh against the present plaintiffs, wherein they claimed themselves to be owners in possession of the suit property by way of adverse possession.

44. Perusal of averments contained in the aforesaid paras of the written statement clearly suggests that after 10.7.1989, i.e. after expiry of lease, defendants claimed themselves to be the owners of the suit property in question. In para-11, as referred hereinabove, defendants specifically stated that after the death of Smt.Lajwanti replying defendants themselves stopped making payment of rent and they started treating themselves to be owners of the suit property. Defendants further stated that they have acquired ownership right in the suit property by way of adverse possession as they have openly been holding themselves out as owners of the said property after August, 1970. Rather, defendants raised the plea of having become owners of the suit property by virtue of provisions of Tenancy Act, as they were tenant in the suit property on the date of coming into operation of the said Act. Defendants further claimed that ownership rights have vested upon them as per provisions of Section 104 of the H.P. Tenancy Act.

45. After bestowing my thoughtful consideration on the aforesaid factual matrix as well as pleadings (referred hereinabove) made by the parties, I am of the view that after expiry of lease i.e. 10.7.1989, defendants cannot claim themselves to be tenant over the suit property because admittedly after 10.7.1989, at no point of time, lease was renewed, rather defendants themselves challenged the status of plaintiff No.2, who admittedly acquired the status of owner in terms of will executed by late Smt.Lajwanti Gujral.

46. Though perusal of plaint itself suggests that plaintiffs filed a suit for recovery of possession against defendants on three grounds; (i) that lease granted by predecessor-in-interest of the plaintiff No.2 in favour of defendant No.1 stands determined by efflux of time; (ii) there is forfeiture of lease due to non-payment of arrears of rent since month of August, 1970 by defendant No.1 to plaintiff No.2 and (iii) period of lease has expired and plaintiffs have no intention either to extend the period of lease or to have the property occupied by defendants. But, apart from above, defendants themselves in their written statement claimed themselves to be the owners of the property by way of adverse possession. In written statement filed by defendants, they specifically claimed that after death of Smt.Lajwanti, they have become owners of the property by way of adverse possession or in the alternative by way of conferment of proprietary rights under H.P. Tenancy Act; meaning thereby that after 10.7.1989 there was no relationship, whatsoever, of landlord and tenant between plaintiffs and defendants and both the parties admitted the aforesaid fact in their respective pleadings filed before the learned trial Court below. It stands proved on record that issue with regard to execution of will by late Smt.Lajwanti Gujral as well as acquiring of status of owner of the property pursuant to will by Shri Rajender Singh, stands decided by passing of judgment Ex.PW-1/S which has got approval up till Hon'ble Apex Court. Hence, in view of above, defendants cannot be allowed to raise plea that since they were tenants of Lajwanti Gujral, they can be evicted only in accordance with law after issuance of notification dated 2.8.2006. Moreover, learned District Judge vide impugned judgment categorically held defendants in unauthorized possession after 10.7.1989 and interestingly in the present appeal, there is no challenge, whatsoever, to the aforesaid findings of learned first appellate Court holding defendants in unauthorized possession after 10.7.1989. Rather, careful

perusal of grounds of appeal clearly suggests that till the filing of appeal, appellants-defendants had been claiming themselves to be in adverse possession of the suit property. At this stage, it would be appropriate to reproduce paras 4 and 5 of the grounds of appeal:-

> *"4. That the plaintiffs having led no evidence to prove that it was a legally and validly constituted Trust and even having not proved the so called deed of Trust, the First Appellate Court ought to have dismissed the appeal. The respondents had also not even proved the so called Will of the deceased on the basis of which they claimed title to the suit property. As such, the First Appellate Court ought to have dismissed the suit and Appeal as well. The learned First Appellate Court has wrongly held the Plaintiffs, who possess no right or title or interest in the suit property, as full owners thereof without there being an iota of evidence in this behalf.*
>
> *5. That the learned First Appellate Court failed to take note of the fact that the appellants had spent substantial amount running into lakhs in improving and developing the property. The learned First Appellate Court also failed to give any finding on the point that the Appellants were in adverse possession of the suit property and that the plaintiffs were complete strangers to the same having no right, title or interest in the same. They had no locus standi to file the suit and had no right, title or interest in the suit property and the learned First Appellate Court has set aside the judgment of the trial Court without any reasons or justification."*

47. Careful perusal of grounds of appeal clearly suggests that defendants themselves denied the relationship of tenant and landlord, if any, between them and plaintiffs because in the present appeal, defendants have not acknowledged the title of plaintiff No.2. Since appellants themselves have not admitted the relationship of landlord and tenant in the written statement as well as in the present appeal, they are estopped to contend at this stage that suit has become infructuous and the provisions of H.P. Rent Act are applicable. Bare perusal of written statement, as has been discussed above, clearly suggests that at no point of time defendants acknowledged the title of plaintiff No.2, rather they claimed themselves to be the owners of the suit property by way of adverse possession. As of today question of title in favour of plaintiffs has attained finality up to Hon'ble Supreme Court and Plaintiff-Trust has been held to be owner of the property in question. It may be noticed that factum of passing judgment Ex.PW-1/S and its having attained finality till Hon'ble Apex Court has not been disputed by the learned counsel for the parties present before this Court in this case.

48. In the aforesaid circumstances, by no stretch of imagination, appellants can be held to be tenants, if any, in terms of lease executed in the year 1969, which admittedly expired on 10.7.1989. Possession of appellants after 10.7.1989 is definitely unauthorized and in no terms they can be termed as tenants in any capacity so as to invoke the provisions of Rent Act. No doubt, appeal filed by the parties is continuation of the original proceedings, but in the present case pendency of appeal may not be the ground available to the appellants to claim the status of tenant because admittedly as has been discussed above after 10.7.1989 appellants-defendants at best can be termed as trespassers but definitely not tenants. Hence continuation of present appeal arising out of *Civil Suit No.411/1 of 95/90*, which is subject matter of this appeal, may not be of any consequence as far as inclusion of area of suit property in Municipal Corporation, Shimla, during the pendency of present appeal in terms of notification dated 2.8.2006, is concerned.

49. In view of above, this Court sees no force in the prayer made by the appellant in ***CMP No.9199 of 2015***, whereby permission has been sought to place on record copy of notification dated 2.8.2006. Accordingly, the same is dismissed.

50. Similarly, in view of detailed discussion made hereinabove, prayer made by the appellant in ***CMP No.3363 of 2016*** for framing additional issue with regard to effect, if any, of the inclusion of the suit property in urban area of the Municipal Corporation, Shimla, cannot be

allowed. However, perusal of substantial question No.2 framed on 20.9.2005 i.e. ***"Whether a suit can be maintained against a Trust in the absence of trustee?",*** clearly suggests that same has not been framed properly, keeping in view the facts of the case. Hence, this application is partly allowed.

51. Admittedly, in the present case, suit has been filed by Trust against the defendants, whereas, perusal of substantial question of law No.2 suggests that suit has been filed against Trust which is factually incorrect. In view of above, prayer of applicant for reframing issue No.2 has considerable force, accordingly, same is reframed as under:-

> *"2. Whether the suit or appeal in the absence of all Trustees of alleged appellant Trust was competent and if no to what effect?"*

52. Since this Court has come to conclusion while deciding application under Order 42 Rule 27 CPC, as has been referred hereinabove, preferred on behalf of applicants-appellants that appellants cannot be held to be tenants, if any, in terms of lease executed in the year 1969, which admittedly expired on 10.7.1989, there is no question, if any, of applicability of H.P. Rent Act in terms of notification dated 2.8.2006 issued by State of Himachal Pradesh including therein area of suit property in MC, Shimla. Accordingly, aforesaid judgments having been relied upon on behalf of the applicants-appellants in this regard may not be of any help in view of aforesaid findings returned by the Court and as such same are not being discussed.

53. Now this Court would be adverting to the merits of the case on the basis of following substantial questions of law No.1 and 3, already framed on 20.9.2005, and newly re-framed substantial question No.2:

> *"1. Whether the findings of the courts below are result of misreading and misinterpretation of law?*
>
> *2. Whether the suit or appeal in the absence of all Trustees of alleged appellant Trust was competent and if no to what effect?"*
>
> *3. Whether a judgment, which is not inter-se between the parties, can form basis of a decree on the ground of resjudicata?"*

54. Keeping in view the controversy at hand, this Court intends to take substantial question of law No.3 at first instance.

Question No.3:

55. Perusal of impugned judgment clearly suggests that learned first appellate Court, while allowing the appeal of the plaintiffs, placed reliance upon judgment and decree dated 16.1.1998, Ex.PW-1/S. Learned first appellate Court was of the view that burden of proof qua title can be discharged by leading evidence raising high degree of probability and in this case, whatever was possible for the plaintiffs, that was tendered in evidence and there is no reliable evidence led by the defendants to prove the absence of title with the plaintiffs. Learned first appellate Court further concluded that presumption of truth attached to the Jamabandi has not been rebutted, rather, documents placed on record by the plaintiffs do prove existence of title; firstly with Shri Rajinder Singh and subsequently, on execution of trust deed, with plaintiff No.1. Accordingly, learned first appellate Court while placing reliance upon judgment Ex.PW-1/S, tendered in evidence by plaintiff before trial Court, came to the conclusion that plaintiff No.1 is entitled to possession of the suit property on the strength of title which stands duly proved on record after 10.7.1989 when the possession of the appellants-defendants became unauthorized.

56. In the present case, as emerged from the record, plaintiffs filed a suit for recovery of possession in the Court of learned Sub Judge Ist Class claiming themselves to be the owners of the property, descriptions whereof have been given above, specifically stating therein that Smt.Lajwanti Gujral wife of Sardar Ajit Singh, erstwhile owner of the suit property, had created lease for 20 years in respect of the suit property in favour of defendants. Plaintiffs further claimed that in the year 1970 Smt.Lajwanti Gujral died, but during her life time she made a will bequeathing her entire property including suit property in favour of plaintiff No.2. Since late

Sardar Ajit Singh wanted to create some charitable Trust in respect of part of his property, plaintiff No.2, after becoming the owner of the entire property of Lajwanti Gujral on the basis of will, solely with a view to honour their wish, created a Trust in the name of Ajit Lajwanti Gujral Trust, Kachi Ghati, Taradevi, Shimla. Since plaintiff No.2 entered into the steps of late Smt.Lajwanti, he requested defendant No.1 who was lessee under Lajwanti Gujral to attorn in his favour, but defendant No.1 instead of accepting the request of plaintiff No.2 asked him to get his title clear from the Court. Defendants by way of written statement refuted the claim of plaintiff No.2 having acquired the title of the property on the strength of will executed by late Smt.Lajwanti Gujral. Defendants specifically stated in the written statement that the suit is liable to be stayed under Section 10 CPC for the reasons that matter in issue in the present suit is directly and substantially is issue in previously instituted two civil suits with respect to the same property between the plaintiffs on one hand and Nanak Singh Gandhi, Parveen Singh and Gurudwara Lal Ajit Memorial Sabha, Kachi Ghati, Shimla on the other hand in Civil Suits No.44 of 1983, titled: Ajit Lajwanti Gujral Trust and Others vs. Nanak Singh Gandhi and Others and Civil Suit No.12 of 1981, titled: Gurudweara Lal Ajit Memorial Sabha vs. Gurdwara Singh Sabha etc. Defendants further stated that in the aforesaid pending civil suits before this Court, the parties are claiming title to the properties of Shri Ajit Singh and as such dispute with respect to the title of the suit property and estate of Shri Ajit Singh, original owner, is sub-judice before this Court between the plaintiffs on one hand and aforesaid persons on the other hand and as such the suit is directly hit by Section 10 CPC and is liable to be stayed till judicial finding is given regarding title of the suit property.

57. Careful perusal of the written statement, relevant paras of which have already been reproduced above, also suggests that appellants-defendants also challenged the authority of late Smt.Lajwanti Gujral to execute a will of the suit property including suit property in favour of plaintiff No.2. Defendants by way of written statement also stated that there does not exist any Trust as claimed by plaintiffs and there has been no proper legal or valid transfer of the suit property in favour of so-called Trust and as such suit being neither competent nor maintainable should be dismissed. Defendants specifically in para-8 of the written statement stated that since litigation in this Court i.e. Civil Suit No.13 of 1981 and Civil Suit No.44 of 1983 claiming the title of the suit property and other properties of late Sardar Ajit Singh are pending, wherein question with regard to title of the suit property and will of Smt.Lajwanti Gujral in favour of plaintiff No.2 is under challenge, is pending, recording of name of plaintiff No.2 in revenue records on the basis of will of Smt.Lajwanti Gujral is not binding upon them. Defendants further stated that as there was no lawful and rightful claimant to the estate of Sardar Ajit Singh, after the death of Smt.Lajwanti, they had no option but to stop payment of rent. But, most interestingly in paras 11 and 15 of the written statement, as have been reproduced above, defendants totally denied the status of landlord being clamed by plaintiffs by stating that after death of Smt.Lajwanti they have stopped making payment of rent in the absence of any lawful claimant and they started treating themselves to be owners of the suit property, since they have acquired ownership rights of the suit property by way of adverse possession. Defendants specifically stated that they have openly been holding themselves to be the owners of the said property after August, 1970. Apart from above, defendants-appellants claimed that they have become owners of the property by virtue of provisions of Tenancy Act by operation of law as they were tenants in the suit property on the date of coming into operation of the said Act. Since defendants while refuting the claim of the plaintiffs put forth in plaint specifically referred two civil suits, as mentioned above, wherein admittedly present plaintiffs were parties either in capacity of plaintiffs or in capacity of defendants, plaintiffs with a view to prove that late Smt.Lajwanti Gujral had executed will bequeathing her entire property including suit property in favour of plaintiff No.2 and further to prove that plaintiff No.2 after acquiring status of owner created Trust i.e. plaintiff No.1 tendered judgment passed by Additional District Judge, Shimla in the suits referred hereinabove as Ex.PW-1/S. At this stage, it may be noticed that initially aforesaid suits were filed before this Court, but lateron for want of pecuniary jurisdiction the same were transferred to the District Judge. Perusal of judgment Ex.PW-1/S clearly suggests that all the issues i.e. (i) with regard to execution of will by late Smt.Lajwanti Gujral in favour of plaintiff No.2 Rajinder Singh Gujral; (ii)

creation of Trust by plaintiff No.2 after acquiring the status of owner on the strength of will executed by late Smt.Lajwanti Gujral, were duly approved in favour of plaintiff. Since this Court had an occasion to peruse judgment dated 16.1.1998, which was duly exhibited by trial Court as Ex.PW-1/S, it can be safely stated that all the issues as referred above were decided in favour of the plaintiffs. Learned Court of Additional District Judge, Shimla, vide judgment dated 16th January, 1998 concluded that Lajwanti Gujral had executed valid will bequeathing her entire property including suit property in favour of plaintiff No.2, who rightly acquired the status of owner on the strength of said will. While deciding the civil suit, referred hereinabove, learned Additional District Judge specifically stated that Rajinder Singh Gujral had all authority to create Trust i.e. Shri Gurdwara Lal Ajit Sabha Trust, Kachi Ghati, Taradevi, Shimla. Plaintiffs with an intention to prove that they have acquired the status of owner of the suit property on the strength of will executed by late Smt.Lajwanti Gujral as well as thereafter creation of Trust by plaintiff No.2 placed on record the aforesaid judgment Ex.PW-1/S. But perusal of judgment passed by the trial Court in the present case suggests that the same was not taken into cognizance by Court below on the ground that the plaintiffs have not shown as to under which provisions of law, the judgment is relevant in this case and can be relied upon by the plaintiffs to prove that the plaintiff No.1 is a Trust and juristic person. Learned trial Court also concluded that the suit in which the judgment was passed, it was alleged by the plaintiffs in the plaint that these suits had no bearing on the present suit. Accordingly, learned trial Court concluded that this judgment is thus, not shown to be relevant under Sections 10, 11 CPC or Sections 41, 42, 43 or Section 116 of the Evidence Act and as such judgment being a judgment-in-personam cannot prove the title of plaintiff No.1, whereas, learned first appellate Court while allowing the appeal placed reliance upon the judgment passed by Hon'ble Apex Court in ***Srinivas vs. Narayanan, AIR 1954 SC 379***, wherein it has been held:-

> *"11. … … … …We are unable to accept this contention. The amount of maintenance to be awarded would depend on the extent of the joint family properties and an issue was actually framed on that question. Moreover, there was a prayer that the maintenance should be charged on the family properties, and the same was granted. We are of opinion that the judgments are admissible under Section 13 of the Evidence Act as assertion of Rukmani Bai that the properties now in dispute belonged to the joint family."*

58. Reliance has also been placed upon the judgment of Hon'ble Apex Court in ***Tirumala Tirupati Devathanams vs. K.M. Krishnaiah, AIR 1998 SC 1132,*** wherein the Court has held as under:-

> *"9. In our view, this contention is clearly contrary to the rulings of this Court as well as those of the privy Council. In Srinivas Krishna Rao Kango vs. Narayandevji Kango, AIR 1954 SC 379, speaking on behalf of a Bench of three learned Judges of this Court, Venkatarama Ayyar, J. held that a judgment not inter parties is admissible in evidence under section 13 of the Evidence Act as evidence of an assertion of a right to property in dispute. A contention that judgments other than those falling under sections 40 to 44 of the Evidence Act were not admissible in evidence was expressly rejected. Again B.K. Mukherjea, J. (as he then was) speaking on behalf of a Bench of four learned Judges in Sital Das vs. Sant Ram, AIR 1954 SC 606 held that a previous judgment no inter partes, was admissible in evidence under section 13 of the Evidence Act as a `transaction' in which a right to property was `asserted' and `recognised'. In fact, much earlier, Lord Lindley held in the Privy Council in Dinamoni vs. Brajmohini, (1992) ILR 29 Cal. 190 (198) (PC) that a previous judgment, not inter partes was admissible in evidence under Section 13 to show who the parties were, what the lands in dispute were and who was declared entitled to retain them. The criticism of the judgment in Dinamoni vs. Brajmohini and Ram Ranjan Chakerbati vs. Ram Narain Singh [1895 ILR 22 Cal 533 (PC)] by sir John Woodroffe in his commentary on the Evidence Act (1931, P*

> *181) was not accepted by Lord Blanesburgh in collector of Gorakhpur vs. Ram Sunder [AIR 1934 PC 157 (61 IA 286)]."*

59. Appellants-defendants, by way of instant petition, laid challenge to the judgment passed by learned Additional District Judge on the ground that Ex.PW-1/S is not permissible or relevant unless it fulfill the mandatory requirement of Sections 42 and 43 of the Evidence Act. Mr.Sood, learned Senior Counsel appearing for the appellants-defendants, vehemently argued that judgment which is not inter parte could not be made admissible in evidence except for limited purpose for bringing them to array as parties in the earlier case and such decree passed in such case with respect to the property. As per Mr.Sood, document Ex.PW-1/S, which is judgment and decree dated 16.1.1998 passed by Additional District Judge in Civil Suits as referred above, was not inter parte and as such specifically in terms of Evidence Act, it was neither admissible in evidence in the present case nor it operated as res judicata between the parties and as such he prayed for setting aside and quashing of the impugned judgment passed by learned Court below.

60. On the other hand, Mr.Bhupender Gupta, learned Senior Counsel for the plaintiffs, vehemently argued that there is no illegality and infirmity in the judgment passed by learned first appellate Court below where it has placed reliance upon judgment Ex.PW-1/S. With a view to substantiate the aforesaid arguments, Mr.Gupta invited the attention of this Court to the written statement filed by the defendants, wherein they specifically prayed for stay of the suit on the ground of pendency of two Civil Suits No.38-S/1 of 95/81, titled: Shri Gurudwara Lal Ajit Memorial Sabha through Shri Nanak Singh vs. Shri Gurudwara Singh Sabha, Cart Road, Shimla and Civil Suit No.6-S/1 of 96/83 titled: Ajit Lajwanti Gujral Trust vs. Shri Nanak Singh Gandhi specifically stating that since there was a dispute with regard to title of the suit property, same may be stayed till disposal of the aforesaid suits. As per Mr.Gupta, since by way of aforesaid judgment Ex.PW-1/S issue with regard to title, execution of will by late Smt.Lajwanti and creation of Trust by plaintiff No.2 stood determined, tendering of aforesaid judgment in evidence had great importance and it could not be ignored by the trial Court below while deciding the suit filed by the plaintiffs. During arguments having been made by him, he specifically referred to Section 43 of the Indian Evidence Act to state that judgment, order, or decree, which is a ***"fact in issue",*** or is relevant under some other provisions of this Act can be tendered in evidence in terms of Section 43.

61. As per Mr.Gupta, controversy decided vide judgment Ex.PW-1/S was/is a *"fact in issue"* in the present suit and as such same was ought to have been taken into consideration by the trial Court below and as such there is no illegality and infirmity in the judgment passed by learned first Appellate Court, where he while allowing the appeal specifically took cognizance of Ex.PW-1/S.

62. In the aforesaid background, this Court solely with a view to test the correctness and genuineness of the arguments having been made on behalf of both the parties deems it fit to refer to the provisions of Sections 40 to 43 of the Indian Evidence Act, 1872, which are reproduced here-in-below:-

> ***"40. Previous judgments relevant to bar a second suit or trial.***—*The existence of any judgment, order or decree which by law prevents any Courts from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.*
>
> ***41.*** *Relevancy of certain judgments in probate, etc., jurisdiction.—A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.*

Such judgment, order or decree is conclusive proof—

that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, [order or decree] declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, [order or decree] declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, [order or decree] declares that it had been or should be his property.

***42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41**.- Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.*

***43. Judgments, etc., other than those mentioned in sections 40 to 42, when relevant**.—Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act."*

63. Perusal of Section 40 suggests that existence of any judgment, order or decree which by law prevents any Courts from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

64. But, Section 41 provides that judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction is relevant and as such judgment, order or decree is conclusive proof, whereas Section 42 specifically provides that judgments, orders or decrees other than those mentioned in section 41 are relevant, if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

65. Close scrutiny of aforesaid Sections 40, 41 and 42 clearly suggests that judgment, order or decree of a competent Court, in exercise of probate, matrimonial admiralty or insolvency jurisdiction has relevance in other cases and can be a conclusive proof while determining the controversy/case in other pending cases.

66. Section 42 clearly bars placing reliance on judgments, orders or decrees other than as mentioned in Section 41. But Section 43 specifically provides that judgments, orders or decrees other than mentioned in Sections 40, 41 and 42 are irrelevant, unless the existence of such judgment, order or decree, is a "fact in issue", or is "relevant" under some other provisions of this Act; meaning thereby that the judgments, orders or decrees other than as mentioned in Sections 40, 41, and 42 can be placed reliance in pending proceedings of other suit, if the existence of such judgments, orders or decrees is a "fact in issue" or "relevant" under some other provisions of this Act.

67. Now, it would be profitable to refer to the meaning of expression ***"Facts in Issue"***, as prescribed in Section 3 of Indian Evidence Act, which is reproduced here-in-below:

"The expression "facts in issue" means and includes – any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceedings, necessarily follows:

> *Explanation.-Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue."*

68. Careful perusal of expression *"Facts in Issue"* as prescribed in Section 3 of the Indian Evidence Act suggests that "facts in issue" means and includes any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

69. If, in the present case, facts are analyzed in light of aforesaid legal position, it clearly emerge from reading of Section 43 of the Act that judgments, orders or decrees other than those mentioned in Sections 40, 41 and 42 can also be placed reliance, if the existence of such judgments, orders or decrees is a "fact in issue" or is relevant under other provisions of this Act. Similarly, perusal of Section 3 wherein facts in issue has been defined suggests that any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability asserted or denied in any suit or proceedings necessarily follows. Explanation of *"Facts in issue"* further provides that whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an "issue of fact", the fact to be asserted or denied in the answer to such issue, is a "fact in issue".

70. Plain reading of aforesaid definition of *"Facts in issue"* suggests that findings returned by the Court with regard to existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceedings, would be termed as *"Facts in issue".*

71. In the present case, as has been discussed in detail, plaintiffs sought recovery of possession of the suit property on the expiry of lease deed dated 10.7.1989. Whereas defendants have denied the claim of the plaintiffs by stating that since issue with regard to the title of the suit property is pending before Court by way of civil suits, referred hereinabove, proceedings initiated by the plaintiffs or recovery of possession may be stayed. Defendants also disputed the status of the plaintiffs by claiming themselves to be the owners of the suit property in terms of adverse possession or in the alternative by way of proprietary rights. Since defendants specifically objected the suit on the ground of pendency of aforesaid suits, wherein issue with regard to execution of will by late Smt.Lajwanti Gujral, who had leased out the property in favour of defendants, acquiring the title of owner by plaintiff No.2, on the strength of will executed by Smt.Lajwanti Gujral and creation of Trust by plaintiff No.2 was pending before Court of learned Additional District Judge, who vide judgment Ex.PW-1/S held the plaintiff No.2 to be the owner of the suit on the strength of validly executed will, by late Smt.Lajwanti Gujral, learned trial Court ought to have taken note of Ex.PW-1/S which was duly tendered by the plaintiff in the evidence in the suit filed for recovery of possession. Since controversy decided vide judgment Ex.PW-1/S had direct bearing on the present suit filed by the plaintiffs, plaintiffs rightly placed reliance on the same by tendering the same as Ex.PW-1/S. Admittedly, vide Ex.PW-1/S learned Additional District Judge, decided the issue of title, execution of will and creation of Trust, which had direct bearing on the present, suit, wherein defendants themselves refuted the claim of plaintiffs on the aforesaid ground which were admittedly decided vide judgment Ex.PW-1/S in favour of plaintiffs. Moreover, perusal of aforesaid civil suits, wherein judgment Ex.PW-1/S was passed, present plaintiffs were the parties either in the shape of plaintiffs or in defendants. Section 43 of the Evidence Act specifically provides that judgment other than those mentioned in Sections 40, 41, and 42 are irrelevant, unless the existence of such judgment, order or decree, is a "fact in issue", or is relevant under some other provisions of this Act. In the instant case, as has clearly emerged from the pleadings available on record, findings returned by the learned Additional District Judge vide Ex.PW-1/S was "fact in issue" whereby relevant issues which had direct bearing upon the suit were decided by the learned Additional District Judge. Section 3 wherein "fact in issue" has been defined specifically provides that "fact in issue" means and includes any fact from which either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding. The explanation to

aforesaid definition specifically provides that the findings of Court while ascertaining/examining the issue on fact would be termed as "fact in issue".

72. In view of the aforesaid discussion, especially where defendants sought stay/dismissal of suit filed by plaintiff on the ground of pendency of suits, wherein learned Additional District Judge, passed judgment Ex.PW-1/S, this Court is of the view that document Ex.PW-1/S i.e. judgment passed by the learned Additional District Judge had great relevance in the present suit and same could be placed reliance in terms of Section 43 of the Indian Evidence Act being a "fact in issue" and as such this Court sees no illegality and infirmity in the findings returned by the learned appellate Court, whereby while allowing the appeal preferred on behalf of the plaintiffs, it placed reliance upon document Ex.PW-1/S. Section 13 of the Indian Evidence Act, 1872 is reproduced hereinbelow:

> *"13. Facts relevant when right or custom is in question.—Where the question is as to the existence of any right or custom, the following facts are relevant:—*
>
> *(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence;*
>
> *(b) particular instances in which the right or custom was claimed, recognized, or exercised or in which its exercise was disputed, asserted or departed from."*

73. Apart from above, perusal of judgment relied upon by the learned first appellate Court while allowing the appeal clearly suggests that the judgment not inter parte is also admissible in evidence under Section 13 of the Evidence Act, as evidence on assertion of a right to property in dispute. In the case, referred above, contention that judgments other than those falling under Sections 40 to 44 of the Evidence Act were not admissible in evidence was expressly rejected. Hon'ble Apex Court held that previous judgment, which is not inter partes, was admissible in evidence under Section 13 of the Evidence Act. Hon'ble Apex Court specifically dealing with the suit for recovery of possession in ***R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami and V.P. Temple and another, AIR 2003 SC 4548*** held that in the suit for recovery of possession based on title it is upon to the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored with him.

74. In the present case also Ex.PW-1/S was the most effective and valid document with the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and as such this Court is of the view that learned trial Court committed illegality by not placing reliance upon Ex.PW-1/S which could be tendered in evidence in terms of Section 43 being "fact in issue".

75. At this stage Mr.Ajay Kumar Sood, learned Senior Counsel, representing the appellants-defendants, placed reliance upon the following judgments passed by the Hon'ble Apex Court to substantiate his argument that no reliance, if any, could be placed upon Ex.PW-1/S in terms of Sections 40 to 43 of Evidence Act.

76. In ***S.P.E. Madras vs. K.V. Sundaravelu, AIR 1978 SC 1017,*** the Hon'ble Apex Court has held:

> *"5. The High Court has in fact taken its earlier judgment in Sessions Case No. 34 of 1968, which ended in acquittal, into consideration in the present case, and has reached the conclusion that the present appeal is "not likely to stand". Here again, the High Court lost sight of the provisions of sections 40 to 44 of the Evidence Act which state the circumstances in which previous judgments are relevant in civil and criminal cases. Thus section 40 states the circumstances in which a previous judgment may be relevant to bar a second suit or trial, and has no application to the present case for the obvious reason that no judgment, order or decree is said to be in existence in this case which could in law be said to prevent the Sessions*

Court from holding the trial. Section 41 deals with the relevancy of certain judgments in probate, matrimonial, admiralty or insolvency jurisdiction and is equally inapplicable. Section 42 deals with the relevancy and effect of judgments, orders or decrees other than those mentioned in section 41 in so far as they relate to matters of a public nature, and is again inapplicable to the present case. Then comes section 43 which clearly states that judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of the Act. As it has not been shown that the judgment in Sessions Case No. 34 of 1968 could be said to be relevant under the other provisions of the Evidence Act, it was clearly "irrelevant" and could not have been taken into consideration by the High Court for the purpose of making the impugned order. The remaining section 44 deals with fraud or collusion in obtaining a judgment, or in competency of a court which delivered it, and can possibly have no application in the present case. It would thus appear that the High Court not only lost sight of the above facts, but also ignored the provisions of section 215 of the Code of Criminal Procedure and thus committed an error of law in basing the impugned judgment on a judgment which was clearly irrelevant."(p.1019)

77. There cannot be any quarrel with regard to the law as laid down by their Lordships in aforesaid case wherein it has been reiterated that the High Court lost sight of the provisions of Sections 40 to 44 of the Evidence Act which state the circumstances in which previous judgments are relevant in civil and criminal cases. Admittedly Section 41 deals with the relevancy of certain judgments in probate, matrimonial, admiralty or insolvency jurisdiction and is equally inapplicable. Section 42 deals with the relevancy and effect of judgments, orders or decrees other than those mentioned in Section 41 in so far as those relate to matters of a public nature. Similarly, Section 43 provides that judgments, orders or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a "fact in issue", or is relevant under some other provisions of the Act.

78. In the present case, aforesaid judgment cannot be made applicable, especially in view of the distinction carved in Section 43 of the India Evidence Act, wherein it has been specifically provided that judgments, orders or decrees other than those mentioned in Sections 40 to 44 are irrelevant unless the existence of such judgment, order or decree is a "fact in issue". It has been discussed in detail in the present case that judgment Ex.PW-1/S has direct bearing on the present suit filed by the plaintiffs and issue decided in the same was "fact in issue" in the present suit and same ought to have been placed reliance by the trial Court while dealing with the suit filed by the plaintiffs.

79. In ***State of Bihar and others vs. Sri Radha Krishna Singh and others, AIR 1983 SC 684,*** Hon'ble Supreme Court has held as under:-

"122. It is also well settled that a judgment in rem like judgments passed in probate, insolvency, matrimonial or guardianship or other similar proceedings, is admissible in all cases whether such judgments are inter partes or not. In the instant case, however, all the documents consisting of judgments filed are not judgments in rem and therefore, the question of their admissibility on that basis does not arise. As mentioned earlier, the judgments filed as Exhibits in the instant case, are judgments in personam and, therefore, they do not fulfill the conditions mentioned in S.41 of the Evidence Act."(p.710)

80. This Court, after perusing the aforesaid judgment relied upon by the appellants, sees no reason to differ with the proposition of law laid down and deems it fit to refer to the other relevant paras of this judgment, wherein Hon'ble Apex Court while dealing with the aforesaid Section of Indian Evidence Act carved out principles to be followed while applying aforesaid Sections:

"133. The cumulative effect of the decisions cited above on this point clearly is that under the Evidence Act a judgment which is not inter parties is inadmissible in evidence except for the limited purpose of proving as to who the parties were and what was the decree passed and the properties which were the subject matter of the suit. In these circumstances, therefore, it is not open to the plaintiffs respondents to derive any support from some of the judgments which they have filed in order to support their title and relationship in which neither the plaintiffs nor the defendants were parties. Indeed, if the judgments are used for the limited purpose mentioned above, they do not take us anywhere so as to prove the plaintiffs case.

142. Relying on an earlier case of the Privy Council this Court further observed thus:

"In Kalka Prasad v. Mathura Prasad (1908-35 Ind App 1666) a dispute arose in 1896 on the death of one Parbati. In 1898 in a suit brought by one Sheo Sahai a pedigree was filed. After this, the suit from which the appeal went up to the Privy Council was instituted in 1901. It was held there that the pedigree filed in 1898 was not admissible having been made post litem motam."

143. Thus, summarising the ratio of the authorities mentioned above, the position that emerges and the principles that are deducible from the aforesaid decisions are as follows:-

(1) A judgment in rem e. g., judgments or orders passed in admiralty, probate proceedings, etc., would always be admissible irrespective of whether they are inter parties or not,

(2) judgments in personam not inter parties are not at all admissible in evidence except for the three purposes mentioned above.

(3) on a parity of aforesaid reasoning, the recitals in a judgment like findings given in appreciation of evidence made or arguments or genealogies referred to in the judgment would be wholly inadmissible in a case where neither the plaintiff nor the defendant were parties.

(4) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little.

(5) Statements, declarations or depositions, etc., would not be admissible if they are post litem motam."(pp.712 & 714)

81. Close scrutiny of aforesaid paras of the judgment clearly suggests that judgments in personam not inter partes are not at all admissible in evidence except for three purposes:-

(a) Firstly, to ascertain what the parties were and what was the decree passed and the properties which were subject matter of the suit, meaning thereby that there is no complete bar in placing reliance on the judgment which was not inter partes, rather reliance can be placed on the judgment while tendering the same is evidence to prove what the parties were and what was the decree passed and the properties which were the subject matter of the suit. In the present case, admittedly, one of the party i.e. plaintiff was party to the judgment passed in Ex.PW-1/S.

(b) Secondly, by placing reliance upon aforesaid judgment Ex.PW-1/S, plaintiffs intended to prove that who were parties before the Court in that suit; and

(c) Thirdly, what was the decree passed and the property which was subject matter of the suit. In the present case, admittedly, for these three reasons, as have been culled out in aforesaid judgment, judgment passed vide Ex.PW-1/S was admissible in evidence, especially when defendants themselves sought stay/dismissal of the suit on the ground of pendency of suit, referred hereinabove, wherein judgment Ex.PW-1/S was passed. Defendants, by way of written statement specifically challenged the title of the plaintiffs by claiming themselves to be the owners of the property.

82. Apart from above, defendants specifically stated that since suit with regard to title is pending before the Court, instant suit filed by the plaintiffs for recovery of possession may be stayed or dismissed in terms of Section 10 of CPC.

83. In the aforesaid background, judgment Ex.PW-1/S could be best evidence available with the plaintiff to demonstrate that he has acquired the title of the property by way of execution of valid will by Smt.Lajwanti Gujral and as such it can be safely concluded that judgment Ex.PW-1/S is admissible in terms of Section 43 of the Indian Evidence Act being fact in issue.

84. The Hon'ble Apex Court in ***Rajan Rai vs. State of Bihar, (2006)1 SCC 191,*** has held as under:-

"8. Coming to the first submission very strenuously canvassed by Shri Mishra, it would be necessary to refer to the provisions of Sections 40 to 44 of the Indian Evidence Act, 1872 (in short `the Evidence Act) which are under the heading "Judgments of Courts of justice when relevant"', and in the aforesaid Sections the circumstances under which previous judgments are relevant in civil and criminal cases have been enumerated. Section 40 states the circumstances in which a previous judgment may be relevant to bar a second suit or trial and has no application to the present case for the obvious reasons that no judgment order or decree is said to be in existence in this case which could in law be said to prevent the Sessions Court from holding the trial. Section 41 deals with the relevancy of certain judgments in probate, matrimonial, admiralty or insolvency jurisdiction and is equally inapplicable. Section 42 refers to the relevancy and effect of judgments, orders or decrees other than those mentioned in Section 41 in so far as they relate to matters of a public nature, and is again inapplicable to the present case. Then comes Section 43 which clearly lays down that judgments, order or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of the Evidence Act. As it has not been shown that the judgment of acquittal rendered by the High Court in appeals arising out of earlier sessions trial could be said to be relevant under the other provisions of the Evidence Act, it was clearly "irrelevant" and could not have been taken into consideration by the High Court while passing the impugned judgment. The remaining Section 44 deals with fraud or collusion in obtaining a judgment, or incompetency of a court which delivered it, and can possibly have no application in the present case. It would thus appear that the High Court was quite justified in ignoring the judgment of acquittal rendered by it which was clearly irrelevant.

10. A three Judges' Bench of this Court had occasion to consider the same very question in the case of Karan Singh vs. The State of Madhya Pradesh, AIR 1965 SC 1037, in which there were in all 8 accused persons out of whom accused Ram Hans absconded, as such trial of seven accused persons, including accused Karan Singh, who was appellant before this Court, proceeded and the trial court although acquitted other six accused persons, convicted the seventh accused, i.e., Karan Singh under Section 302 read with Section 149 IPC. Against his conviction, Karan Singh preferred an appeal before the High Court. During the pendency of his appeal, accused Ram Hans was apprehended and put on trial and upon its conclusion, the trial court recorded order of his acquittal, which attained finality, no appeal having been preferred against the same. Thereafter, when the appeal of accused Karan Singh was taken up for hearing, it was submitted that in view of the judgment of acquittal rendered in the trial of accused Ram Hans, the conviction of accused Karan Singh under Section 302 read with Section 149 IPC could not be sustained, more so when other six accused persons, who were tried with Karan Singh, were acquitted by the trial court and the judgment of acquittal attained finality. Repelling the contention, the High Court after considering the evidence

adduced came to the conclusion that murder was committed by Ram Hans in furtherance of the common intention of both himself and accused Karan Singh and, accordingly, altered the conviction of Karan Singh from Section 302/149 to one under Section 302/34 IPC. Against the said judgment, when an appeal by special leave was preferred before this Court, it was contended that in view of the verdict of acquittal of accused Ram Hans, it was not permissible in law for the High Court to uphold conviction of accused Karan Singh. This Court, repelling the contention, held that decision in each case had to turn on the evidence led in it. Case of accused Ram Hans depended upon evidence led there while the case of accused Karan Singh, who had appealed before this Court, had to be decided only on the basis of evidence led during the course of his trial and the evidence led in the case of Ram Hans and the decision there arrived at would be wholly irrelevant in considering merits of the case of Karan Singh, who was appellant before this Court. This Court observed at page 1038 thus: (SCR pp.3-4)-

> *" As the High Court pointed out, that observation has no application to the present case as here the acquittal of Ramhans was not in any proceeding to which the appellant was a party. Clearly, the decision in each case has to turn on the evidence led in it; Ramhans's case depended on the evidence led there while the appellant's case had to be decided only on the evidence led in it. The evidence led in Ramhans's case and the decision there arrived at on that evidence would be wholly irrelevant in considering the merits of the appellant's case."*

In that case, after laying down the law, the Court further considered as to whether the High Court was justified in converting the conviction of accused Karan Singh from Section 302/149 to one under Section 302 read with section 34 IPC after recording a finding that the murder was committed by Ram Hans in furtherance of common intention of both himself and accused Karan Singh. This Court was of the view that in spite of the fact that accused Ram Hans was acquitted by the trial court and his acquittal attained finality, it was open to the High Court, as an appellate court, while considering appeal of accused Karan Singh, to consider evidence recorded in the trial of Karan Singh only for a limited purpose to find out as to whether Karan Singh could have shared common intention with accused Ram Hans to commit murder of the deceased, though the same could not have otherwise affected the acquittal of Ram Hans. In view of the foregoing discussion, we are clearly of the view that the judgment of acquittal rendered in the trial of other four accused persons is wholly irrelevant in the appeal arising out of trial of appellant Rajan Rai as the said judgment was not admissible under the provisions of Sections 40 to 44 of the Evidence Act. Every case has to be decided on the evidence adduced therein. Case of the four acquitted accused persons was decided on the basis of evidence led there while case of the present appellant has to be decided only on the basis of evidence adduced during the course of his trial."(pp.194-197)

85. In view of detailed analysis of pleadings available on record as well as law referred hereinabove, this Court is of the view that Ex.PW-1/S was admissible to be tendered in evidence in terms of Section 43 of Evidence Act being "fact in issue". At the cost of repetition, it may be stated that defendants themselves prayed for stay of the suit on the grounds of Civil Suit Nos.44/83 and 12/81, wherein judgment Ex.PW-1/S was passed, meaning thereby that the decision in suits referred hereinabove had direct bearing on the suit filed by the plaintiffs against the present appellants-defendants.

86. At this stage, it would be appropriate to refer to para-1 of preliminary objections of the written statement, which has been reproduced above, wherein defendants themselves stated that present suit is liable to be stayed under Section 10 of CPC for the reasons that the matter in issue in the present suit is also directly in issue in previously instituted two civil suit with regard to the same property between the plaintiffs on one hand and Nanak Singh Gandhi on

the other hand. Since defendants themselves stated that the matter in issue in the present suit is directly and substantially in issue in previously instituted two civil suits No.44/83 and 12/81, wherein admittedly present plaintiffs were party, they cannot be allowed to state at this stage that the judgment passed by learned Additional District Judge in aforesaid civil suits, referred in para-1 of preliminary objections by defendants, cannot be relied upon in present suit in terms of Sections 41, 42 and 43 of Indian Evidence Act. Rather, keeping in view the candid admission made by the defendants in written statement, wherein defendants themselves admitted that the matter in issue in the present suit is directly and substantially in issue in previously instituted civil suits, this Court is of the view that learned first appellate Court rightly placed reliance upon the judgment Ex.PW-1/S passed in the aforesaid civil suits, which had admittedly direct bearing upon the present suit filed by the plaintiffs. Hence, this Court after seeing Ex.PW-1/S as well as pleadings of the parties i.e. plaint and written statement has no hesitation to conclude that learned first appellate Court placed reliance on the judgment Ex.PW-1/S in the present proceedings in terms of Section 43 being "fact in issue". Substantial question of law No.3 is answered accordingly.

<u>Questions No.1 and 2:</u>

87. Now, this Court would be adverting to substantial questions No.1 and 2. This Court, while exploring answer to substantial question No.3, had an occasion to travel through the entire evidence, be it oral or documentary, on record adduced by the parties and as such it sees no force in the submissions having been made on behalf of learned counsel representing the appellants-defendants that Courts below have fallen in error while appreciating the evidence adduced on record. Shri Ajay Kumar Sood had strenuously argued that first appellate Court has not dealt with the evidence in its right perspective, rather he has acted with material illegality and irregularity in passing the impugned judgment and decree. He also stated that learned first appellate Court, while passing impugned judgment and decree, mis-interpreted the law as applicable to the facts of the present case and as such prayed for quashing of the impugned judgment. Since this Court while answering question No.3 has already dealt with issue of application of Sections 41, 42 and 43 of the Indian Evidence Act to ascertain the correctness and genuineness of the judgment passed by the learned first appellate Court and has been held that Ex.PW-1/S could be placed reliance in terms of Section 41 being fact in issue, it sees no force in the contention put forth on behalf of the appellants-defendants. While answering question No.3 it has been already held that there is no illegality and irregularity in the judgment passed by the learned first appellate Court wherein he allowed the appeal of the present plaintiffs' specifically holding that Ex.PW-1/S could be relied upon in evidence. This Court is also of the view that Ex.PW-1/S could be read in evidence in terms of Section 43 being "fact in issue" and as such contention put forth on behalf of the counsel for the appellants that learned Court below misinterpreted the law has no force and is rejected in view of the detailed discussion made hereinabove.

88. As far as misreading of evidence, as alleged by the appellants-defendants, is concerned, this Court is of the view that since first appellate Court solely placed the reliance upon document Ex.PW-1/S, it had no occasion to refer to the other part of evidence. Once Ex.PW-1/S was taken into consideration by the first appellate Court while accepting the appeal of the plaintiff, there was no need to look into the other part of evidence adduced on record solely for the reason that bare perusal of judgment Ex.PW-1/S clearly suggests that plaintiff No.2 was held to be owner of the suit property on the strength of will, which was held to be validly executed by Smt.Lajwanti Gujral in favour of plaintiff No.2. Similarly, perusal of Ex.PW-1/S suggests that question of creation of Trust by plaintiff No.1 was duly proved on record by the present plaintiffs in that case by placing copy of Deed of Trust created by plaintiff No.2 after acquiring title of ownership on the strength of will. Since learned first appellate Court held that document Ex.PW-1/S could be placed reliance upon, it was sufficient for that Court to conclude that aforesaid property belongs to validly created Trust, who is entitled to file suit for recovery of possession against defendants, who admittedly after 10.7.1989 was in authorized possession of the premises.

89. Apart from above, this Court had an occasion to peruse the statements made by the plaintiff during trial which clearly suggests that PW-1 Baldev Singh, who happened to be a President of plaintiff-Trust specifically placed on record copy of Jamabandi Ex.PW-1/A as well as copy of Trust Deed mark `A' to suggest that Trust was created by plaintiff No.2 Rajinder Singh Gujral and on the strength of same mutation was entered in favour of the Trust qua the suit property. He also exhibited the notice issued to defendants through counsel Ex.PW-1/F, receipt Ex.PW-1/G, H and J, acknowledgement Ex.PW-1/L and Ex.PW-1/M. Aforesaid PW also received reply Ex.PW-1/Q and letter Ex.PW-1/R from the defendants. In reply to aforesaid legal notices got issued by PW-1 in the capacity of President of plaintiff Trust, defendants nowhere in their reply vide Ex.PW-1/Q and Ex.PW-1/R disputed the title of plaintiff No.1, rather vide Ex.PW-1/R they enclosed copy of opinion of Advocate Shri K.D. Sood, wherein he opined that till the time suit already pending, as referred hereinabove, is decided they may defer making payment of rent in favour of Shri Rajinder Singh Gujral, plaintiff No.2; meaning thereby that defendants while answering legal notice issued by the plaintiffs nowhere raised issue with regard to creation of Trust/existence of Trust after the death of Smt.Lajwanti Gujral. Though perusal of record suggests that plaintiffs were not able to place on record original copy of Trust Deed but in his statement he categorically stated that Chairman, Gurudwara Singh Sabha, was ex-officio Chairman and there were six trustees; namely; Sardar Jagat Singh, Jasbir Kaur, Surjit Kaur Kalra, Iqbal Singh and Sardar Jagdish. While making statement he stated that Trust was made in the year 1982, copy of which is mark `A'. He also stated that in the year 1969 defendants were inducted as lessee in the suit land by late Smt.Lajwanti Gujral. It has also come in statement that after becoming owner plaintiff No.2 Rajinder Singh Gujral issued notice to the defendants and notice through counsel was also issued. In view of aforesaid candid and specific statement of PW-1 wherein he stated that after death of late Smt.Lajwanti, plaintiff No.2, acquired the status of owner and got legal notice issued to defendants asking them to vacate the premises and make payment of rent, this Court is of the view that learned trial Court was not right in returning the findings that the plaintiff has not proved that they are owners in possession of the suit land and are entitled to recover the possession of the suit property. Plaintiffs categorically stated with regard to creation of Trust and other six trustees, named above, and he also disclosed the names of those trustees. Even cause title of the suit suggests that all other trustees; namely; Smt.Jasbir Kaur, Giani Iqbal Singh and Smt.Surjit Kalra, were impleaded as proforma defendants in the suit and as such this Court sees no illegality and infirmity in the impugned judgment and sees no force in the contention of the counsel representing the appellants-defendants.

90. Apart from above, if for the sake of arguments this contention put forth on behalf of the counsel representing the appellants is accepted that PW-1 who was the President of plaintiff No.1-Trust was unable to prove the creation of Trust and authorization, if any, on behalf of Trust to initiate proceedings against the defendants, in that event also, there is plaintiff No.2 Rajinder Singh Gujral, who admittedly acquired the status of owner after death of Smt.Gujral qua the suit property, which stands duly proved vide judgment Ex.PW-1/S. PW-1 in his statement categorically stated that before the death of Smt.Lajwanti Gujral, she made a will in favour of plaintiff No.2 and on the strength of same, mutation was attested. He categorically stated that Rajinder Singh, plaintiff No.2, executed a trust deed as per wishes of his parents, and he being the Chairman of Gurudwara Singh Sabha filed the present suit. Since, suit in question was filed by both i.e. plaintiff No.1 Trust and another by plaintiff No.2 who admittedly acquired the status of owner after the death of Smt.Lajwanti which stand duly proved by Ex.PW-1/S, non-placing of original Trust Deed was not of serious consequence, which could entail dismissal of suit by the learned trial Court below. Leaving everything aside, when judgment Ex.PW-1/S has been already held admissible in evidence in terms of Section 43 of the Indian Evidence Act, all issues regarding title would automatically be decided in favour of the plaintiffs. Both the questions are answered accordingly.

91. In view of the detailed discussion made hereinabove, this appeal is dismissed. The judgment passed by the learned first appellate Court below is upheld and that of the learned

trial Court is set aside and the suit filed by the plaintiffs is decreed. There shall be no order as to costs.

92. Interim order, if any, is vacated. All miscellaneous applications are disposed of.

****

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

Piar Chand & Others ..Appellants-Plaintiffs
Versus
Ranjeet Singh & Others ..Respondents-Defendants

Regular Second Appeal No.293 of 2006.
Judgment Reserved on: 30.08.2016.
Date of decision: 16.09.2016

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit seeking declaration that they are owners in possession of the suit land – the suit land was wrongly recorded to be in possession of defendants No.1 to 3- AC 1st Grade had wrongly declared the defendants to be the owners in possession of the suit land – defendants claimed that suit land was in possession of their predecessor-in-interest as non-occupancy tenant- plaintiffs had purchased the suit land in the year 1965-66 but the tenancy was prior to the sale – defendants had become the owners after the commencement of H.P. Tenancy and Land Reforms Act- the suit was decreed by the Trial Court- an appeal was preferred, which was allowed- held in second appeal that in the present case defendants had filed counter-claims, which were dismissed by the Trial Court – the suit of the plaintiff was decreed- Counter-claim is in the nature of a cross suit – a separate decree should have been prepared in the counter-claim- Appellate Court should not have been entertained composite appeal – appeal allowed – judgment of the Appellate Court set aside and that of the Trial Court restored.(Para-21 to 46)

Cases referred:

Rajni Rani and Another vs. Khairati Lal and Others, (2015)2 SCC 682
Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11
Satya Devi vs. Partap Singh and others, (2006)1 SCC 312

For the Appellants: Mr.B.P. Sharma, Senior Advocate with Mr.Arun Kumar, Advocate.
For Respondents No.1(a) to 1(d) & 2 to 4. Mr.Neeraj Gupta, Advocate.
For Respondent No.7: Ex-parte

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellants-plaintiffs against the judgment and decree dated 20.03.2005, passed by the learned Additional District Judge, Ghumarwin, District Bilaspur, H.P., reversing the judgment and decree dated 11.5.2001, passed by the learned Sub Judge Ist Class, Ghumarwin, whereby the suit filed by the appellants-plaintiffs has been decreed.

2. The brief facts of the case are that the appellants-plaintiffs *(herein after referred to as the `plaintiffs'),* filed a suit for declaration and permanent prohibitory injunction against the respondents-defendants *(hereinafter referred to as the `defendants')* stating therein that they were owners in possession of the suit land measuring 9.6 bighas, comprised in Khasra No.59 and 9 Khata/Khatauni No.20 min/33 and 34, situated in village Nagraon, Pargana Tiun, Tehsil

Ghumarwin, District Bilaspur, Himachal Pradesh. It was averred in the plaint that in the revenue record, the suit land was wrongly entered in the possession of defendants No.1 to 3 and at the same time defendant No.4 was recorded as co-owner in the column of ownership, which entries were challenged by the plaintiffs. It was further stated that defendant No.4 had disposed of more land than her share and consequently she was left with no share in the suit land. It was further stated that defendants No.1 to 3 were not in possession of the suit land. However, it was only on 26.6.1992 when defendants came to the suit land and tried to dispossess the plaintiffs. Thereafter, plaintiffs came to know that A.C. Ist Grade, Ghumarwin, declared defendants to be owners in possession of the suit land and said order was also challenged. Hence, the present suit for declaration that plaintiffs are owners in possession of the suit land. Plaintiffs further prayed for consequential relief of permanent prohibitory injunction restraining the defendants from interfering in the suit land.

3. Defendants No.1 to 3 contested the suit and filed joint written statement. They also filed counter claim against the plaintiffs. It was stated by the defendants that suit land was under possession of their predecessor-in-interest Sant Ram and Bhauru as non-occupancy tenant under the previous owners Shankru Devi, Sundri Devi and Gulabi Devi on the payment of $1/4^{th}$ produce as rent. The plaintiffs had purchased the share of Ishwar Dass and Narain Singh successors of Gulabi in the year 1965-66, but the tenancy of defendant No.1 to 3 were prior to said sale. Therefore, defendants stated that now by operation of H.P. Tenancy and Land Reforms Act, defendants had acquired proprietary rights. Therefore, defendants prayed by way of counter-claim to be declared owners in possession of the suit land.

4. Defendant No.4 did not appear to contest the suit before the lower Court and as such she was proceeded against ex-parte.

5. The plaintiffs filed written statement to the counter-claim and also replication whereby they again reaffirmed their own case and refuted the case of defendants as pleaded in the written statement and the counter claim.

6. On the pleadings of the parties, the learned trial Court framed the following issues:-

> *"1. Whether the plaintiffs are the owners in possession of the suit land? OPP.*
>
> *2. Whether the defendants are entitled to be declared as owner in possession of the suit land? OPP.*
>
> *3. Relief."*

7. Learned trial Court vide common judgment and decree dated 11.5.2001 partly decreed the suit of the plaintiff and also dismissed the counter claim filed by the defendants.

8. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiff was partly decreed and counter claim of defendants-appellants were dismissed, appellants-defendants filed an appeal under Section 96 of the Code of Civil Procedure *(for short `CPC')* read with Section 21 of the H.P. Courts Act assailing therein judgment and decree dated 11.5.2001 passed by learned Sub Judge Ist Class in the Court of learned Additional District Judge, Ghumarwin.

9. Learned Additional District Judge, Ghumarwin vide judgment and decree dated 20.3.2005 accepted the appeal preferred by the defendants by setting aside the judgment and decree passed by the learned trial Court. Learned first appellate Court also decreed the counter claim of the contesting defendants to the effect that defendants No.1 to 3 are owners in possession of the suit land and entries in the revenue record in favour of plaintiffs are wrong and illegal.

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

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

"(1) Whether the findings of the ld.Appellate court below are sustainable in the eyes of law when it is based on mere revenue entries which are itself contradictory and stands rebutted by adducing oral as well as documentary evidence. Particularly when the appellants/ plaintiffs are in exclusive possession of the suit land for the last more than 30 years and are entitled to be declared as owners in possession of the suit land and whereas defendants/respondents never remained in possession of suit land?

2. Whether the Ld.Addl.District Judge has committed illegality in allowing the appeal and decreeing the counter claim of the respondents-defendants whereas separate appeal against the dismissal of counter claim has not been filed by the respondents?

3. Whether the Ld.Addl.District Judge wrongly interpreted the revenue entries?"

12. Mr.B.P. Sharma, Learned Senior Counsel appearing for the appellants-plaintiffs, vehemently argued that the impugned judgment and decree passed by learned first appellate Court is not sustainable in the eye of law as the same is not based upon correct appreciation of evidence as well as law on point. Mr.Sharma contended that bare perusal of impugned judgment passed by learned first appellate Court suggests that the same is based on conjectures and surmises and learned first appellate Court has fallen in grave error while reversing the judgment and decree passed by the learned trial Court that too on the very flimsy grounds.

13. Mr.Sharma forcefully contended that the impugned judgment passed by the first appellate Court is totally contrary to the provisions of law because learned first appellate Court had no occasion, whatsoever, to decree the counter claim of defendants in the appeal preferred by them against the judgment and decree dated 11.5.2001 passed by learned trial Court, whereby the suit of the plaintiffs was partly decreed and counter claims were dismissed. As per Mr.Sharma, since defendants had not filed separate appeal after paying requisite court fee against the dismissal of the counter claim by the trial Court, learned first appellate Court had no authority, whatsoever, to allow the counter claim in the appeal admittedly filed against the judgment passed by the learned trial Court, whereby suit of the plaintiffs was partly decreed. With a view to substantiate his aforesaid arguments, he invited the attention of this Court to Order 8 Rule 6A CPC to demonstrate that counter claim is in the nature of plaint and when it is dismissed, it is to be assailed by way of filing an appeal before the competent Forum by paying requisite court fee on the basis of claim.

14. Mr.Sharma forcefully contended that bare perusal of Order 8 Rules 6A to 6D clearly suggests that a counter claim preferred by the defendants, is in the nature of a cross-suit and even if the suit is dismissed, counter claim remain alive for adjudication; meaning thereby that the counter claim can only be entertained by the Court if requisite court fee is paid by the defendants on the valuation of counter claim. Mr.Sharma strenuously argued that if the counter claim is dismissed on being adjudicated on merits, it forecloses the rights of the defendants and hence as per Order 8 Rule 6A(2) Court is required to pronounce the final judgment in the same suit, both on the original claim/suit as well as also on counter claim. Mr.Sharma further contended that though in the present case learned trial Court, while partly allowing the suit filed by the plaintiff, dismissed the counter claim filed by defendants vide common judgment, but same could not be assailed by way of common appeal as is in the present case assailing therein impugned judgment and decree passed in favour of the plaintiffs as well as rejection of counter claim. Mr.Sharma forcefully contended that once there was conclusive determination of right of parties by the Court, while rejecting the counter claim filed by the defendants, it attained the status of decree and as such same was required to be assailed by way of filing separate appeal. Mr.Sharma further contended that trial Court may have not drawn formal decree, while rejecting the counter claim of the defendants, but once the rights are finally adjudicated by the Court, while rejecting the counter claim, it attained the status of decree and as such judgment and

decree, specifically dismissing the counter claim, could not be assailed by way of common appeal, as has been done in the present case. Learned Counsel representing the plaintiffs-appellants also contended that learned first appellate Court, while allowing the counter claim filed on behalf of defendants, miserably failed to appreciate the evidence on record which was suggestive of the fact that the appellants are owners in possession of the suit land for more than 30 years and the learned trial Court had rightly concluded on the basis of evidence adduced on record that the defendants never remained in possession of the suit land.

15. Mr.Sharma with a view to substantiate his submissions further stated that learned first appellate Court has fallen in grave error while not appreciating that apart from entries, which were itself contrary in the revenue record, defendants No.1 and 2 miserably failed to adduce any cogent evidence showing defendants in possession of the suit land and moreover the revenue entries stood rebutted by the overwhelming evidence, be it ocular or documentary, on record. While concluding his arguments, Mr.Sharma strenuously argued that the judgment passed by learned first appellate Court deserves to be quashed and set aside being perverse and against law because bare perusal of the pleadings as well as evidence produced on record suggests that learned first appellate Court has failed to appreciate that there was no document available on record suggestive of the fact that payment of rent, if any, was further made by defendants to S/Shri Narain Singh and Ishwar from whom the plaintiff had purchased the land. Mr.Sharma also placed reliance on the judgments of Hon'ble Apex Court in **Rajni Rani and Another vs. Khairati Lal and Others, (2015)2 SCC 682** and ***Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others,*** **AIR 1964 SC 11.**

16. Mr.Neeraj Gupta, learned counsel appearing for the defendants-respondents, supported the judgment passed by the learned first appellate Court. Mr.Gupta vehemently argued that bare perusal of the impugned judgment passed by learned first appellate Court suggests that the same is based upon correct appreciation of evidence available on record as well as law laid down and as such no interference, whatsoever, by this Court warranted in the present facts and circumstances of the case. Mr.Gupta, while referring to the impugned judgment, strenuously argued that close scrutiny of the same suggests that each and every aspect of the matter including legal arguments as have been raised by their learned counsel representing the plaintiffs, have been duly and meticulously dealt with by the learned trial Court and as such present appeal deserves to be dismissed.

17. Mr.Gupta, while refuting the submissions having been made on behalf of the appellants that counter claim filed by the defendants could not be allowed in the composite appeal filed by the defendants before the learned Additional District Judge, stated that since learned trial Court vide common judgment dated 11.5.2001 had dismissed counter claim filed by the defendants while allowing the appeal preferred by the present plaintiffs, defendants rightly filed first appeal before learned District Judge laying challenge therein to both passing of decree in favour of the plaintiffs as well as dismissal of counter claim and as such no illegality and infirmity can be found in the judgment passed by learned trial Court below. Mr.Gupta further contended that no appeal can be filed without there being any decree. Learned trial Court while rejecting the counter claim had not drawn any decree and as such no separate appeal could be filed. In this regard reliance has been placed upon the judgment of the Hon'ble Apex Court in ***(Smt.)Satya Devi vs. Partap Singh and others, (2006)1 SCC 312.***

18. Mr.Gupta further contended that bare perusal of revenue record, adduced on record by the parties, clearly demonstrates that previously Bhauru was recorded as tenant in possession of the suit land during settlement under owners; namely; Narain Singh and Ishwar Dass co-sharers on payment of $1/4^{th}$ of the produce as rent i.e. Exs.D-1 and D-2. Similarly, Bhauru is also recorded as tenant under Smt.Gulabi and Ishwar Dass in copy of Jamabandi for the year 1965-66 (Ex.D-2) and thereafter as per Ex.D-3 the plaintiffs purchased the suit land from Smt.Gulabi and Ishwar Dass. Since Bhauru was already coming in possession of the suit land in non-occupancy tenant under Narain Singh and Ishwar Dass on payment of $1/4^{th}$ share of the produce as rent and he continued to be non-occupancy tenant in possession of the suit land

on payment of 1/4th share of the produce of the rent even after purchase of share of Smt.Gulabi by the plaintiffs. Mr.Gupta forcefully contended that since the entries in the revenue record, (since the time of consolidation) were in favour of defendants No.1 to 3 and their predecessor-in-interest was coming in possession of suit land as tenants on payment of 1/4th share of the produce as rent, there is no illegality and infirmity in the judgment passed by the learned first appellate Court, whereby it came to the conclusion that predecessor-in-interest of defendants No.1 to 3 were already in possession of the suit land and as non-occupancy tenants even before suit land was purchased by the plaintiffs in the year 1966. Mr.Gupta further contended that bare perusal of evidence available on record, nowhere suggests that evidence, if any, was either led by the plaintiffs to rebut the entries in revenue record prior to the year 1966, which clearly depicts that predecessor-in-interest of defendants No.1 to 3 were already in possession of the suit as non-occupancy tenant prior to purchase the suit land by the plaintiffs.

19. Mr.Gupta also contended that it stands duly proved on record that previously Bhauru i.e. predecessor-in-interest of defendants No.1 to 3 was non-occupancy tenant qua the suit land on payment of 1/4th share of produce of rent, but lateron proprietary rights were conferred upon defendants No.1 to 3 qua suit land in terms of Section 104 of the H.P. Tenancy and Land Reforms Act, 1972 *(for short Tenancy Act').* But the defendants were wrongly reflected as purchasers of the suit land in the revenue record; whereas it is proved that the defendants and their predecessors-in-interest were coming in possession of the suit land as non-occupancy tenants. Hence, the entries in the revenue record showing the plaintiffs as owners and defendants No.1 to 3 as were apparently wrong, whereas defendants No.1 to 3 had become owners of the suit land as per Section 104 of the Tenancy Act. In view of aforesaid submissions, Mr.Gupta prayed for dismissal of the present appeal.

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

21. Keeping in view the specific objection with regard to maintainability of appeal filed by the defendants under Section 96 CPC read with Section 21 of the H.P. Courts Act before the learned Additional District Judge, wherein defendants laid challenge to the judgment and decree dated 11.5.2001 passed by learned Sub Judge Ist Class, Ghumarwin passed in Civil Suit No.214/1 of 1992, it would be appropriate for this Court to take substantial question No.2, which is reproduced below, for consideration at the first instance:-

> *2. Whether the Ld.Addl.District Judge has committed illegality in allowing the appeal and decreeing the counter claim of the respondents-defendants whereas separate appeal against the dismissal of counter claim has not been filed by the respondents?*

22. It is undisputed before this Court that present appellants-plaintiffs filed a suit for declaration and permanent injunction against the respondents-defendants specifically on the averments which have been narrated in the earlier part of the judgment. It is also matter of record that in the aforesaid Civil Suit No.214/1 of 1992, present defendants-respondents filed counter claims alongwith the written statement.

23. Perusal of the counter claims filed on behalf of the defendants-respondents suggests that defendants-respondents valued their counter claims at the rate of Rs.200/- for the purpose of court fee and jurisdiction and fixed court fee of Rs.20/- on the counter claim. Careful perusal of record of trial Court below further suggests that present appellants-plaintiffs also filed replication-cum-written statement to the counter claims filed by the respondents-defendants.

24. However, fact remains that learned trial Court, after framing issues, as have been reproduced above, passed judgment and decree dated 11.5.2001, whereby suit of the present appellants-plaintiffs was partly decreed and counter claims filed by the respondents-defendants were dismissed. Operative part of the judgment and decree passed by the learned trial Court suggests that learned trial Court decreed the suit of the plaintiff for declaration as well as permanent prohibitory injunction partly by declaring the plaintiffs to be the owners in possession

of the suit land alongwith defendant No.4. Since defendants No.1 to 3 could not establish their tenancy as well as possession, the plea of tenancy raised by the defendants was rejected. Learned trial Court further decreed the suit of the plaintiff for permanent prohibitory injunction restraining defendants No.1 to 3 from causing any interference in the suit land. Learned trial Court after dismissing the suit of the plaintiffs against defendant No.4 also dismissed counter claims filed by the defendants, whereby defendants-respondents had sought declaration that they are owners in possession over the suit land.

25. Learned trial Court on the basis of judgment and decree, as referred above, also drawn decree in suit for possession in terms of Order 20 Rules 9 & 10 CPC specifically ordering therein that suit of the plaintiffs for declaration as well as permanent prohibitory injunction is partly decreed to the effect that plaintiffs are hereby declared as owners in possession of the suit land alongwith defendant No.4. Careful perusal of decree, as referred, hereinabove, suggests that it also stands mentioned, *"Hence, suit against defendant No.4 fails and is hereby dismissed and the counter-claim filed by the defendants is also hereby dismissed".* But, learned trial Court failed to draw separate decree as far as dismissal of counter claims filed by the defendants is concerned.

26. Defendants-respondents, being aggrieved with the aforesaid judgment and decree, approached the learned District Judge by way of appeal under Section 96 CPC read with Section 21 of H.P. Courts Act. At this stage, it would be appropriate to reproduce cause title/head-note of appeal preferred by the defendants-respondents before the learned District Judge, which reads thus:

> *"Civil appeal Under Section 96 C.P.C. read with section 21 of the HP Courts Act against the decree and judgment dated 11.5.2001 in Civil Case No.214/1 of 1992, of Sh.Purender Vidya, Sub Judge Ist Class Ghumarwin, by which the learned Sub Judge has decreed the suit filed by plaintiffs i.e. respondents No.1 to 4, against the appellants. Appeal for setting aside the decree and judgment passed by the learned Sub Judge and to dismiss the suit of the plaintiffs."*

27. Careful perusal of aforesaid cause title nowhere suggests that defendants-respondents, while filing appeal, assailing therein judgment and decree passed by the learned trial Court, specifically prayed for allowing the counter claims. Though record reveals that in prayer clause defendants-respondents, while seeking quashing and setting aside the judgment and decree dated 11.5.2001 passed by learned Sub Judge also prayed that counter claim filed by defendants may be decreed with costs.

28. Before adverting to the submissions having been made on behalf of the learned counsel representing both the parties, it would be appropriate to refer to relevant provisions of law applicable in the present case i.e. Order 8 Rule 6A:

> *"6A. Counter claim by defendant.- (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not:*
>
> *Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court.*
>
> *(2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.*
>
> *(3) The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the court.*

> (4) *The counter claim shall be treated as a plaint and governed by the rules applicable to plaints."*

29. Aforesaid provisions of law entitles defendants in a suit to set up counter claims against the claim of the plaintiffs in respect of cause of action accruing to them against the plaintiffs either before or after filing the suit, but before defendants files their defence or before the time stipulated for delivering the defence is expired. Needless to say that aforesaid right of filing counter claim is in addition to his right of pleading as set up in Rule 6. Further perusal of aforesaid provisions of law suggests that counter claim, if any, filed on behalf of the defendants would be treated as a plaint and same would be governed by Rules applicable to the plaint. Similarly, counter claims filed on behalf of the defendants would have same effect as a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and the counter claim.

30. Similarly, Rule 6A(3) enables the plaintiff to file a written statement, if any, to the counter claim filed by the defendants. Rule 6D specifically provides that in case suit of the plaintiff is stayed, discontinued or dismissed, the counter claim filed on behalf of the defendant would nevertheless be proceeded with.

31. Similarly, Rule 6E provides that if plaintiff fails to file reply to the counter claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it deems fit. It would be relevant here to refer to Order VIII Rule 6F:

> *"6F. Relief to defendant where counter-claim succeeds.- Where in any suit a set-off or counter-claim is established as a defence against the plaintiffs claim and any balance is found due to the plaintiff or the defendant, as the case may be , the Court may give judgment to the party entitled to such balance."*

32. Perusal of aforesaid Order VIII Rule 6F clearly suggests that where in any suit a set-off or counter claim is established as a defence against the plaintiffs' claim and any balance is found due to the plaintiff or the defendant, Court may give judgment to the party entitled to such balance. Further perusal of Order VIII Rule 6G suggests that no pleadings, if any, subsequent to the written statement filed by a defendant other than by way of defence to set up a claim can be presented except with the leave of Court.

33. Under Order VIII Rule 10 when any party fails to file written statement as required under rule 1 or rule 9 within the stipulated time, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

34. Careful perusal of aforesaid provisions of law clearly suggests that counter claim, if any, preferred by the defendant in the suit is in nature of cross suit and even if suit is dismissed counter claim would remain alive for adjudication. Since counter claim is in nature of cross suit, defendant is required to pay the requisite court fee on the valuation of counter claim. It has been specifically provided in the aforesaid provisions that the plaintiff is obliged to file a written statement qua counter claim and in case of default court can pronounce the judgment against the plaintiff in relation to the counter claim put forth by the defendant as it has an independent status. As per Rule 6A(2), the Court is required to pronounce a final judgment in the same suit both on the original claim and also on the counter-claim.

35. In the instant case, as has been discussed in detail, defendants filed counter claims which were finally dismissed by the trial Court by stating that defendants No.1 to 3 could not establish their tenancy as well as possession and accordingly they were restrained from interfering in the possession of the plaintiffs as well as defendant No.4.

36. In the present case, as clearly emerged from the judgment passed by the learned trial Court, learned trial Court effectively determined the rights of the parties on the basis of counter claim as well as written statement thereto filed by the respective parties and as such it

attained the status of decree. It would be profitable here to reproduce definition of the term *`decree'* as contained in Section 2(2) of CPC:-

> *"2.(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [1][* * *] Section 144, but shall not include –*
>
> *(a) any adjudication from which an appeal lies as an appeal from an order, or*
>
> *(b) any order of dismissal for default.*
>
> *Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"*

37. Close scrutiny of aforesaid definition of "decree" clearly suggests that there should be formal expression of adjudication by the Court while determining the rights of the parties with regard to controversy in the suit, which would also include the rejection of plaint. Similarly, determination should be conclusive determination resulting in a formal expression of the adjudication. It is settled principle that once the matter in controversy has received judicial determination, the suit results in a decree, either in favour of the plaintiff or in favour of the defendant.

38. In the present case, as has been observed above, learned trial Court while decreeing the suit of the plaintiff specifically dismissed the counter claim on the ground that defendants were unable to prove their possession and tenancy; meaning thereby that counter claim filed by defendants was duly adjudicated and decided on merits by the trial Court holding that defendants No.1 to 3 have not been able to prove their tenancy and possession qua the suit land. At the cost of repetition, it is once again stated that by way of counter claim defendants claimed that they may be declared owners in possession of the suit land which was negatived by the trial Court.

39. In the aforesaid background, this Court while examining the statements having been made on behalf of the counsel representing the appellants-plaintiffs, found sufficient force in the arguments raised on behalf of appellants that learned first appellate Court could not have entertained composite appeal as preferred in the present case by the defendant specifically laying challenge therein to the judgment and decree passed by the Court, whereby the suit was decreed and counter claim was dismissed.

40. When learned trial Court dismissed the counter claim by expressing opinion that defendants No.1 to 3 were not able to prove their tenancy and possession, it can be termed as formal expression of adjudication as far as counter claim is concerned. Definition of "decree" clearly suggests that there has to be formal expression of adjudication. Accordingly, in the present case, as is seen from the judgment passed by the learned trial Court, learned trial Court specifically observed while rejecting the counter claim that *"defendants No.1 to 3 could not establish their tenancy as well as possession, therefore, the plea of tenancy raised by the defendants itself sufficient to cause serious threat in the possession of the plaintiffs"*. Admittedly, in the present case, learned trial Court has not drawn formal decree while rejecting counter claims filed by defendants, but if the judgment in its entirety passed by the Court is seen, it clearly emerge that rights have finally been adjudicated. Once as per provisions of law counter claims are in nature of cross-suit, learned trial Court below ought to have passed separate decree specifically dismissing the counter claim of the defendants. But in the present case, where no separate decree was passed while rejecting counter claim, defendants cannot be allowed to state that since there was no formal decree passed by trial Court, there was no occasion for them to file

separate appeal after paying requisite court fee. It has been held in catena of cases that Court may or may not draw formal decree, but if by virtue of order of Court rights are finally decided/adjudicated, it would assume the status of decree. Apart from above, aforesaid issue, as is being determined in the instant appeal, is no more res intigra.

41. In this regard, it would be appropriate to place reliance on the judgment of the Hon'ble Apex Court in **Rajni Rani and Another vs. Khairati Lal and Others, (2015)2 SCC 682**, wherein the Court has held as under:-

> *"3. After the counter-claim was filed, Defendants 1 and 2 filed an application for dismissal of the counter-claim on the foundation that the same did not merit consideration as it was barred by Order 2, Rule 2 CPC. It was set forth in the application that a suit for declaration was earlier filed by the present appellants along with others against the defendants and a decree was passed in their favour on 21.9.2002 whereby it was held that the present appellants and some of the respondents were entitled to 1/4th share each. The judgment and decree passed in the said suit was assailed in appeal and the appellate court modified the judgment and decree dated 21.9.2002 vide judgment dated 15.2.2003 holding that each one of them was entitled to 1/9th share and the said modification was done on the ground that the property was ancestral in nature and the sisters had their shares. After disposal of the appeal, one of the sisters filed a declaratory suit to the effect that she is the owner in possession of land in respect of 1/9th share in the suit land and in the said suit a counter-claim was filed by Defendants 12 to 14 stating that they had become owners in possession of the suit property on the basis of a properly registered Will dated 18.5.1995 executed by Jeth Ram. In the application it was set forth that the counter-claim had been filed in collusion with the plaintiff as the plea of claiming any status under the Will dated 18.5.1995 was never raised in the earlier suit. It was urged that the plea having not been raised in the earlier suit, it could not have been raised by way of a counter-claim in the second suit being barred by the principles of Order 2, Rule 2 of CPC.*
>
> *4. The learned trial Judge adverted to the lis in the first suit, the factum of not raising the plea with regard to Will in the earlier suit and came to hold that the counter-claim could not be advanced solely on the ground that the existence of the Will had come to the knowledge of the defendants only in the year 2003. Being of this view, the learned trial Judge allowed the application filed by the Defendant 1 and 2 and resultantly dismissed the counter-claim filed by the Defendant 12 to 14 vide order dated 13.10.2010.*
>
> *5. The legal substantiality of the aforesaid order was called in question in Civil Revision No. 900 of 2011 preferred under Article 227 of the Constitution of India wherein the High Court taking note of the previous factual background came to hold that the learned trial Judge had failed to appreciate that the Will dated 18.5.1995 executed by Jeth Ram, the father of Defendant 12 to 14, was alive at the time of adjudication of the earlier suit and hence, the said Will could not have taken aid of during his lifetime. The aforesaid analysis persuaded the learned Single Judge to set aside the order passed by the learned trial Judge. However, the Single Judge observed that it would be open to the plaintiff to raise all pleas against the counter-claim.*
>
> *6. We have heard Mr. Arvinder Arora, learned counsel for the appellants and Mr. S.S. Nara, learned counsel for the respondents.*
>
> *7. At the very outset, we must make it clear that we are not inclined to advert to the defensibility or justifiability of the order of rejection of the counter-claim by the learned trial Judge or the annulment or invalidation of the said order by the High Court. We shall only dwell upon the issue whether the revision petition could have*

been entertained or was it obligatory on the part of respondents herein to assail the order by way of appeal.

8. *The submission of Mr. Arora, learned counsel appearing for the appellants is that the counter-claim is in the nature of a plaint and when it is dismissed it has to be assailed by way of appeal before the competent forum by paying the requisite court fee on the basis of the claim and such an order cannot be set at naught in exercise of supervisory jurisdiction of the High Court. Learned counsel for the respondents, per contra, would contend that such an order is revisable and, in any case, when cause of justice has been subserved this Court should not interfere in exercise of its jurisdiction under Article 136 of the Constitution of India.*

9. *To appreciate the controversy in proper perspective it is imperative to appreciate the scheme relating to the counter-claim that has been introduced by CPC (amendment) Act 104 of 1976 with effect from 1.2.1977.*

9.1 Order 8, Rule 6A deals with counter-claim by the defendant. Rule 6A(2) stipulates thus:-

"6-A(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim."

9.2. Rule 6A(3) enables the plaintiff to file a written statement. The said provision reads as follows:-

"6-A(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court."

9.3. Rule 6A(4) of the said Rule postulates that:

"6-A.(4) The counter-claim shall be treated as a plaint and governed by rules applicable to a plaint.

9.4 Rule 6B provides how the counter-claim is to be stated and Rule 6C deals with exclusion of counter-claim.

9.5 Rules 6-D deals with the situation when the suit is discontinued. It is as follows:-

"6-D. Effect of discontinuance of suit. – If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with."

9.6. On a plain reading of the aforesaid provisions it is quite limpid that a counter-claim preferred by the defendant in a suit is in the nature of a cross-suit and by a statutory command even if the suit is dismissed, counter-claim shall remain alive for adjudication. For making a counter-claim entertainable by the court, the defendant is required to pay the requisite court fee on the valuation of the counter-claim. The plaintiff is obliged to file a written statement and in case there is default the court can pronounce the Judgment against the plaintiff in relation to the counter-claim put forth by the defendant as it has an independent status. The purpose of the scheme relating to counter-claim is to avoid multiplicity of the proceedings. When a counter-claim is dismissed on being adjudicated on merits it forecloses the rights of the defendant. As per Rule 6A(2) the court is required to pronounce a final judgment in the same suit both on the original claim and also on the counter-claim. The seminal purpose is to avoid piece-meal adjudication. The plaintiff can file an application for exclusion of a counter-claim and can do so at any time before issues are settled in relation to the counter-claim. We are not concerned with such a situation.

10. *In the instant case, the counter-claim has been dismissed finally by expressing an opinion that it is barred by principles of Order 2, Rule 2 of the CPC. The question is what status is to be given to such an expression of opinion. In this context we may refer with profit the definition of the term decree as contained in section 2(2) of CPC:-*

> *"2. (2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within[[* * *] Section 144, but shall not include –*
>
> *(a) any adjudication from which an appeal lies as an appeal from an order, or*
>
> *(b) any order of dismissal for default.*
>
> *Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"*

11. *In R. Rathinavel Chettiar and Another v. V. Sivaraman, (1999)4 SCC 89, dealing with the basic components of a decree, it has been held thus: (SCC pp.93-94, paras 10-11)*

> *"10. Thus a "decree" has to have the following essential elements, namely:*
>
> *(i) There must have been an adjudication in a suit.*
>
> *(ii) The adjudication must have determined the rights of the parties in respect of, or any of the matters in controversy.*
>
> *(iii) Such determination must be a conclusive determination resulting in a formal expression of the adjudication.*
>
> *11. Once the matter in controversy has received judicial determination, the suit results in a decree either in favour of the plaintiff or in favour of the defendant."*

12. *From the aforesaid enunciation of law, it is manifest that when there is a conclusive determination of rights of parties upon adjudication, the said decision in certain circumstances can have the status of a decree. In the instant case, as has been narrated earlier, the counter-claim has been adjudicated and decided on merits holding that it is barred by principle of Order 2, Rule 2 CPC. The claim of the defendants has been negatived. In Jag Mohan Chawla v. Dera Radha Swami Satsang, (1996)4 SCC 699 dealing with the concept of counter-claim, the Court has opined thus (SCC p.703, para 5)*

> *"5... is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection (sic protraction), the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross-suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit."*

13. *Keeping in mind the conceptual meaning given to the counter-claim and the definitive character assigned to it, there can be no shadow of doubt that when the counter-claim filed by the defendants is adjudicated and dismissed, finality is attached to it as far as the controversy in respect of the claim put forth by the*

defendants is concerned. Nothing in that regard survives as far as the said defendants are concerned. If the definition of a decree is appropriately understood it conveys that there has to be a formal expression of an adjudication as far as that Court is concerned. The determination should conclusively put to rest the rights of the parties in that sphere. When an opinion is expressed holding that the counter-claim is barred by principles of Order 2, Rule 2 CPC, it indubitably adjudicates the controversy as regards the substantive right of the defendants who had lodged the counter-claim. It cannot be regarded as an ancillary or incidental finding recorded in the suit.

14. In this context, we may fruitfully refer to a three-Judge Bench decision in M/s. Ram Chand Spg. & Wvg. Mills v. M/s. Bijli Cotton Mills (P) Ltd., AIR 1967 SC 1344 wherein their Lordships was dealing with what constituted a final order to be a decree. The thrust of the controversy therein was that whether an order passed by the executing court setting aside an auction sale as a nullity is an appealable order or not.

15. The Court referred to the decisions in Jethanand and Sons v. State of U.P., AIR 1961 SC 794 and Abdul Rahman v. D.K. Cassim and Sons, AIR 1933 PC 58 and proceeded to state as follows: (Ram Chand Spg. & Wvg. Case, AIR p. 1347, para 13)

> *"13.In deciding the question whether the order is a final order determining the rights of parties and, therefore, falling within the definition of a decree in Section 2(2), it would often become necessary to view it from the point of view of both the parties in the present case — the judgment-debtor and the auction-purchaser. So far as the judgment-debtor is concerned the order obviously does not finally decide his rights since a fresh sale is ordered. The position however, of the auction-purchaser is different. When an auction-purchaser is declared to be the highest bidder and the auction is declared to have been concluded certain rights accrue to him and he becomes entitled to conveyance of the property through the court on his paying the balance unless the sale is not confirmed by the court. Where an application is made to set aside the auction sale as a nullity, if the court sets it aside either by an order on such an application or suo motu the only question arising in such a case as between him and the judgment- debtor is whether the auction was a nullity by reason of any violation of Order 21, Rule 84 or other similar mandatory provisions. If the court sets aside the auction sale there is an end of the matter and no further question remains to be decided so far as he and the judgment-debtor are concerned. Even though a resale in such a case is ordered such an order cannot be said to be an interlocutory order as the entire matter is finally disposed of. It is thus manifest that the order setting aside the auction sale amounts to a final decision relating to the rights of the parties in dispute in that particular civil proceeding, such a proceeding being one in which the rights and liabilities of the parties arising from the auction sale are in dispute and wherein they are finally determined by the court passing the order setting it aside. The parties in such a case are only the judgment-debtor and the auction-purchaser, the only issue between them for determination being whether the auction sale is liable to be set aside. There is an end of that matter when the court passes the order and that order is final as it finally, determines the rights and liabilities of the parties viz. the judgment-debtor and the auction-purchaser in regard to that sale, as after that order nothing remains to be determined as between them."*

After so stating, the Court ruled that the order in question was a final order determining the rights of the parties and, therefore, fell within the definition of a decree under Section 2(2) read with Section 47 and was an appealable order.

16. We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counter-claim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counter-claim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under Article 227 of the Constitution of India. Ergo, the order passed by the High Court is indefensible."

42. After perusing aforesaid judgment passed by Hon'ble Apex Court, this Court need not to elaborate further on the issue at hand because Hon'ble Apex Court has categorically held that if by virtue of order of the Court rights have finally been adjudicated, it would assume the status of decree. Hon'ble Apex Court has also stated that Court may or may not draw a formal decree but if rights are finally adjudicated, it would assume the status of a decree. Learned Apex Court has further held that in such like situation order passed by trial Judge has the status of decree and challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee.

43. Accordingly, in view of the detailed discussion made hereinabove as well as law laid down by Hon'ble Apex Court, this Court sees no force in the contention put forth on behalf of the counsel representing the defendants that in the absence of specific decree drawn by learned trial Court at the time of dismissal of their counter claim, defendants could not file separate appeal. Substantial question is answered accordingly.

44. Since this Court is of the view that learned first appellate Court has erred in entertaining the composite appeal filed on behalf of the defendants specifically laying challenge to the judgment passed by the learned trial Court, wherein suit of the plaintiffs was partly decreed and the counter claim filed by the defendants was dismissed, there is no need to look into the other substantial questions of law as the same have become redundant in view of the findings returned by the Court qua substantial question No.2.

45. As far as judgments relied upon by the learned counsel appearing for the respondents-defendants are concerned, this Court is of the view that the same are not applicable in the present facts and circumstances of the case, especially in view of the law laid down by the Hon'ble Apex Court (supra).

46. In view of the detailed discussion made hereinabove, this appeal is allowed. The judgment passed by the learned first appellate Court below is quashed and set aside and that of the learned trial Court is upheld and the suit filed by the plaintiffs is decreed. There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

****

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

Om Prakash Chand ....Appellant-Defendant

Versus

Parkash Chand ...Respondent-Plaintiff

Regular Second Appeal No. 502 of 2006.
Date of decision: 20.09.2016

Transfer of Property Act, 1882- Section 60- Plaintiff pleaded that he is mortgagor of the shop, which was redeemed in favour of the defendant on the payment of Rs.5,000/-- he requested the defendant to receive the money and to redeem the property but defendant refused- defendant denied the relationship of mortgage and mortgagee and pleaded that he was inducted as tenant on the rent of Rs.200/- per month – the suit was decreed by the trial Court- an appeal was preferred, which was dismissed – held in second appeal that plaintiff had proved the mortgage – the execution of the mortgage deed was admitted by the defendant in cross-examination – mortgage was duly recorded in the rapatroznamcha – the Courts had rightly decreed the suit- appeal dismissed.(Para- 14 to 22)

Cases referred:
Tulsi and Others vs. Chandrika Prasad and Others, 2006(8) SCC 322
State of H.P. and Others vs. Shivalik Agro Poly Products and Others, (2004)8 SCC 556
Jupudi Kesava Rao vs. Pulavarthi Venkata Subbarao and others, 1971(1) SCC 545
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264.

For the Appellant: Mr.Amit Singh Chandel, Advocate.
For Respondent: Mr.T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellant-defendant *(hereinafter referred to as the `defendant')* against the judgment and decree dated 18.8.2006, passed by learned District Judge, Hamirpur, affirming the judgment and decree dated 14.12.2005, passed by learned Civil Judge(Junior Division), Court No.II, Hamirpur, H.P., whereby the suit filed by the respondent-plaintiff *(hereinafter referred to as the `plaintiff')* has been decreed.

2. The brief facts of the case are that the plaintiff filed a suit for redemption. It is averred that the plaintiff is mortgagor of a shop measuring 8 feet X 18 feet as shown Mark-A in the site plan and the land to the extent of $1/9^{th}$ share measuring 15-78 Sq.Mtrs. out of the land comprised in Khata No.180, Khatauni No.800, Khasra No.547, measuring 142.02 Sq.Mtrs., as per Jamabandi for the year 1997-98, situated in Up Mahal Partap Nagar, Tappa Bajuri, Tehsil and District Hamirpur, H.P. *(hereinafter referred to as the `suit premises').* It is further averred that on 27.7.1992, the plaintiff mortgaged the suit premises in favour of the defendant on receipt of Rs.5000/- as mortgage debt. It is alleged that the plaintiff was ready and willing to pay the mortgage money to defendant, but the defendant was neither ready to receive the mortgage amount nor got the mortgage redeemed and finally on 28.12.2002, the defendant refused to receive the mortgage money and to redeem the mortgaged property i.e. the suit premises. Hence, the plaintiff has filed the present suit.

3. Defendant, by way of filing written statement, resisted and contested the suit by taking preliminary objections qua maintainability, estoppel, valuation and cause of action. On merits, the defendant claimed that no relationship of mortgagor and mortgagee existed or exists between the parties to the suit, but there is relationship of landlord and tenant because the shop was let out by the plaintiff in favour of the defendant at the rental of Rs.200/- per month and a sum of Rs.5000/- was taken by the plaintiff from the defendant as refundable security/Pugri at the time of termination of the tenancy and subsequently the rent was enhanced to Rs.325/- per month. It is averred that the agreement of mortgage was got executed by the plaintiff to escape from the provisions of H.P. Urban Rent Restriction Act and prayed for dismissal of the suit.

4. By way of replication, the plaintiff, while denying the allegations made in the written statement, reaffirmed the averments made in the plaint and controverted the contrary averments made in the written statement.

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

"1. Whether the plaintiff has mortgaged the suit premises to the defendant? OPP
2. Whether the plaintiff is entitled for the redemption of the suit premises as alleged? OPP.
3. Whether the defendant is the tenant of the plaintiff as alleged? OPD.
4. Whether the suit is not maintainable? OPD.
5. Whether the plaintiff is estopped to file this suit by his own act and conduct? OPD.
6. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, if so, its correct valuation ? OP Parties.
7. Whether the plaintiff has no cause of action to file this suit? OPD.
8. Relief."

6. The learned trial Court, on the basis of pleadings, settled the aforesaid issues and besides issue No.6, being not pressed, decided all the issues in favour of the plaintiff and accordingly decreed the suit of the plaintiff. An appeal preferred before the learned Appellate Court was dismissed.

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

> *"1. Whether the Court below erred in law to treat alleged writing as a mortgage deed, is it not an inadmissible evidence for want of stamp and registration when admittedly the value of the subject matter is more than Rs.100/-."*

8. Mr.Amit Singh Chandel, learned counsel representing the appellant-defendant vehemently argued that impugned judgments passed by both the Courts below are not sustainable in the eye of law as the same are not based upon the correct appreciation of evidence adduced on record by respective parties as well as proposition of law. Mr.Chandel further contended that bare perusal of the impugned judgment passed by both the Courts below itself suggests that evidence led on record by defendant was not dealt with in its right perspective by the Courts below. Rather, trial Court below failed to decide the specific issue i.e. whether the mortgage was created in favour of defendant. Mr.Chandel further argued that both the Courts below have erred in not appreciating that mortgage deed, if any, could not be taken into consideration while acceding the claim put forth by the plaintiff especially when plaintiff was unable to prove on record that mortgage deed was registered under Indian Registration Act, 1908 by paying requisite stamp duty. Learned counsel representing the appellant also contended that Courts below have fallen in grave error while treating alleged writing as a mortgage deed, especially when value of the subject matter was more than Rs.100/- and same was not registered after affixing requisite stamp value.

9. Mr. Chandel strenuously argued that entire evidence led on record by the plaintiff itself suggests that defendant was inducted as a tenant by the plaintiff in the suit premises qua which he was in receipt of regular rent and as such both the Courts below erred in concluding that the provisions of H.P. Urban Rent Restriction Act were not applicable. Similarly, Courts below have failed to appreciate that plaintiff, solely with a view to oust the defendant, set up a plea of mortgaging of property, if any, in favour of defendant, whereas, he was unable to prove on record by leading cogent and convincing evidence that mortgage deed was ever registered in terms of Registration Act, 1908. During arguments, Mr.Chandel also invited the attention of this Court towards the evidence led on record by the defendant before trial Court to demonstrate that Courts below miserably failed to read evidence produced on record in the shape of record of Municipal Corporation, Hamirpur *(for short `M.C. Hamirpur'),* wherein he was duly recorded as a tenant of the defendant qua the suit premises and as such learned Court below,

while decreeing the suit of the plaintiff, has caused great injustice to the defendant. Similarly, attention of this Court was invited to Ex.PW-3/A, Rapat No.667, dated 27.11.1992, to demonstrate that undue weightage was given by the Courts below to the entry effected by the revenue authorities which suggests that oral mortgage was entered in revenue records by the Patwari that too at the back of defendant.

10. Mr.Chandel further contended that DW-2 Rajinder Singh, Clerk, M.C. Hamirpur, clearly stated that plaintiff have four tenants and appellant-defendant is one of the tenants and as such Courts below have miserably failed to appreciate that defendant could only be evicted by resorting to the provisions of H.P. Urban Rent Control Act. While concluding his arguments, Mr.Chandel forcefully contended that bare perusal of mortgage deed i.e. Ex.PW-3/A itself suggests that same is fictitious and was set up by plaintiff to defeat the provisions of H.P. Urban Rent Control Act, which were applicable in the case of defendant, who was admittedly recorded as a tenant in the M.C. record and as such judgment and decree passed by both the Courts below deserves to be quashed and set aside being totally perverse.

11. To substantiate the aforesaid submissions, he placed reliance on the judgments of Hon'ble Apex Court in ***Tulsi and Others vs. Chandrika Prasad and Others, 2006(8) SCC 322, State of H.P. and Others vs. Shivalik Agro Poly Products and Others, (2004)8 SCC 556*** and ***Jupudi Kesava Rao vs. Pulavarthi Venkata Subbarao and others, 1971(1) SCC 545.***

12. Mr.T.S. Chauhan, learned Counsel appearing for the respondent-plaintiff, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have meticulously dealt with each and every aspect of the matter. He also urged that scope of interference by this Court is very limited especially when two Courts have recorded concurrent findings on the facts as well as law. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

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

14. Undisputed facts, as emerged from the record, are that the plaintiff, who was owner of the suit premises as depicted in site plan Ex.PW-2/A, filed a suit for redemption against the appellant-defendant stating therein that he mortgaged the shop as depicted in site plan Ex.PW-2/A and land to the extent of 1/9th share measuring 15-78 square meters as described above. He further contended that defendant is mortgagee of the suit premises, which was mortgaged with him on 27.7.1992 and a sum of Rs.5000/- was secured debt. Plaintiff claimed that he was ready and willing to pay the mortgage money to defendant, but the defendant was neither ready to receive the mortgage amount nor got the mortgage redeemed inspite of several requests made by him and as such he filed suit for redemption.

15. Defendant by way of written statement claimed that suit premises was never mortgaged, rather the same was let out to defendant by plaintiff at the rate of Rs.200/- per month, which was subsequently enhanced to Rs.325/- per month and agreement, if any, of mortgage was executed by the plaintiff to escape from the provisions of H.P. Urban Rent Restriction Act. Defendant also denied that a sum of Rs.5000/- was taken as security deposit by the plaintiff.

16. Record clearly suggests that both the Courts below have returned concurrent findings that plaintiff had mortgaged the suit premises to the defendant for a sum of Rs.5000/- in the year 1992 and as such suit of the plaintiff was decreed by holding him entitled for redemption of shop, description whereof has been given hereinabove, on the payment of Rs.5000/- to defendant. Learned trial Court also directed the defendant to vacate the suit premises and handover the possession of the same to the plaintiff.

17. During the proceedings of the case, this Court had an occasion to peruse the entire evidence led on record by respective parties, wherein admittedly plaintiff was able to prove on record that he had mortgaged the suit premises to the defendant for a sum of Rs.5000/- which he now proposed to redeem by paying him an amount of Rs.5000/-. Hence, this Court sees no reason to interfere with the concurrent findings of fact as returned by the Courts below especially when it stands duly proved on record that both the Courts below have dealt with each and every aspect of the matter meticulously.

18. This Court with a view to answer the substantial question, as referred above, critically analyzed the evidence led on record by the respective parties. Defendant in his cross-examination specifically admitted the claim of the plaintiff that mortgage deed was prepared, which was duly signed by him. Careful perusal of the cross-examination of DW-1 leaves no doubt in the mind of this Court that suit premises were mortgaged by the plaintiff in favour of the defendant and in this regard mortgage deed was prepared, which was duly signed by defendant. Interestingly, defendant himself admitted in his cross-examination that he was informed by Patwari with regard to mortgage of the suit property with him. Defendant has also admitted that he had signed the papers when the payment was made by him. He also admitted that no rent deed was prepared and he was unable to produce any receipt of rent. In view of his candid and categorical admission made in cross-examination, this Court probably need not to answer the substantial question of law because once defendant admits that mortgage deed was prepared and he had signed the same, substantial question has no relevance as far as decision qua controversy involved in the present case is concerned. Defendant, in his grounds of appeal as well as submissions having been made at the time of hearing, made an attempt to demonstrate that mortgage deed Ex. PW-3/A could not be termed as mortgage deed because same was not registered and no proper stamp duty was paid, when admittedly value of subject matter was more than Rs.100/-. This Court also perused Ex.PW-3/A i.e. mortgage deed, placed on record by the plaintiff to demonstrate that suit premises were mortgaged by him in favour of defendant for a sum of Rs.5000/-. Perusal of Ex.PW-3/A clearly suggests that on 27.7.1992, as claimed by the plaintiff in the plaint, plaintiff had mortgaged suit premises to the defendant, which has been duly registered in Rapat Roznamcha for the year 1991-92 and duly signed by Patwari concerned. Since defendant himself admitted that PW-1 informed him with regard to mortgage deed and he had signed the same, now at this stage defendant cannot be allowed to state that no mortgage deed was ever executed and same cannot be led in evidence since same was not registered.

19. In view of candid admission having been made on behalf of defendant himself that mortgage deed was prepared and he had appended his signature, this Court sees no reason to check the genuineness and correctness of substantial question referred hereinabove. For the sake of arguments, if it is presumed that Courts below, while placing reliance upon mortgage deed, fell in error ignoring the aspect that mortgage deed was not registered and properly valued, especially when the subject matter was for more than Rs.100/-, in that eventuality also claim of defendant bounds to fail in view of his own admission wherein he admitted that mortgage deed was executed and he had appended his signatures on the same. His further admission that Patwari had disclosed him regarding mortgage of the suit premises left no scope for this Court to interfere with the concurrent findings returned by the Courts below, wherein Courts below rightly concluded that in view of specific admission having been made on behalf of defendant witness, suit of the plaintiff deserves to be upheld.

20. At this stage, it may be observed that the judgments having been relied upon by the counsel representing the appellant, as referred above, have no application because in view of candid admission having been made on behalf of the plaintiff that mortgage deed was executed, it was not necessary for the plaintiff to prove the mortgage deed in accordance with the provisions of Indian Evidence Act. This Court is of the view that in view of the candid admission made by the defendant with regard to execution of mortgage deed, non-registration of mortgage deed after affixing proper stamp duty has no effect and bearing on the present suit filed by the plaintiff.

21. This Court is fully satisfied that both the courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter, since both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case supra, wherein the Court has held as under:

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

22. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which was further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appears to be based on correct appreciation of oral as well as documentary evidence. Hence, present appeal fails and is dismissed, accordingly.

23. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

****

BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

M/s.Bharat Healthcare Limited and Anr. ....Petitioners
Versus
Authorized Officer, Punjab National Bank & Others ....Respondents

CWP No.1629 of 2016
Judgment Reserved on: 08.09.2016
Date of decision: 22.09.2016

Constitution of India, 1950- Article 226- Petitioner had taken the loan- loan accounts were declared NPA- notice was issued – proceedings were initiated under Securitization and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 (SARFAESI) Act- possession of the factory land, building, plants, machinery, raw material and finished stocks was taken – held, that the petitioner had not approached the appropriate authority after issuance of the notice- the jurisdiction of the Court was barred under Section 13(2) of SARFAESI Act- the aggrieved person has to approach Debt Recovery Tribunal for the redressal of his grievance – a complete machinery has been provided under the Act- writ Court has no jurisdiction when the matter is covered under SARFAESI Act- writ petition dismissed. (Para-11 to 26)

Cases referred:
M/s.Cecil Instant Power Company vs. Punjab National Bank and Others, ILR 2016 (II) HP 537 (D.B.)
M/s Madras Petrochem Ltd. and another vs. BIRF and others AIR 2016 SC 898
SPS Steels Rolling Mills Ltd. vs. State of Himachal Pradesh and others, ILR 2015 (III) HP 1387 (D.B.)
Punjab National Bank vs. O.C. Krishnan and others (2001) 6 SCC 569
United Bank of India vs. Satyawati Tondon and others (2010) 8 SCC 110

For the Petitioners: Kanwar Ashwani Kumar, Advocate with Mr.Malay Kaushal, Advocate.
For Respondents No.1 to 3.: Mr.G.S. Rathore, Advocate.
For Respondent No.4: M/s.Anup Rattan, Romesh Verma and Varun Chandel, Additional Advocate Generals.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of present writ petition filed under Article 226 of the Constitution of India, the petitioner has invoked extra ordinary jurisdiction of this Court and has prayed for following main relief(s):-

"i) That records of the case may kindly be called from the respondent bank and District Magistrate;

ii) That writ in the nature of certiorari may kindly be issued quashing action of respondents in taking possession of the factory land, building, plant and machinery, raw materials, finished stocks of the petitioners;

iii) That writ in the nature of mandamus may kindly be issued directing the respondents to restore possession of the factory land, building, plant and machinery, raw materials, finished stocks to the petitioners;

iv) That appropriate writ, order or direction may kindly be issued in the facts and circumstances of the case for staying further proceeding or process by the respondents for sale of assets of the petitioners taken in possession by respondents;

v) That writ, order or direction may kindly be issued to the respondents with direction to compensate the petitioners on account of loss suffered due to expiry/perishing of raw materials, ready stocks of medicines and wastage on account of medicines under process of manufacturing etc."

2. Briefly stated the facts of the case are that petitioner No.1, which is a Company incorporated on 10.11.2005, under the Companies Act, 1956 (Act No.1 of 1956) having CIN U 24230 HP 2005 PLC 29169, manufacturing medicines and other healthcare products at village Chabacha Khurd, Dharampur Subathu Road, Tehsil Kasauli, District Solan, within territorial jurisdiction of this Hon'ble Court.

3. Petitioner-Company was having loan accounts CC Hypothecation 87-13293, Term Loan IC-18, Term Loan IC-27 and Term Loan IC-36 with respondent No.3-Bank, Branch Office, Subathu, District Solan, operating cash-credit account since 28.6.2006. The aforesaid loan accounts were declared NPA on 31.3.2012. Accordingly, respondent No.1 issued notice dated 8.5.2012 under Securitization and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 *(for short `SARFAESI Act')* (Annexure P-1) against present petitioner.

4. It emerged from the record that pursuant to non-compliance of the aforesaid notice issued under *SARFAESI Act'*, respondent-bank took into possession the factory land,

building, plants, machinery, raw materials and finished stocks situated in the jurisdiction of this Court. Present petitioners, being aggrieved with the aforesaid action of taking over by the respondents, approached this Court by way of present petition seeking therein the reliefs, as have been reproduced hereinabove.

5. Before proceeding to decide this case, it may be noticed that initially this matter was listed before this Court on 23.6.2016, when learned counsel representing the petitioners was asked/called upon to justify maintainability of the writ petition. However, on his request, matter was adjourned to 30.6.2016. Similarly, on 30.6.2016, judgment passed by this Court in ***CWP No.618 of 2016, titled as M/s.Cecil Instant Power Company vs. Punjab National Bank and Others, decided on 23rd March, 2016,*** was brought to the notice of the counsel, wherein issue with regard to maintainability of petition qua the notice issued under `*SARFAESI Act'* stood decided by this Court.

6. On that day, attention of learned counsel representing the petitioners was also invited to the relief clause of the petition, wherein none of the order filed by the Authority, pursuant to issuance of show cause notice under `*SARFAESI Act'* was assailed, accordingly counsel made a prayer to amend the writ petition.

7. Petitioners moved an application, i.e. ***CMP No.5180 of 2016*** under Order 6 Rule 17 of the Code of Civil Procedure, seeking amendment of the writ petition. But, interestingly petitioners proposed following amendments:

> *"2. That in compliance to the directions/order passed by this Hon'ble Court, the applicants/petitioners are amending the present Civil Writ Petition in the Prayer clause No.(ii) to the following effects:-*
>
> *"(ii) That appropriate writ, order or direction may kindly be issued for wrong and illegal action of the respondents in taking possession of the factory, land, building, plant and machinery, raw materials, finished stocks of the petitioners"*

8. When the matter came up for hearing on 8.9.2016 for admission before this Court, learned counsel was asked to justify the maintainability of the present petition in terms of judgment, as has been referred above. But, counsel representing the petitioner stated that he does not press the application for leave to amend since this petition has been filed under Articles 226/227 of the Constitution of India and this Court has ample powers to look into the grievance of the petitioners put forth in the present writ petition filed under Article 226 of the Constitution of India. His statement was taken on record and application was dismissed as not pressed.

9. In the aforesaid background, this Court proceeded to decide the matter at hand. Though, prima facie this Court is of the view that present writ petition is not maintainable at all, but otherwise also, perusal of averments contained in the writ petition as well as documents annexed therewith clearly suggests that respondent-bank had issued notice under Section 13(2) of the `*SARFAESI Act'* on 8.5.2012 (Annexure P-1), whereby due to default in payment of installments/ interest/principal debt, the accounts of the Company were classified as Non Performing Asset on 5.3.2012 in terms of guidelines issued by the Reserve Bank of India. Accordingly, bank expressed its inability to permit continuation of aforesaid facilities of term loan and same were recalled.

10. Similarly, vide aforesaid order, petitioners were informed that amount due to the bank as on 5.3.2012 was Rs.3,42,86,354/- with further interest and other expenses w.e.f. 1.3.2012 until full payment was made. By way of aforesaid notice, petitioners were duly informed that in terms of Section 13(13) of the `*SARFAESI Act'*, they would not, after receipt of notice, transfer by way of sale, lease, or otherwise any of the secured assets without prior consent of the bank.

11. At this stage, it is not understood that when this notice (Annexure P-1) was issued on 8.5.2012, what prevented the present petitioners to approach appropriate forum in

accordance with law immediately after issuance of notice. Hence, at this belated stage, this Court sees no reason, whatsoever, to look into the subsequent events, which have ultimately arisen from order dated 8.5.2012. Apart from above, this Court, after perusing the relief clause, is at lost to fathom what kind of relief can be extended to the petitioners in the present facts and circumstances of the case. Bare perusal of the relief clause nowhere suggests that till date Authority envisaged under *`SARFAESI Act'* has ever passed any order determining the interest/rights of the present petitioners. Petitioners by way of present petition have sought quashing of action of respondent-bank in taking possession of factory land, building, plants, machinery, raw materials and finished stocks of petitioners. But, interestingly, petitioner-Company has nowhere placed on record any document pursuant to which respondent-bank has allegedly taken into possession the factory land, building, plants, machinery, raw materials and finished stocks as mentioned above.

12. Similarly, this Court is unable to understand which orders are required to be stayed, as have been prayed in clause-(iv) of the prayer clause, because admittedly there is nothing before this Court suggestive of the fact that respondent-bank, pursuant to issuance of notice dated 8.5.2012 (Annexure P-1), ever initiated any action which ultimately resulted in confiscation of the property as described hereinabove.

13. Leaving everything aside, another question, which requires consideration of this Court, is whether action, if any, initiated under *`SARFAESI Act'* can be looked into by this Court under its writ jurisdiction (under Article 226/227 of the Constitution of India).

14. In view of summary as narrated above, it clearly stands established on record that the petitioners have availed term loan and on account of default of its repayment, respondent-bank initiated proceedings under Section 13(2) of the *`SARFAESI Act'.* Since, petitioners failed to make payment in terms of the aforesaid notice, their assets were taken over by the respondents, though nothing has been placed on record by the petitioners suggestive of the fact that pursuant to issuance of notice under Section 13(3) of the *`SARFAESI Act'*, steps, if any, were ever taken by the respondent-bank, but after seeing the averments contained in the petition, it can be presumed that respondent-bank, being not satisfied with the action, if any, taken by the petitioners issued notice under Section 13(3) of the said Act and proceeded to take over the properties. At this stage, it would be relevant to take note of certain provisions of *`SARFAESI Act',* which read as under:-

> *"**13. Enforcement of security interest (1)** Notwithstanding anything contained in section 6 9 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provisions of this Act.*
>
> ***(2)** Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).*
>
> ***(3)** The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.*
>
> *(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate*

within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

(4) *In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--*

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

17. Right to appeal *(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:*

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation. - For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.........................."

15. Bare perusal of Section 17 of the *`SARFAESI Act'*, as referred above, under which there is a provision of appeal, clearly provides that any person, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorized officer can approach Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures have been taken.

16. In the present case when this Court had an occasion to hear the matter on several times, it was unable to lay its hand to any document suggestive of the fact that present petitioners, before approaching this Court under Articles 226/227 of the Constitution of India, had ever made an attempt to file an appeal in terms of Section 17 of the *`SARFAESI Act'*.

17. At the cost of repetition, it may again be stated here that counsel representing the petitioners, while answering the question of maintainability, only reiterated that this Court enjoys extraordinary jurisdiction under Article 226/227 of the Constitution of India and it has all powers to look into the proceedings, even if, same are initiated under *`SARFAESI Act'*. But, this Court really finds it difficult to accept the aforesaid contention put forth on behalf of the petitioners, in view of the specific provisions laid down in the Act, as have been referred above as well as various pronouncements made by the Hon'ble Apex Court with regard to jurisdiction of the Writ Court while dealing with the matter pertaining to the *`SARFAESI Act'*.

18. Close scrutiny of *`SARFAESI Act'* clearly suggests that it provides complete mechanism to deal with the recovery of debts due to banks and financial institutions.

19. Apart from the above, we may also notice that not only does the *`SARFAESI Act'*, provides a complete mechanism for the aggrieved party, but the same even has over-riding effect over many other laws as held by the Hon'ble Supreme Court in its recent decision in ***M/s Madras Petrochem Ltd. and another*** vs. ***BIRF and others AIR 2016 SC 898***.

20**.** It cannot also be disputed that it was only on account of the poor working of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 that the *`SARFAESI Act'* was brought into force in the year 2002 and this has been duly noticed by the Hon'ble Supreme Court in ***M/s Madras Petrochem Ltd***. (supra) wherein it was held as under:

> *".**18.** Regard being had to the poor working of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was brought into force in the year 2002. The statement of objects and reasons for this Act reads as under:-*
>
> *"STATEMENT OF OBJECTS AND REASONS OF THE SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002*
>
> *The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of nonperforming assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisition*

and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce nonperforming assets by adopting measures for recovery or reconstruction.

2. It is now proposed to replace the Ordinance by a Bill, which, inter alia, contains provisions of the Ordinance to provide for—

(a) registration and regulation of securitisation companies or reconstruction companies by the Reserve Bank of India;

(b) facilitating securitisation of financial assets of banks and financial institutions with or without the benefit of underlying securities;

(c) facilitating easy transferability of financial assets by the securitisation company or reconstruction company to acquire financial assets of banks and financial institutions by issue of debentures or bonds or any other security in the nature of a debenture;

(d) empowering securitisation companies' or reconstruction companies to raise funds by issue of security receipts to qualified institutional buyers;

(e) facilitating reconstruction of financial assets acquired by exercising powers of enforcement of securities or change of management or other powers which are proposed to be conferred on the banks and financial institutions;

(f) declaration of any securitisation company or reconstruction company registered with the Reserve Bank of India as a public financial institution for the purpose of section 4A of the Companies Act, 1956;

(g) defining 'security interest' as any type of security including mortgage and change on immovable properties given for due repayment of any financial assistance given by any bank or financial institution;

(h) empowering banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e. classification of the borrower's account as non-performing asset in accordance with the directions given or under guidelines issued by the Reserve Bank of India from time to time;

(i) the rights of a secured creditor to be exercised by one or more of its officers authorised in this behalf in accordance with the rules made by the Central Government;

(j) an appeal against the action of any bank or financial institution to the concerned Debts Recovery Tribunal and a second appeal to the Appellate Debts Recovery Tribunal;

(k) setting up or causing to be set up a Central Registry by the Central Government for the purpose of registration of transactions relating to securitisation, asset reconstruction and creation of security interest;

(l) application of the proposed legislation initially to banks and financial institutions and empowerment of the Central Government to extend the application of the proposed legislation to non-banking financial companies and other entities;

(m) non-application of the proposed legislation to security interests in agricultural lands, loans not exceeding rupees one lakh and cases where eighty per cent, of the loans are repaid by the borrower.

3. The Bill seeks to achieve the above objects."

19. *This Act was brought into force as a result of two committee reports which opined that recovery of debts due to banks and financial institutions was not moving as speedily as expected, and that, therefore, certain other measures would have to be put in place in order that these banks and financial institutions would better be able to recover debts owing to them.*

20. *In a challenge made to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in Mardia Chemicals Ltd. Etc. v. Union of India (UOI) and Ors. Etc. Etc., (2004) 4 SCC 311, this Court went into the circumstances under which the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was enacted, as follows:-*

> *"Some facts which need to be taken note of are that the banks and the financial institutions have heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects. Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the Governments in creating Debts Recovery Tribunals and appointing presiding officers, for a long time. Even after leaving that margin, it is to be noted that things in the spheres concerned are desired to move faster. In the present-day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards securitisation of the debts and to evolve means for faster recovery of NPAs was not called for or that it was superimposition of undesired law since one legislation was already operating in the field, namely, the Recovery of Debts Due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and the Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another Expert Committee was constituted, then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and growth-oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved.*

In its Second Report, the Narasimham Committee observed that NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report the Narasimham Committee deals about legal and legislative framework and observed:

> *"8.1. A legal framework that clearly defines the rights and liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. As a result, the economy has not been able to reap the full benefits of*

the reforms process. As an illustration, we could look at the scheme of mortgage in the Transfer of Property Act, which is critical to the work of financial intermediaries....”

One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the assets without intervention of the court and for reconstruction of assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amounts of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the Report of the Narasimham Committee, yet another Committee was constituted headed by Mr. Andhyarujina for bringing about the needed steps within the legal framework. We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances and the financial climate world over, if it was thought as a matter of policy to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor is it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy.

We may now consider the main enforcing provision which is pivotal to the whole controversy, namely, Section 13 in Chapter III of the Act. It provides that a secured creditor may enforce any security interest without intervention of the court or tribunal irrespective of Section 69 or Section 69-A of the Transfer of Property Act where according to sub-section (2) of Section 13, the borrower is a defaulter in repayment of the secured debt or any instalment of repayment and further the debt standing against him has been classified as a non-performing asset by the secured creditor. Sub- section (2) of Section 13 further provides that before taking any steps in the direction of realizing the dues, the secured creditor must serve a notice in writing to the borrower requiring him to discharge the liabilities within a period of 60 days failing which the secured creditor would be entitled to take any of the measures as provided in sub-section (4) of Section 13. It may also be noted that as per sub-section (3) of Section 13 a notice given to the borrower must contain the details of the amounts payable and the secured assets against which the secured creditor proposes to proceed in the event of non-compliance with the notice given under sub-section (2) of Section 13.” [at para 34,36 and 38]

21. *The “pivotal” provision namely Section 13 of the said Act makes it clear that banks and financial institutions would now no longer have to wait for a Tribunal judgment under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 to be able to recover debts owing to them. They could, by following the procedure laid down in Section 13, take direct action against the debtors by taking possession of secured assets and selling them; they could also take over the management of the business of the borrower. They could also appoint any person to manage the secured assets possession of which has been taken over by them, and could require, at any time by notice in writing to any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due from the borrower, to pay the secured creditor so much of the money as is sufficient to pay the secured debt.*

> ***22.*** *In order to further the objects of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Act contains a non obstante clause in Section 35 and also contains various Acts in Section 37 which are to be in addition to and not in derogation of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Three of these Acts, namely, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992, relate to securities generally, whereas the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 relates to recovery of debts due to banks and financial institutions. Significantly, under Section 41 of this Act, three Acts are, by the schedule to this Act, amended. We are concerned with the third of such Acts, namely, the Sick Industrial Companies (Special Provisions) Act, 1985, in Section 15(1) of which two provisos have been added. It is the correct interpretation of the second of these provisos on which the fate of these appeals ultimately hangs.".*

21. At this stage, it would be profitable to refer to the judgment passed by the Division Bench of this Court in ***CWP No. 2783 of 2015-I, titled SPS Steels Rolling Mills Ltd.*** vs. ***State of Himachal Pradesh and others, decided on 25th June, 2015,*** wherein it was held as under:

> *"5. It appears that action has been drawn against the writ petitioner in terms of Section 13 (4) of The Securitisation and Reconstruction of Financial Assets and Enforcements of Security Interest Act, 2002 (for short "SARFAESI Act"). SARFAESI Act is a self-contained mechanism and the aggrieved party has to invoke the remedies provided by the SARFAESI Act. The writ petitioner has remedy of appeal as per the mandate of Section 17 of the SARFAESI Act. It is apt to reproduce relevant portion of Section 17 of the SARFAESI Act herein:*
>
> > *"**17. Right to appeal.** - (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:*
> >
> > *Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.*
> >
> > *Explanation. - For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17........................."*
>
> *6. The Apex Court in a series of judgments in the cases titled as United Bank of India versus Satyawati Tondon and others, reported in (2010) 8 Supreme Court Cases 110; Union Bank of India and another versus Panchanan Subudhi,reported in (2010) 15 Supreme Court Cases 552; Indian Bank versus M/s. Blue Jaggers Estate Ltd. & Ors., reported in 2010 AIR SCW 4751; Kanaiyalal Lalchand Sachdev and others versus State of Maharashtra and others, reported in (2011) 2 Supreme Court Cases 782; Standard Chartered Bank versus V. Noble Kumar and others with Senior Manager, State Bank of India and another versus R. Shiva Subramaniyan and another, reported in (2013) 9 Supreme Court Cases 620; J. Rajiv Subramaniyan and another versus Pandiyas and others, reported in (2014) 5 Supreme Court Cases 651; and Keshavlal Khemchand and sons Private Limited and others versus Union of India and others, reported in (2015) 4 Supreme Court*

Cases 770, has discussed the issue and held that the writ petition is not maintainable.

7. This Court in CWP No. 4779 of 2014,titled as M/s Indian Technomac Company Ltd. versus State of H.P. & ors.,decided on 04.08.2014, held that when an alternate remedy is available, writ petition is not maintainable. The said judgment of this Court has been upheld by the Apex Court on 22.08.2014 in SLP (C) No. 22626-22641 of 2014.

8. The Apex Court in a latest judgment in the case titled as Union of India and others versus Major General Shri Kant Sharma and another, reported in 2015 AIR SCW 2497, held that when an alternate efficacious remedy is available to the writ petitioner, he should not be allowed to give a slip to law.

9. The Apex Court in the case titled as Sadashiv Prasad Singh versus Harender Singh and others, reported in (2015) 5 Supreme Court Cases 574, held that the writ petition is not maintainable when a remedy of appeal is available to the writ petitioner. It is apt to reproduce para 23.3 of the judgment herein:

> *"23.3. Thirdly, a remedy of appeal was available to Harender Singh in respect of the order of the Recovery Officer assailed by him before the High Court under Section 30, which is being extracted herein to assail the order dated 5-5-2008:*
>
> > *" **30. Appeal against the order of Recovery Officer.** - (1) Notwithstanding anything contained in Section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.*
> >
> > *(2) On receipt on an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under Sections 25 to 28 (both inclusive)."*
> >
> > *The High Court ought not to have interfered with in the matter agitated by Harender Singh in exercise of its writ jurisdiction. In fact, the learned Single Judge rightfully dismissed the writ petition filed by Harender Singh."*

10. Learned counsel for the writ petitioner has placed reliance on the judgment rendered by the Apex Court in a case titled as KSL and Industries Limited versus Arihant Threads Limited and others, reported in (2015) 1 Supreme Court Cases 166, is not applicable in the facts and circumstances of this case.

11. Having said so, the writ petition is not maintainable."

22. In the case of ***Punjab National Bank*** vs***. O.C. Krishnan and others (2001) 6 SCC 569***, the Hon'ble Supreme Court held that where there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the constitutional scheme. This would be evident from the observations contained in paras 5 and 6 of the judgment which read thus:

> "5.*In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the Act"). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We Jo not propose to go into the correctness of the decision of the High Court an I whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.*

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this last track procedure cannot be allowed to be derailed either b> taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

23. In ***United Bank of India*** vs. ***Satyawati Tondon and others (2010) 8 SCC 110,*** after referring to various precedents on the subject, the Hon'ble Supreme Court held that Section 13 of the *`SARFAESI Act'* contains detailed mechanism for enforcement of security interest as would be evident from the following observations:

"12. Section 13 of the SARFAESI Act contains detailed mechanism for enforcement of security interest. Sub-section (1) thereof lays down that notwithstanding anything contained in Sections 69 or 69-A of the Transfer of Property Act, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. Sub-section (2) of Section 13 enumerates first of many steps needed to be taken by the secured creditor for enforcement of security interest. This sub-section provides that if a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non- performing asset, then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice with an indication that if he fails to do so, the secured creditor shall be entitled to exercise all or any of its rights in terms of Section 13(4).

13. Sub-section (3) of Section 13 lays down that notice issued under Section 13(2) shall contain details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank or financial institution. Sub-section (3-A) of Section 13 lays down that the borrower may make a representation in response to the notice issued under Section 13(2) and challenge the classification of his account as non-performing asset as also the quantum of amount specified in the notice. If the bank or financial institution comes to the conclusion that the representation/objection of the borrower is not acceptable, then reasons for non- acceptance are required to be communicated within one week.

14. Sub-section (4) of Section 13 specifies various modes which can be adopted by the secured creditor for recovery of secured debt. The secured creditor can take possession of the secured assets of the borrower and transfer the same by way of lease, assignment or sale for realising the secured assets. This is subject to the condition that the right to transfer by way of lease, etc. shall be exercised only where substantial part of the business of the borrower is held as secured debt. If the management of whole or part of the business is severable, then the secured creditor can take over management only of such business of the borrower which is relatable to security. The secured creditor can appoint any person to manage the secured asset, the possession of which has been taken over. The secured creditor can also, by notice in writing, call upon a person who has acquired any of the secured assets from the borrower to pay the money, which may be sufficient to discharge the liability of the borrower.

15. Sub-section (7) of Section 13 lays down that where any action has been taken against a borrower under sub-section (4), all costs, charges and expenses properly incurred by the secured creditor or any expenses incidental thereto can be recovered from the borrower. The money which is received by the secured creditor is required to be held by him in trust and applied, in the first instance, for such costs, charges and expenses and then in discharge of dues of the secured creditor. Residue of the money is payable to the person entitled thereto according to his rights and interest. Sub-section (8) of Section 13 imposes a restriction on the sale or transfer of the secured asset if the amount due to the secured creditor together with costs, charges and expenses incurred by him are tendered at any time before the time fixed for such sale or transfer.

16. Sub-section (9) of Section 13 deals with the situation in which more than one secured creditor has stakes in the secured assets and lays down that in the case of financing a financial asset by more than one secured creditor or joint financing of a financial asset by secured creditors, no individual secured creditor shall be entitled to exercise any or all of the rights under sub-section (4) unless all of them agree for such a course.

17. There are five unnumbered provisos to Section 13(9) which deal with pari passu charge of the workers of a company in liquidation. The first of these provisos lays down that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956. The second proviso deals with the case of a company being wound up on or after the commencement of this Act. If the secured creditor of such company opts to realise its security instead of relinquishing the same and proving its debt under Section 529(1) of the Companies Act, then it can retain sale proceeds after depositing the workmen's dues with the liquidator in accordance with Section 529-A.

18. The third proviso requires the liquidator to inform the secured creditor about the dues payable to the workmen in terms of Section 529-A. If the amount payable to the workmen is not certain, then the liquidator has to intimate the estimated amount to the secured creditor. The fourth proviso lays down that in case the secured creditor deposits the estimated amount of the workmen's dues, then such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited with the liquidator. In terms of the fifth proviso, the secured creditor is required to give an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

19. Sub-section (10) of Section 13 lays down that where dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application before the Tribunal under Section 17 for recovery of balance amount from the borrower. Sub-section (11) states that without prejudice to the rights conferred on the secured creditor under or by this section, it shall be entitled to proceed against the guarantors or sell the pledged assets without resorting to the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets.

20. Sub-section (12) of Section 13 lays down that rights available to the secured creditor under the Act may be exercised by one or more of its officers authorised in this behalf. Sub-section (13) lays down that after receipt of notice under sub-section (2), the borrower shall not transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice without prior written consent of the secured creditor.

21. In terms of Section 14, the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose

jurisdiction the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor.

22. Section 17 speaks of the remedies available to any person including borrower who may have grievance against the action taken by the secured creditor under sub-section (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that sub-section. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3-A) shall not constitute a ground for filing application under Section 17(1).

23. Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in consonance with sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the secured creditor under sub-section (4) of Section 13 is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt.

24. Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made under Section 17 is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously.

25. Section 18 provides for an appeal to the Appellate Tribunal.

26. Section 34 lays down that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or Appellate Tribunal is empowered to determine. It further lays down that no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken under the SARFAESI Act or the DRT Act. Section 35 of the SARFAESI Act is substantially similar to Section 34(1) of the DRT Act. It declares that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

24. The Hon'ble Apex Court, while rendering aforesaid judgment, deprecated the action of High Courts, while dealing with the matters squarely covered under *SARFFAESI Act* and *DRT Act.* It shall be apt to reproduce the following observations as contained in paragraph 43*:*

"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery

of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."

It clearly emerges from the law laid down in ***United Bank of India's*** case *supra* that the Hon'ble Supreme Court has expressed its displeasure with regard to entertaining of petition(s) by High Courts under *`SARFFAESI Act'* despite there being availability of statutory remedies under the *DRT* and the *`SARFAESI Act'* and passing of orders have serious impact on the rights of the banks and other financial institutions to recover their dues as would be evident from the following observations:

"55. *It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."*

25. Careful perusal of the aforesaid enunciation of the law laid down by the Hon'ble Apex Court from time to time clearly suggests that the writ court has no jurisdiction to deal with the matters which are squarely covered under *`SARFAESI Act'*. The Hon'ble Apex Court, while taking serious note of exercising of jurisdiction by High Courts under Articles 226/227 of the Constitution of India, has repeatedly held that when an effective remedy is available to the aggrieved person, Courts should refrain in entertaining such petitions. Hon'ble Apex Court has also held that in exercise of powers under Article 226 of the Constitution of India, High Courts have serious impact on the rights of banks and other financial institutions to recover their dues and as such directed that they must exercise their discretion in such matter with greater caution, care and circumspection.

26. In view of the above detailed discussion as well as law laid down by the Hon'ble Apex Court, this Court is of the view that present petition is not maintainable and the same is accordingly dismissed. However, the petitioners are at liberty to approach the appropriate forum under *`SARFAESI Act'* for redressal of their grievances.

27. Pending applications, if any, are disposed of. Interim direction, if any, stands vacated.

****

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

Shambhu Ram ....Appellant
Versus
Lakhu and others ....Respondents

RSA No. 494/2006
Decided on : October 25, 2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that he is a co-sharer in the suit land – he had improved the suit land by spending considerable amount- defendants threatened to construct a road through the suit land – hence, the suit was filed – the suit was decreed by the trial Court- an appeal was preferred, which was allowed- held in second appeal

that it was duly proved that suit land was allotted to the plaintiff and was made cultivable by the plaintiff and his brothers- plaintiff is recorded to be the owner in possession of the suit land- no material was brought on record to controvert the revenue entries- no plea was taken that defendants were entitled to use the passage in exercise of easementary and customary rights – the defendants had failed to prove the existence of passage over the suit land- the Appellate Court had wrongly allowed the appeal- appeal dismissed. (Para- 10 to 26)

Cases referred:
Balley v. Rama Shanker Lal, AIR 1975 Allahabad 461
M.A.M. Abdullah v. K.A. Qadus, AIR 1976 Jammu and Kashmir 23

For the appellant : Mr. Raman Jamalta, Advocate.
For the respondents : Mr. Virender Singh, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

Instant Regular Second Appeal has been filed against judgment and decree dated 24.8.2006, passed by the learned Additional District Judge, Fast Track Court, Kangra at Dharamshala, HP in Civil Appeal No. 21-P/04/02, reversing judgment and decree dated 18.1.2002 passed by Sub Judge (II), Palampur in Civil Suit No. 252/1997, whereby suit for permanent prohibitory injunction filed by the present appellant-plaintiff (herein after referred to as 'plaintiff') was decreed.

2. Briefly stated, facts as emerge from the record are that the plaintiff filed a suit for grant of decree of permanent prohibitory injunction under Sections 36 to 39 of the Specific Relief Act, restraining the respondents-defendants (herein after referred to as 'defendants') from taking forcible possession, digging any portion of the land, cutting trees, uprooting the boundary forcibly, or constructing any passage/road on the land, comprising Khata No. 216, Khatauni No. 449, Khasra Nos. 378 and 1295/381 (Kita 2) land measuring 0-25-40 Hects vide Jamabandi for the year 1991-92, situated in Mohal Banuri Khas, Mouja Banuri, Tehsil Palampur, District Kangra, HP, or interfering in the land in any manner, whatsoever. It is further averred in the plaint that plaintiff is cosharer in the suit land and land was allotted to him under the Scheme of allotment to the landless persons by the Government of HP. Plaintiff and his brothers made the suit land cultivable after spending huge amount, thereafter proprietary rights were also conferred upon the plaintiffs as is evident from Jamabandi for the year 1991-92. Plaintiff further claimed that he planted trees of Tunni, Eucalyptus, Poplar, Khirak, Orange etc. way back in the year 1989-90. In para-4 of the plaint, specific averments are made that there is one path, which is also recorded in the revenue record adjoining to the boundary of plaintiff's land and used by villagers. Plaintiff further averred that for the convenience of the general public, the plaintiff has also given one path from his land itself. Defendants threatened to construct forcibly a road through the suit land. Defendants intended to trespass over the suit land and started digging the suit land to construct road, hence, the suit was filed.

3. Defendants filed written statement taking preliminary objections of maintainability, estoppel, cause of action and suit being bad for non-joinder /mis-joiner of necessary parties. Defendants set up a case that suit land was 'Shamlat' prior to allotment to the plaintiff and was being used by the villagers as Charand and old path was there, which was 100 years old. They further submitted in the written statement that path was very old and Kanungo had visited the spot and submitted his report to the Tehsildar for incorporating the path in the revenue record. He placed on record Annexure A. In the aforesaid background, defendants prayed for dismissal of the suit.

4. Replication was filed by the plaintiff reiterating the averments contained in the plaint. Plaintiff specifically denied the contents of written statement. Learned trial Court framed following issues on 10.3.2000.

"1. Whether the plaintiff is entitled for the decree of permanent and prohibitory injunction, as prayed for? OPP
2. Whether the suit of the plaintiff is not maintainable, in the present form? OPD
3. Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD
4. Whether the plaintiff has no cause of action to file the present suit? OPD
5. Whether the suit of the plaintiff is bad for non-joinder/mis-joinder of necessary parties? OPD
6. Relief."

5. The learned trial Court vide judgment and decree dated 18.1.2002, decreed the suit of the plaintiff for permanent prohibitory injunction to the extent that defendants were restrained from interfering or taking over forcible possession, digging the passage/ path in the suit land. Defendants filed appeal against the judgment and decree of the learned trial Court before Additional District Judge, Fast Track Court, Kangra at Dharamshala i.e. Civil Appeal No. 21-P/04/02, which was allowed by the first appellate Court vide judgment and decree dated 24.8.2006, reversing the judgment and decree of the learned trial Court and dismissing the suit of the plaintiff. Hence, the present Regular Second Appeal by the plaintiff.

6. The Regular Second Appeal was admitted on 20.9.2007, on the following substantial questions of law:

"1. Whether the learned Appellate Court has erred in holding that public path exists on suit land in absence of any revenue record to this effect on record.
2. That whether defendants have any right of path over suit land in view of the fact that they failed to establish any such right on record."

7. Mr. Raman Jamalta, Advocate vehemently argued that the judgment passed by the first appellate Court is not sustainable in the eyes of law since it is not based on correct appreciation of evidence, as such same deserves to be set aside. Mr. Jamalta further contended that bare perusal of judgment passed by first appellate Court clearly suggests that it miserably failed to appreciate the evidence in its right perspective and first appellate Court while allowing appeal of the defendants, completely ignored overwhelming evidence available on record, suggestive of the fact that no path exists over the suit land. With a view to substantiate aforesaid argument, Mr. Jamalta made this Court to travel through the judgment passed by first appellate Court as well as evidence led on record by the defendants to demonstrate that all the material witnesses of the defendants including defendants admitted the factum that no path existed over the suit land, rather same is adjoining to the land of the plaintiff. Mr. Jamalta further contended that learned Court below has erred in coming to the concluding that the plaintiff made admission about existence of path on the suit land, qua which suit had been filed. In this regard, he specifically invited attention of the Court to para-4 of the plaint and stated that there is no admission on the part of the plaintiff with regard to existence of path over the suit land. He contended that bare perusal of para-4 of the plaint suggests that plaintiff in no uncertain terms stated that there is one path, which is also recorded in the revenue record, adjoining to the boundary of the plaintiff's land and is used by villagers and passers-by. He also stated that the first appellate Court while reversing judgment passed by learned trial Court, which was admittedly based on proper appreciation of evidence, wrongly arrived at the conclusion that public path exists over the suit land. He strenuously argued while referring to the evidence adduced on record by the plaintiff specifically in the shape of Ext. P-1, that it is admitted fact that adjoining to the suit land, there is a public path and there is no path over the suit land. As per Mr. Jamalta, aforesaid clear cut evidence placed on record by the plaintiff has been completely

ignored by the first appellate Court while reversing the judgment of the trial Court. While concluding his arguments, Mr. Jamalta further contended that no evidence worth the name has been led on record by the defendants suggestive of the fact that the path, if any, over the suit land was used by the defendants as well as other villagers since the time of their fore-fathers. Moreover, there are no pleadings with regard to customary and easementary rights in the written statement and as such judgment passed by first appellate Court deserves to be set aside, and suit of the plaintiff deserves to be decreed.

8. Mr. Virender Singh, counsel appearing for the defendants, supported the judgment and decree passed by first appellate Court. He argued that bare perusal of judgment passed by first appellate Court clearly suggests that first appellate Court below has dealt with each and every aspect of the matter meticulously and rightly set aside the judgment and decree passed by trial Court, since it was not based on correct appreciation of evidence on record adduced by respective parties. Mr. Virender, while referring to para-4 of the plaint forcibly contended that there is clear cut admission on the part of the plaintiff that path exists over the suit land and as such there is no illegality and infirmity in the findings recorded by the first appellate Court to this effect. Mr. Virender while referring to the statements made by the plaintiff's witnesses, forcibly contended that there is no evidence worth the name on record led by plaintiff from where it could be inferred that no path passes over the suit land, rather there is clear cut admission made by the plaintiff's witnesses with regard to factum of existence of path over the suit land. While concluding his arguments, Mr. Virender strenuously argued that bare perusal of judgment of trial Court, nowhere suggests that most important and crucial fact of the usage of path over the suit land from time immemorial as pleaded by the defendants and duly proved by leading cogent evidence was considered by trial Court and as such judgment and decree passed by trial Court was rightly set aside by first appellate Court in the appeal. He prayed for dismissal of the appeal.

9. I have heard the learned Counsel for the parties and gone through the record very carefully.

10. This Court, solely with a view to ascertain the genuineness and correctness of the submissions of plaintiff as well as to explore answer to substantial questions of law as reproduced herein above, critically analyzed the entire evidence available on record. It clearly emerged from the record and not disputed by the defendants that suit land was allotted to the plaintiff under Scheme of allotment to landless persons by the Government of HP, which was further made cultivable by the plaintiff and his brothers. Similarly, perusal of Ext. P-1, certified copy of Jamabandi for the year 1991-92, clearly suggests that plaintiff is owner of the suit land since proprietary rights were conferred on him after allotment of land under the Scheme. This Court, while sifting entire evidence, was not able to lay its hands on any documentary evidence led on record by the defendants to controvert revenue entry recorded in favour of the plaintiff i.e. Ext. P-1, wherein plaintiff has been recorded as owner. There is no mention with regard to existence of path over the suit land in Jamabandi, Ext. P-1.

11. PW-1 Shambhu Ram, while deposing before trial Court categorically stated that the land in dispute belonged to him as well as to his brother. He categorically stated that the land bearing Khata No. 216, Khasra Nos. 378 and 1295/381 measuring 6 ½ Kanal is owned by him. He further stated that on 30.9.1997, defendants interfered in the suit land and threatened to construct road over the same. He also stated that defendants forcibly trespassed over his land and cut fruit bearing trees and extended threats, as such, he filed the suit. He specifically stated in examination-in-chief that there is no path passing through the suit land, rather 3 metre wide passage passes through side of his land. In cross-examination, he fairly admitted that earlier suit land was 'Shamlat' and was being used by other villagers. He also admitted that prior to allotment of land to him, same was being used by persons but self stated that after allotment, path was shifted to the side of suit land. He also admitted that as of today, that road is not being used.

12. PW-2 Nandu Lal and PW-3 Saina Devi may not be of any help to the plaintiff. PW-4 Nandu Ram, specifically stated that he has no knowledge whether there is any passage adjoining to the land of the plaintiff.

13. PW-5 Om Parkash stated that defendants claimed passage over the suit land. It has also come in cross-examination that it is correct that there is path on the spot but same is not in revenue record. In his cross-examination, he also admitted that it is not a common passage.

14. If the statements adduced on record by the plaintiff are read in conjunction with Ext. P-1, Jamabandi for the year 1991-92, it is duly proved on record that there is no entry in the revenue record with regard to alleged passage over the suit land, rather careful perusal of aforesaid ocular as well as documentary evidence led on record by the plaintiff, clearly suggests that plaintiff is owner of the land and there exists no path over the suit land. Close scrutiny of cross-examination conducted upon plaintiff Shambhu Ram, compels this Court to draw inference that defendants admitted the claim of the plaintiff that there exists a public path adjoining the suit land but the same is not being used. If the suggestion put forth by the defendants to aforesaid witness is examined critically, it clearly emerges that defendants admitted the factum of existence of alternative path adjacent to the suit land, as has been categorically stated by the plaintiff in his plaint as well as deposition before the Court. Cross-examination conducted on this plaintiff witness, nowhere suggests that defendants at any point of time, were able to extract anything contrary to what he stated in his examination-in-chief. Since factum with regard to ownership as well as non-recording of path in the revenue record stands duly proved, this Court also perused evidence led on record by the defendants to ascertain whether passage over the suit land was being used by the defendants as well as other villagers before allotment to the plaintiff under the Scheme referred to herein above.

15. Defendant Puran Chand stated that path is situated over the suit land and same was being used by the villagers. He further stated that the plaintiff wanted to close the passage situated over the suit land. However, in cross-examination, he admitted that passage is situated adjacent to the suit land. In cross-examination, though he denied that no path is situated over the suit land but the fact remains that in his cross-examination, he admitted that passage is situated adjacent to the suit land, which corroborates the version of the plaintiff as stated in his plaint as well as statement before the Court.

16. Similarly, DW-2 Shubh Karan also admitted the factum of existence of alternative path adjacent to the suit land.

17. DW-3 Gorkhu Ram also admitted existence of path adjacent to the suit land.

18. Aforesaid witnesses have categorically stated that said path was never closed by the plaintiff Shambhu Ram. Close scrutiny of aforesaid defendants' witnesses though suggests that prior to allotment in favour of the plaintiff, some portion of aforesaid land was being used as path over the suit land but if their statements are read in entirety, it clearly proves the case of the plaintiff who, in no uncertain terms, stated that there is one path, which is also recorded in revenue record, on the boundary of the suit land and was being used by the villagers and passers-by. Aforesaid defendants' witnesses admitted in clear terms that there is path adjacent to the suit land and same has been never closed by the plaintiff. Perusal of judgment passed by the first appellate Court clearly suggests that while accepting the appeal of the defendants, it heavily relied upon para-4 of the plaint, which is reproduced herein below:

> "4. That there is one path which is also recorded in the revenue record adjoining the boundry of the plaintiff's land and is used by the Villagers and passers by. Moreover, for the convenience of the General Public, the Plaintiff has also given one path from his land itself."

19. First appellate Court, after reading aforesaid averments contained in para-4 of the plaint, came to the conclusion that there is clear cut admission on the part of the plaintiff

that there is one path which is recorded in revenue record, adjoining to the boundary of the plaintiff's land and is being used by the villagers. First appellate Court also took into consideration that plaintiff himself admitted that he has given one path through his land itself. This Court, after perusing averments contained in para-4 of the plaint, has no hesitation to conclude that first appellate Court misread and mis-interpreted averments contained in the plaint and wrongly came to the conclusion that there is clear cut admission on the part of the plaintiff with regard to existence of passage over the suit land, rather perusal of aforesaid para clearly suggests that plaintiff in no uncertain terms stated that there is one another path recorded in the revenue record adjoining to boundary of the plaintiff's land, which is used by villagers and passers-by. If aforesaid averments contained in para-4 of the plaint are read juxtaposing the statement of PW-1 Shambhu Ram, made before the Court, it clearly corroborates his version, wherein he stated that there exists one passage adjacent to the land and as such this Court is unable to accept the reasoning assigned by the Court below while setting aside the judgment of trial Court, which appears to be based on correct appreciation of evidence adduced on record.

20. Similarly, this Court, after perusing written statement filed by defendants, specifically to para-4 of the plaint is unable to accept that path existing over the suit land was being used by the villagers from time immemorial because no evidence worth the name has been led on record suggestive of the fact that passage over the suit land was being used by their forefathers and as such they have a right over the same. Similarly, this Court sees no pleading on record by the defendants suggesting that the defendants have customary and easementary rights over the suit land and as such findings returned by the first appellate Court to the effect that there existed path over the suit land, and defendants are entitled to enjoy same, deserve to be set aside being erroneous and foreign to the record. This Court, after perusing averments contained in the plaint, as well as statement of PW-1 Shambhu Ram, has all the reasons to believe the version of the plaintiff that prior to allotment of land to him, villagers used to pass through same but now there exists path adjacent to his land. Defendants have acknowledged the existence of alternative path as stated by DW-2. DW-3 has stated that the plaintiff has never stopped that passage. Moreover, perusal of Ext. P-1 as has been discussed herein above clearly suggests that there is no entry in revenue record with regard to existence of path over the suit land and as such this Court sees no merit in the finding recorded by the first appellate Court. While accepting the appeal of the defendants, first appellate Court wrongly interpreted the contents of para-4 of the plaint, which otherwise suggests that there exists alternative path adjacent to the suit land.

21. Hence, this Court has no hesitation to conclude that the first appellate Court erred in concluding that public path existed on the suit land because there is no entry in the revenue record to this effect. Similarly, as has been discussed above, defendants have not been able to prove on record by leading cogent evidence that they have right over path allegedly existing over suit land. Since there is no revenue record suggestive of the fact that there existed path over the suit land, onus was high upon the defendants to prove that they have/ had customary and easementary right over the said path allegedly existing over the suit land. At the cost of repetition, it may be stated that there are no pleadings as well oral evidence adduced on record by the defendants suggestive of the fact that being villagers, they had customary and easementary rights to use path in question. Simple assertion from the defendants that they have been using the land for more than 100 years, may not be sufficient to conclude that defendants have some right to use the path.

22. In written statement to para-4 of the plaint, defendants have stated as under:

> "4. In reply to Para 4 of the Plaint: - It is not admitted hence denied. The path which is described in the plaint is an old path about 100 years old which is being used by about 100 families of Zamidars of the village-Banuri, Teh-Palampur for long time and is used by the persons of the village and this is the only path for the Zamindars. The path is not occupied even by the plaintiff. There is no other way to cross the village. This path is also being used by the villagers for taking water from the Handpump installed by the I &P.H Department. The path is very old and

> Kanungo has visited the spot and has submitted his report to the Tehsildar for incorporating the path in the revenue record. Copy of Report is attached as Annexure'-'A'."

23. At the best, keeping in view the averments contained in the plaint and statement made by the plaintiff while deposing before the Court, use of path over the suit land, if any, can be termed as 'permissive, and by no stretch of imagination, defendants can claim it as a matter of right.

24. In **Balley v. Rama Shanker Lal** reported in AIR 1975 Allahabad 461, the learned Single Judge of Allahabad High Court has held as under:

> "5. The main question that falls for determination in this appeal is whether the plaintiff can be said to have acquired a prescriptive right of way under Section 15 of the Easements Act on the 'Danda' running over the ridge 'between the two fields Nos. 30 and 31. Learned counsel for the plaintiff-respondent contended that the learned Judge of the lower appellate Court rightly applied the law in holding that the plaintiff having proved that he has been passing over the disputed passage for over 25 years after purchasing plots Nos. 9 and 10 for enjoyment thereof without any let or hindrance, it would be presumed that he did it as of right Reliance was placed in this connection on the cases of Hari v. Mahadeo (AIR 1921 Nag 127), Phoolchand v. Murari Lal (AIR 1951 Madh Bha 89) and Tukaram Rajaram Suple v. Sonba Chindu Mali (AIR 1959 Bom 63). In my judgment, the learned Judge of the court below seems to 'be of the view that once a person establishes his passing over a piece of land for more than 20 years without any evidence of interruption or hindrance, then he would be deemed to be so doing as of right and he would acquire a prescriptive right of way under Sec. 15 of the Easements Act Even the cases cited by the learned counsel for the plaintiff-respondent do not lay down any such rule of law. It would be seen that in all those cases on the facts and circumstances it was either found that the user was as of right or the user was not as of right but was by way of leave or licence. Here in the instant case the plaintiff came with a case that there was passage one Lattha wide on which bullock carts and Ikkas could pass and he had been using it for over 25 years as of right for access from the main road to his Gher in plots Nos. 9 and 10. This affirmative case pleaded by him has not been found to be established. What has been found established is that on the ridge between the boundaries of the two cultivated fields there was a passage 1 to 2 feet wide which could be used as an access from the public road to the agricultural plots in the village lying to the south of that public road. It is the common feature in our agricultural villages that on the Mend 'boundary between two cultivated agricultural fields public generally pass and hardly by habit any agriculturist objects to it. I have no hesitation in holding that such passing over the ridges of the field to and fro by the villagers would always the permissive user. Thus an uninterrupted user by any person of a ridge between the two agricultural fields for passing over it could be presumed to be permissive and not as of right. Moreover, it would not toe in public interest if this court countenances recognizing acquisition of prescriptive right of way over the boundaries of the agricultural fields as that would lead to complications in the agricultural areas having a baneful effect end completely preventing the re-arrangements of agricultural fields or their divisions. In the circumstances of the instant case in the consolidation proceedings, on the own admission of the plaintiff, Rama Shanker Lal, who appeared in the witness box, he did not ask for a chak road over the disputed land. The view of the court below that such an objection could not have been raised under Section 9 or 20 of the Consolidation of Holdings Act may be a correct view tout there was nothing to (prevent the plaintiff when the chaks were toeing carved to ask the Consolidation to leave a passage. The attempt of the plaintiff that the consolidation had put stone pillars

demarcating the passage has miserably failed as there is a finding recorded that no such stone pillars were found at the spot which were put as demarcation by the Consolidator. I, therefore, hold that the lower appellate Court has misdirected itself in holding that as of right the plaintiff had 'been using the 'Danda' for access to the plots 9 and 10 from the public road. It would be 'presumed that the user was permissive. The plaintiff could not succeed therefore merely on the evidence as adduced by him that any prescriptive right of way has accrued to him under Section 15 of the Easements Act."

25. In **M.A.M. Abdullah v. K.A. Qadus** reported in AIR 1976 Jammu and Kashmir 23, the learned Single Judge of the Jammu and Kashmir High Court has held as under:-

"13. Now the evidence of the plaintiffs, a resume of which has been given above, does not establish the case of the plaintiffs that they have been using this pathway as of right and also openly. It can be well gleaned from the evidence on record that the pathway the plaintiffs have been using was on mere permissive lines which did not create any vested right in the plaintiffs to claim a right of easement. There is, also the report of the various revenue officers on the record especially the report of the Naib Tehsildar who went on spot and found that no pathway, as claimed by the plaintiffs, existed. It is also found that there are no entries in the revenue records suggesting that a right of path-way existed on Survey No. 976-min. Had this been so, then there ought to have been some entries in "WAJIB UL ARAZ" or in some other revenue record. It is also no correct that the spring is located in the joint land of the parties as given out by some of the witnesses of the plaintiffs. That indeed runs counter to the very case set up by the plaintiffs. "

26. Substantial questions of law are answered accordingly.

27. Consequently, in view of the aforesaid discussion, present appeal is allowed. Judgment and decree dated 24.8.2006 passed by the learned Additional District Judge, Fast Track Court, Kangra at Dharamshala, HP in Civil Appeal No. 21-P/04/02 is set aside. Judgment and decree dated 18.1.2002 passed by Sub Judge 1st Class Court No. 2, Palampur in Civil Suit No. 252/97 is restored, whereby suit of the plaintiff was decreed. Pending applications are disposed of. Interim directions, if any, are vacated.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Manju @ Maju ……Petitioner
Versus
State of H.P. ……Respondent

Criminal Revision No.204 of 2016
Decided on : 26.9.2016

Indian Penal Code, 1860- Section 457 and 380- Petitioner was convicted and sentenced by the trial Court- an application was filed for taking a lenient view in sentencing the petitioner – sentence was reduced by Learned Additional Sessions Judge- held, that Additional Sessions Judge duly considered mitigating circumstances and had reduced the sentence- no ground for further reduction is made out- benefit of Probation of Offenders Act cannot be granted as the same is not applicable, in view of the fact that maximum sentence is more than seven years- revision dismissed. (Para- 3 to 5)

For the petitioner : Mr. Umesh Kanwar, Advocate.
For the State : Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge *(Oral)*

Petitioner has assailed judgment dated 2.9.2015 passed by Additional Sessions Judge-I, Kangra at Dharamshala, District Kangra in Jail Appeal No. 1-D/X/2014 affirming conviction but reducing sentence imposed upon petitioner by learned Judicial Magistrate Ist Class, Court No. II, Nurpur vide judgment dated 10th December 2013 in Cr. Case No. 14-II/2013.

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

3. Petitioner was convicted by trial Court under Sections 457 (Part-II) and 380 of IPC and was sentenced to undergo rigorous imprisonment for three years each and also to pay fine of Rs. 10,000/- each for both offences. Petitioner was further sentenced to undergo simple imprisonment for six months for each default in case of payment of fine imposed upon him.

4. During pendency of appeal before Addl. Sessions Judge petitioner had moved an application through counsel accepting her conviction with request for taking lenient view in sentencing her. It was submitted on her behalf that her application be treated as mercy application/ petition for taking lenient view in deciding appeal.

5. Learned Addl. Sessions Judge, had considered the application and keeping in view circumstances of the case had reduced sentence from three years each to two years each under Sections 457 (Part-II) and 380 of IPC. Fine was also reduced to its half i.e. from Rs. 10,000/- each to Rs. 5,000/- each for both offences. Sentence of further imprisonment for default in payment of fine was also reduced from six months to three months for each default.

6. Learned counsel for petitioner admitted that as a consequence of acceptance of guilt and conviction it is not open for petitioner to assail her conviction in this revision petition, however, he submitted that in revisional jurisdiction this Court has power to assess correctness and reduce quantam of sentence. Learned counsel for petitioner submitted that courts below have failed to consider case of petitioner for granting benefit of Section 4 of Probation of Offender Act 1958.

7. Imprisonment for the offence under Section 457 (Part-II) IPC can be extended for 14 years and for offence under Section 380 IPC sentence can be extended up to 7 years. Trial Court had sentenced petitioner to undergo rigorous imprisonment for three years each under Sections 457 (Part-II) and 380 IPC with fine of Rs. 10,000/- each for these offences. Learned Addl. Sessions Judge has duly considered mitigating circumstances and has reduced sentence from three years each to two years each and not only period of imprisonment, but the fine amount as well as period of imprisonment for default in making payment of fine has also been reduced. No ground for further reduction is made out in present petition either in period of imprisonment or fine.

8. Plea of counsel for petitioner for extending benefit of Section 4 of Probation of Offenders Act is also not tenable as provisions of this section are not applicable in present case as maximum sentence for offences in question in present case is more than 7 years.

9. After considering submissions of learned counsel for petitioner and scrutinizing record, I find that there is no material irregularity, illegality, perversity or any other infirmity in the impugned judgment warranting interference of this Court.

10. In view of above discussion, petition is dismissed being devoid of merit. Record of Courts below be sent back with copy of judgment.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Satnam @ Titu ……Petitioner
Versus
State of H.P. ……Respondent

Criminal Revision No. 205 of 2016
Decided on :26.9.2016

Indian Penal Code, 1860- Section 457 and 380- Petitioner was convicted and sentenced by the trial Court- an application was filed for taking a lenient view in sentencing the petitioner – sentence was reduced by Learned Additional Sessions Judge- held, that Additional Sessions Judge duly considered mitigating circumstances and had reduced the sentence- no ground for further reduction is made out- benefit of Probation of Offenders Act cannot be granted as the same is not applicable, in view of the fact that maximum sentence is more than seven years- revision dismissed. (Para- 3 to 5)

For the petitioner : Mr. Umesh Kanwar, Advocate.
For the State : Mr. Ramesh Thakur, Deputy Advocate General.

The following order of the Court was delivered:

Vivek Singh Thakur, Judge *(Oral)*

Petitioner has assailed judgment dated 2.9.2015 passed by Additional Sessions Judge-I, Kangra at Dharamshala, District Kangra in Jail Appeal No. 1-D/X/2014 affirming conviction but reducing sentence imposed upon petitioner by learned Judicial Magistrate Ist Class, Court No. II, Nurpur vide judgment dated 10th December 2013 in Cr. Case No. 14-II/2013.

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

3. Petitioner was convicted by trial Court under Sections 457 (Part-II) and 380 of IPC and was sentenced to undergo rigorous imprisonment for three years each and also to pay fine of Rs. 10,000/- each for both offences. Petitioner was further sentenced to undergo simple imprisonment for six months for each default in case of payment of fine imposed upon him.

4. During pendency of appeal before Addl. Sessions Judge petitioner had moved an application through counsel accepting his conviction with request for taking lenient view in sentencing him. It was submitted on his behalf that his application be treated as mercy application/ petition for taking lenient view in deciding appeal.

5. Learned Addl. Sessions Judge, had considered the application and keeping in view circumstances of the case had reduced sentence from three years each to two years each under Sections 457 (Part-II) and 380 of IPC. Fine was also reduced to its half i.e. from Rs. 10,000/- each to Rs. 5,000/- each for both offences. Sentence of further imprisonment for default in payment of fine was also reduced from six months to three months for each default.

6. Learned counsel for petitioner admitted that as a consequence of acceptance of guilt and conviction it is not open for petitioner to assail his conviction in this revision petition, however, he submitted that in revisional jurisdiction this Court has power to assess correctness and reduce quantam of sentence. Learned counsel for petitioner submitted that courts below have failed to consider case of petitioner for granting benefit of Section 4 of Probation of Offender Act 1958.

7. Imprisonment for the offence under Section 457 (Part-II) IPC can be extended for 14 years and for offence under Section 380 IPC sentence can be extended up to 7 years. Trial Court had sentenced petitioner to undergo rigorous imprisonment for three years each under

Sections 457 (Part-II) and 380 IPC with fine of Rs. 10,000/- each for these offences. Learned Addl. Sessions Judge has duly considered mitigating circumstances and has reduced sentence from three years each to two years each and not only period of imprisonment, but the fine amount as well as period of imprisonment for default in making payment of fine has also been reduced. No ground for further reduction is made out in present petition either in period of imprisonment or fine.

8. Plea of counsel for petitioner for extending benefit of Section 4 of Probation of Offenders Act is also not tenable as provisions of this section are not applicable in present case as maximum sentence for offences in question in present case is more than 7 years.

9. After considering submissions of learned counsel for petitioner and scrutinizing record, I find that there is no material irregularity, illegality, perversity or any other infirmity in the impugned judgment warranting interference of this Court.

10. In view of above discussion, petition is dismissed being devoid of merit. Record of Courts below be sent back with copy of judgment.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Girdhari Lal ……Petitioner
Versus
State of H.P. ……Respondent

Criminal Revision No. :14 of 2013
Date of Decision:04.10.2016

Punjab Excise Act, 1914- Section 61(i)(c)- Accused had set up an apparatus for production of illicit liquor- 10 liters illicit liquor and 100 liter drum containing lahan were found – the accused was tried and convicted by the trial Court- an appeal was filed, which was dismissed- held in revision that no independent witnesses were associated by the police party as the recovery was effected during the night time – the conviction can be placed upon the statements of the official witnesses subject to careful and cautious scrutiny of their statements – there are over writings in the daily diary at two places regarding the time , which makes the prosecution version doubtful – recovered illicit liquor was never produced before the Court -considering the fact that prosecution is relying upon the testimonies of official witnesses – the contradictions become significant – revision allowed and accused acquitted of the charge framed against him.(Para-6 to 14)

For the petitioner : Mr. Avinash Jaryal, Advocate.
For the respondent : Mr. Ramesh Thakur and Mr. Pankaj Negi, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral).

Petitioner has assailed his conviction and sentence imposed upon him by trial Court affirmed by learned Sessions Judge in appeal.

2. I have heard learned counsel for parties and have also gone through material placed on record.

3. Prosecution case is that on 5.1.2007 at about 10 PM police party headed by SI Gurdeep Singh consisting of PW-2 HHC Rajender Singh and PW-4 HC Sehdev departed police station after recording DD entry report No. 13 dated 5th January 2007. At about 11.30 PM, on reaching near village Byass, they saw fire light on Dober Khala side. They reached on the spot to inquire the matter and found that respondent had set up apparatus for production of illicit

liquor. Police party recovered 10 Ltrs illicit liquor and 100 Ltr drum containing Lahan. After taking one bottle from drum as sample, remaining Lahan was destroyed. One bottle as sample was also taken from illicit liquor. Entire case property was sealed vide memo Ex. PW-2/A. Rukka Ex. PW-5/A was sent to Police Station through PW-2 Rajender Singh for registration of FIR and in pursuance to same, FIR Ex. PW-2/A was registered. After completion of investigation and obtaining report of Chemical Examiner Ex. PW-5/D, challan was presented in the Court against the accused.

4. After conclusion of trial, petitioner was convicted and sentenced by Judicial Magistrate First Class to undergo simple imprisonment for six months and to pay fine of Rs. 3000/- and in case of default to further undergo simple imprisonment for two months.

5. Appeal filed by the petitioner, assailing his conviction and sentence was dismissed by learned Sessions Judge.

6. In present case, no independent witness was associated by the police party and it was explained satisfactorily that keeping in view mid night time and place of commission of offence, it was not possible to associate independent witness at that time. PW-2, PW-4 and PW-5 are spot official witnesses of recovery. It is well settled law that conviction can be based upon statements of official witnesses only, but subject to careful and cautious scrutiny of their statements and on finding their statements cogent, reliable, trustworthy and confidence inspiring. In the light of this settled Law, veracity of PW-2, PW-4 and PW-5 is to be assessed. Learned counsel for petitioner submits that there are material and major contradictions and discrepancies in statements as well as documents of prosecution evidence which create doubt about the genesis of the story of the prosecution and therefore, impugned judgments are liable to be quashed and conviction and sentence imposed upon petitioner is liable to be set aside.

7. Learned counsel for petitioner submits that there is overwriting in DD entry report No. 13 Ex. PW-1/A with regard to date of report. As in the said document, in all two places, where date has been mentioned, there is over writing which cast doubt on actual time and date of recording/preparation of the said DD report. He alleges that the said DD report is anti dated because it is not a simple overwriting mistake at one place, but there is over writing at all places wherever the said date was to be mentioned and this overwriting was also admitted by PW-1 HHC Rajender Singh. It is further pointed out by counsel for petitioner that rukka was prepared on spot at 1.30 PM and was handed over to PW-2 HHC Rajender Singh for registration of FIR in police station Paonta Sahib whereupon FIR Ext. PW2/A was registered. In FIR time of receiving information in Police Station has been mentioned as 0305 hours and regarding General Diary reference entry No. 45 was also stated to be made at 305 hours indicating that FIR was lodged after 305 hours. He submitted that PW-5 Inspector Gurdeep Singh stated that statement of PW-4 Sahdev reached in Police Station prior to 3.30 a.m. which indicated that before leaving Police Station by PW-2 after registration of FIR, PW-4 and PW-5 had reached there, but PW-4 stated that PW-2 Rajinder Singh met him and PW-5 in Police Post Mazra. This discrepancy is irreconcilable as it was not possible for PW-2 Rajender Singh to leave Police Station with or without case file before registration of FIR which, as per prosecution, was lodged after 0305 hours and as per prosecution evidence case property was deposited in the Malkahana at 03: 30 hours establishing that PW-4 and PW-5 definitely arrived in Police Station before 3.30 a.m. completely ruling out possibility of meeting PW-2 Rajinder Singh, with PW-4 and PW-5 in Police Post Mazra and further in case PW-2 Rajinder Singh actually met them in Police Post Mazra then the timings mentioned in the FIR are manipulated which cast doubt on fair investigation by the police.

8. It is further pointed out by learned counsel for petitioner that in Ex. PW1/A after timing, date mentioned is 5.1.2007 and PW-5 also stated date of leaving Police Station as 5.1.2007. However, PW-2 and PW-4 stated that they left Police Station on 6.1.2007 at 11.30 P.M. and it was not clarified by prosecution nor Public Prosecutor sought any permission to cross-examine either of witness for deviating from prosecution story.

9. Another discrepancy pointed out by learned counsel for petitioner is that as per Ex. PW1/A police party left the Police Post at 10 PM whereas PW-4 stated that they left Police Post at 8-9 O' Clock. PW-4 stated that they reached near Dobber Khala at 9.30 PM, but PW-2 stated that they reached Dobber Khala at 11.30 PM.

10. Learned counsel for petitioner also argued that as per memo Ext. PW2/A recovered illicit liquor was 10 Ltrs whereas PW-2 deposed the said quantity about 18 Ltrs and PW-4 and PW-5 stated that recovered liquor was 9-10 Ltrs. Further, this recovered illicit liquor was never produced in the Court. PW-2 admitted that tin container produced in the Court was empty, there was no chit on the said tin and there was no seal on the said tin produced in the Court. PW-5 also admitted that liquor was not shown to him in the Court and the tin shown to him in the court was empty.

11. In the beginning in impugned judgments date of leaving Police Station by police party has been mentioned as 6.1.2007 whereas in letter part of judgments that has been discussed as 5.1.2007. PW-2 and PW-4 referred the said date as 6.1.2007 whereas in the statement of PW-5 and in Ex. PW1/A, this date has been stated to be as 5.1.2007.

12. Learned Deputy Advocate General submitted that contradictions and discrepancies pointed out by counsel for petitioner have no significance as the recovery of illicit liquor and Lahan on the spot has been duly corroborated in the statements of PW-2, PW-4 and PW-5 and the commission of the offence by petitioner is duly proved on record.

13. In present case, all witnesses are official witnesses who are dealing with criminal cases hearing experience of proceedings in Courts. They are not common men and for that reason discrepancy and contradictions in their statements particularly like present case which are irreconcilable qua the date and time of occurrence gains significance. Non production of recovered illicit liquor also render case of the prosecution doubtful. As per prosecution, iron drum having capacity of 100 ltrs was also seized and brought to police post along with other case property i.e. tin, stones, fire wood and empty earthen pot. Three police officials went on spot, one of them left the spot with Rukka. There were two police officials and one petitioner on the spot. It is unbelievable that all these articles were brought by them during night to the police post by covering distance through forest on foot.

14. Courts below have considered and referred only part of statement of prosecution witnesses whereas statements as a whole were to be considered. The aforesaid contradictions and discrepancies have not been discussed at all. Courts below have ignored the material and major contradictions and irreconcilable discrepancies` referred supra. Therefore, impugned judgments are set aside and conviction and sentence imposed upon petitioner is quashed. Petitioner-accused is acquitted of the charges framed against him and bail bonds, if any, furnished by him are cancelled and fine amount deposited by him, if any, shall be refunded to him. Records of the Courts below be sent back immediately.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

M/s.GH Hydro Power Ventures Pvt.Ltd. …Petitioner
Versus
State of H.P. & Others …Respondents

CWP No.2171 of 2015
Judgment Reserved on: 21.09.2016
Date of decision: 5.10.2016

Constitution of India, 1950- Article 226- Applications for allotment of Hydel Project were invited – petitioner filed an application for allotment – documents were found to be deficient and the case

of the petitioner was rejected – the capacity of the project was enhanced- a request was made to consider the case of the petitioner, which was again rejected – held, that the fact that the documents were not submitted was not disputed – the rejection was also not in dispute – rejection was conveyed in the year 2006, while the writ petition was filed in the year 2015- ample opportunities were given to bring on record the certificate of registration and when the same was not brought on record, the application was rejected – rejection cannot be said to be arbitrary – the Court has limited power to interfere in the contractual matter – it is the domain of the department to prescribe conditions, factors and guidelines – the petitioner has no right to challenge the same, unless these are contrary to basic principles of law- no reason has been brought on record to interfere with the decision- writ petition dismissed.(Para-15 to 31)

Cases referred:

Tata Cellular vs. Union of India, (1994)6 SCC 651
Raj Kumar vs. State of Himachal Pradesh and Others, 2014(2) Him.L.R.(DB) 1217
S.G.Jaisinghani vs. Union of India and Others, AIR 1967 SC 1427
Satwant Singh Sawhney vs. D.Ramarathnam, Assistant Passport Officer, New Delhi and Others, AIR 1967 SC 1836
Namit Gupta vs. State of H.P. and Others, AIR 2014 HP 49
Pritam Singh vs. State of Himachal Pradesh, (2013)1 Him.L.R. 130
Saroj Garg vs. State of H.P. & Ors., AIR 2011 HP 94.
Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Paritosh Bhupeshkumar Sheth and Others and Alpana V.Mehta vs. Maharashtra State Board of Secondary Education and Another, (1984)4 SCC 27
Parisons Agrotech Private Limited and Another vs. Union of India and Others, (2015)9 SCC 657
Census Commissioner and Others vs. R.Krishnamurthy, (2015)2 SCC 796

For the Petitioner:	Mr.Ajay Vaidya, Advocate.
For Respondent No.1:	Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan and Mr.Romesh Verma, Additional Advocate Generals with Mr.J.K. Verma, Deputy Advocate General.
For Respondents No.2 & 3:	Mr.Vijay Arora, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of present writ petition under Article 226/227 of the Constitution of India, the petitioner prayed for following main relief(s):-

"(a) Issue writ in the nature of certiorari quashing and set aside the impugned orders dated 24.02.2015 (Ann P-14) as issued by respondent No.1;

(b) Issue a writ of mandamus or any other suitable writ, order or direction, directing the respondents not to allot the Self Identified Hydel Project Joiner Top Hydel Project 05.00 MW to any other person including any company, firm, AOP, Society etc.

(c) Issue a writ of mandamus or any other suitable writ, order or direction, directing the respondents to allot the Self Identified Hydel Project Joiner Top Hydel Project 05.00 MW to the petitioner in time bound manner."

2. In brief, facts, as emerged from the record, are that respondent No.2, pursuant to Hydro Power Policy of the State of Himachal Pradesh, invited applications for the allotment of Self Identified "Joiner Top" i.e. Hydel Project 05.00 MW situated at District Chamba, Himachal Pradesh in the year 2004. Petitioner herein, pursuant to aforesaid advertisement, made an

application in the name and style of M/s.Kangra Kullu Hydro Power Ventures (P) Ltd. *(for short `KKHPV')* for allotment of Self Identified Joiner Top of 1.5 MW small Hydro Power Project. Though *`KKHPV'* had applied for Kesta Neri (1.50 MW) SHP, under self identified category on 31.12.2004, but, lateron petitioner requested that the aforesaid application be considered against Joiner Top (1.50 MW) SHP instead of Kesta Neri SHP. Further perusal of pleadings available on record suggests that after receipt of aforesaid application, filed on behalf of petitioner for allotment of self identified project, during scrutiny of documents at Government level, it transpired that registration of the Company was not in place at that relevant time. Accordingly, respondent No.2 sent a communication dated 29.3.2006 (Annexure R-2) to *`KKHPV' (Original Applicant)* with reference to its application dated 31.12.2004 for allotment of Joiner Top (1.50 MW) SHP in District Chamba, requesting therein to send certified copy from the concerned Registrar of Companies *(for short `ROC')* regarding latest status of Directors/Promoters and stake-holders of the applicant-Company. But, it appears that applicant-*`KKHPV'* failed to supply documents, as were required vide communication dated 29.3.2006, therefore, the Council of Ministers in its meeting held on 5.6.2006 rejected the application of the petitioner, which was made in the name of *`KKHPV'* and Project in question was approved for advertisement in future. Respondent No.3 vide communication dated 3.10.2006, Annexure R-1, informed the applicant-*`KKHPV'* with regard to rejection of its application dated 31.12.2004 for setting up of Joiner Top (1.50 MW) SHP in District Chamba, H.P. Pleadings available on record, nowhere suggests that the aforesaid decision, taken by the Council of Ministers in its meeting held on 5.6.2006, was ever challenged in appropriate proceedings before appropriate Court of law and as such, the same attained finality. However, perusal of pleadings and documents placed on record by the petitioner, especially Annexure P-3, suggest that present petitioner i.e. M/s.GH Hydro Power Ventures Pvt.Ltd., Ranital, District Kangra, *(for short `GHHPVPL')* had submitted initial application dated 31.12.2004 in the name and style of *`KKHPVPL',* which was admittedly not registered with the *`ROC'* at that relevant time. Thereafter, *`ROC'* vide Registration No.U40101HP2006PTC030557 dated 04.09.2006 approved the name of the Company as *`GHHPVPL'*. Perusal of Annexure P-3 leaves no doubt that before 4.9.2006 neither Company in the name and style of *`GHHPVPL'* nor in the name of *`KKHPVPL'* was in existence and as such respondents rejected the said application dated 31.12.2004.

3. Perusal of Annexures P-4 & P-5 further suggest that even after rejection of its application dated 31.12.2004 by the respondents, the petitioner kept on pursuing the matter with the respondents with regard to allotment of Self Identified Project, as detailed hereinabove, in terms of application dated 31.12.2004, despite there being specific rejection of its application by the Council of Ministers on 5.6.2006.

4. Thereafter, it appears that present petitioner made a representation to Hon'ble the Chief Minister of the State with regard to allotment of Joiner Top (1.50 MW) SHP, which was duly replied by respondent No.2 vide communication dated 27.9.2008, wherein petitioner was informed that capacity of the Project seems to be low and other Project namely; Upper Joiner had been contemplated for capacity of 12 MW, which will be utilizing the discharge available for the project. Respondent specifically informed the petitioner-Company that capacity of Joiner Top may be more than 5MW which needs to be resurveyed/investigated for optimum utilization of potential available.

5. Petitioner vide letter dated 17th October, 2008 (Annexure P-7) again requested respondent No.3 to allot Project i.e. Joiner Top SHP (EL $\pm$ 1960 m to EL $\pm$ 2400 m) of 5 MW capacity. However, the aforesaid request of the petitioner was rejected by respondent No.3 vide communication dated 23.10.2010 (Annexure P-8), wherein he specifically informed the petitioner that initial application dated 31.12.2004, filed in the name and style of *`KKHPVPL'* in Kesta Neri (1.5 MW) SHP, under self identified category by the petitioner, was considered by the Council of Ministers on 5.6.2006 and no action was taken on the request in view of the fact that rejection order was already made.

6. Respondent No.3 vide aforesaid communication specifically informed the present petitioner that application submitted by it was forwarded to the Government of Himachal Pradesh by HIMURJA vide communication dated 3.8.2009, but Government directed that the capacity of the proposed Project may be got confirmed from the Himachal Pradesh State Electricity Board Limited *(for short `HPSEBL').* Accordingly, Chief Engineer (P&M) was requested by HIMURJA on 4.9.2009 for confirmation of capacity and comments. In nutshell, vide aforesaid communication respondent No.3 categorically informed the petitioner that Project is no more in self identified domain and as such representation, if any, made by the petitioner is redundant.

7. But, despite aforesaid rejection order passed by the respondent, present petitioner kept on making correspondence with various authorities as emerged from Annexure P-9. Perusal of Annexure P-11 annexed with the petition suggests that pursuant to request made by respondents No.2 and 3, as was directed by the State of Himachal Pradesh, HPSEBL informed that *"The optimal installed capacity for the Project is 4.86 MW). The intake will be located at E1.2395m. The power house will be located on elevation of 1990m. The Plant load Factor for high season for the project is anticipated to be 0.52, while the Plant load Factor for lean season is expected to be 0.16."*

8. Careful perusal of aforesaid communication dated 29.3.2012 sent by HPSEBL clearly suggests that capacity with regard to Joiner Top SHP in District Chamba was of 4.86 MW, whereas petitioner while making application dated 31.12.2004 had shown its capacity as 1.5 MW. Record further reveals that petitioner herein had filed CWP No.671 of 2015, which came to be decided by learned Single Bench of this Court on 16.1.2015, wherein directions were issued to Principal Secretary, (MMP & Power) to the Government of Himachal Pradesh to decide the representation of the petitioner by passing a speaking order within a period of three weeks from the date of the order. Perusal of order dated 16.1.2015 (Annexure P-13) clearly suggests that the same was passed by this Court at the behest of petitioner, wherein Court was informed that petitioner had already made representation for redressal of its grievance to the Principal Secretary (MMP & Powers) to the Government of Himachal Pradesh on 2.1.2015 (Annexure P-12). However, fact remains that pursuant to aforesaid directions given by the learned Single Bench of this Court in CWP No.671/2015, respondents passed detailed speaking order dated 24.2.2015, whereby representation of the petitioner was rejected being devoid of any merit. Principal Secretary(NES) to the Government of Himachal Pradesh, while rejecting representation filed by the petitioner, pursuant to directions passed by learned Single Bench of this Court, specifically held that original application stood rejected in the year 2006 and subsequent guidelines issued on 12.11.2008 are not applicable in the case of petitioner, though the petitioner was afforded an opportunity of making representation as per guidelines of 12.11.2008. Careful perusal of order dated 24.2.2015 (Annexure P-14) suggests that after rejection of petitioner's application already made on 31.12.2004, Council of Ministers had taken conscious decision on 5.6.2006 to re-advertise the Project and in this regard petitioner was duly informed on 3.10.2006. It also emerges from the aforesaid order that Project in question was re-advertised on 5.2.2007 alongwith other Projects qua which two applications were received, but admittedly neither *`KKHPVPL'* nor *`GHHPVPL'* (petitioner) ever applied for said Project.

9. At this stage, it would be apt to reproduce following paras of order dated 24.2.2015 (Annexure P-14) passed by Principal Secretary (NES) to the Government of Himachal Pradesh:-

> *"2. Whereas the Hydro Power Policy was under finalization, therefore, the Govt.decided on 08.06.2005 that no action be taken on the applications received for allotment of SHEPs and the security fee/processing fee deposited by the applicants be refunded to them and no application be entertained till the finalization of Hydro Power Policy. Accordingly, the application fee and EMD received with the applications were refunded to all the applicants including M/s.Kangra Kullu Hydro Power Venture Pvt.Ltd. on 02.07.2005 by Himurja.*

3. Whereas after issuance of Policy guidelines on 02.01.2006, it was decided by the Govt. that if the applicants had made substantial progress they could apply for allotment of the SHEP to Himurja. In response to this, the representation from M/s.Kangra Kullu Hydro Power Venture Pvt.Ltd. was received on 4.2.2006 for allotment of Joiner Top (1.50 MW) SHEP in Distt.Chamba. During scrutiny of the representation, it was observed that documentation with regard to formation of company were not proper. Due to non registration of the company the representation was rejected and it was decided on 5.6.2006 to re-advertise the project. The applicant was also intimated with the rejection on 3.10.2006. The project was re-advertised on 5.02.2007 alongwith other projects. Only two applications were received against this project but neither M/s.Kangra Hydro Power Venture Pvt.Ltd. nor M/s GH Hydro Power Venture Pvt.Ltd. applied for the said project. Only the projects for where applications were received, were allotted in the year 2008 and for remaining projects, it was decided to re-advertise after proper survey & investigation in respect of two parameters i.e. optimum capacity & clear cut elevation range to avoid any further conflict in view of the decision sanity check was done by Himurja and it was found that two projects namely Joiner (12 MW) and Upper Joiner-II (10MW) are allotted downstream the Joiner Top (1.50 MW) SHEP and availability of water for the proposed project is almost the same as shall be available for these allotted projects. Himurja observed that capacity of the project can remain above 5MW, therefore, they took up the matter with HPSEBL who informed that capacity of the project may be around 7.50 MW.

4. Whereas the applicant again represented on 27.07.2009 pleading that capacity of the Joiner Top SHEP cannot exceed 5MW. The matter was, therefore, again taken up with HPSEBL who informed that capacity of the project will be 4.86 MW with reduced elevation range i.e. 2395m-1990m. The elevations intimated by HPSEBL were different to elevations mentioned in the application submitted by M/s.Kangra Kullu Hydro Power Venture Pvt.Ltd. which had submitted for the elevation range of 2400m-1960m.

5. Whereas the application for allotment of the project was submitted in the name of M/s.Kangra Kullu Hydro Power Venture Pvt.Ltd. and subsequent representation was received in Himurja in the name of M/s.GH Hydro Power Venture (P) Ltd. Documents of the same were not complete. The capacity of the project was also under underassessed."

10. Being aggrieved and dis-satisfied with the aforesaid order dated 24.2.2015, petitioner has approached this Court seeking therein the reliefs as have been reproduced above.

11. Mr.Ajay Vaidya, learned counsel representing the petitioner, vehemently argued that petitioner had applied for the project strictly in terms of Hydro Power Policy of the State, but respondents had no reason, whatsoever, not to allot the Project in question to petitioner when petitioner offered to install Project with 4.86 MW capacity and in this regard he spent lacs of rupees for preparing the survey reports etc. Mr.Vaidya also argued that admittedly petitioner was single bidder for self identified Hydel Project and no loss would have occurred to the respondent-State, if it was allotted in favour of the petitioner, who was financially competent to undertake the Project in question. Mr.Vaidya also contended that neither it was ever conveyed to the petitioner that his original application dated 31.12.2004, preferred in the name and style of *`KKHPVPL'*, was rejected for want of registration certificate nor any opportunity of being heard was ever afforded to him and as such impugned order is not sustainable and same deserves to be quashed and set aside.

12. While concluding his arguments, Mr.Vaidya stated that perusal of impugned orders itself suggests that same have been passed in slipshod manner without there being any application of mind, without following mandatory guidelines issued by the State of Himachal

Pradesh in this regard (Annexure P-15) and as such present petition deserves to be allowed by granting relief as has been prayed for.

13. Mr.Shrawan Dogra, learned Advocate General, vehemently argued that present petition deserves to be dismissed solely on the ground of delay and laches, as it stands duly proved on record that application initially filed by the petitioner in the name and style of *`KKHPVPL'* stood rejected on 5.6.2006, whereas present petition has been filed in the year 2015 i.e. after more than 9 years as no ground muchless sufficient ground has been raised to condone the delay in maintaining the present petition. He also stated that since application filed by the petitioner in the name of *`KKHPVPL'* which was not registered with *`ROC'* at the time of consideration of the application, same was rejected by Council of Ministers and decision was taken to re-advertise the Project. It is also stated that once decision was taken to re-advertise the Project on 5.6.2006, petitioner cannot claim any right in view of his original application dated 31.12.2004. He also invited the attention of this Court to the impugned order to demonstrate that pursuant to the rejection of application of the petitioner by the Council of Ministers, Project in question was re-advertised on 5.2.2007 alongwith other Projects, wherein admittedly, petitioner never applied and as such present petition is not maintainable deserves to be dismissed.

14. We have heard learned counsel for the parties and have gone through the record of the case.

15. It clearly emerges from the facts as well as submissions made by the learned counsel representing the parties, as narrated above, that the present petitioner-company originally made application, dated 31.12.2004, in the name of *`KKHPVPL'* and applied for 1.5 MW Joiner Top capacity self identified Project at Kesta-Neri, but, since present petitioner, despite repeated reminders, failed to submit certificate of registration of the company, application submitted by it for allotment of the Project in question was rejected by Council of Ministers in its meeting held on 5.6.2006. It is also undisputed before us that pursuant to aforesaid rejection of the application of the petitioner, Project in question was re-advertised on 5.2.2007 alongwith other Projects. Though, application of the petitioner-Company stood rejected, but admittedly, no action, whatsoever, was ever taken by it to assail decision dated 5.6.2006, which was duly communicated to it vide communication dated 3.10.2006 (Annexure R-1), in any Court of law and as such same attained finality qua the petitioner as far as application dated 31.12.2004 is concerned. Though petitioner by way of placing documents on record made an attempt to demonstrate that despite there being rejection of its application, matter remained pending with the respondent-department and he was repeatedly given assurances by the respondents that matter is under active consideration, but keeping in view the abovesaid fact this Court is unable to accept aforesaid submissions.

16. Interestingly, present petitioner, instead of laying specific challenge to the decision dated 5.6.2006, wherein its proposal was rejected, filed writ petition before this Court, which came to be registered as CWP No.671 of 2015, wherein also petitioner only prayed for consideration of his representation dated 2.1.2015, pending before the Principal Secretary (MMP & Powers) to the Government of Himachal Pradesh. Learned Single Bench of this Court vide order dated 16.1.2015 disposed of the said writ petition by directing the Principal Secretary (MMP & Powers) to decide the representation in light of notification dated 12.11.2008 issued by the State of Himachal Pradesh.

17. This Court is of the view that passing of order dated 16.1.2015 in CWP No.671 of 2015 may not be of any help to the petitioner as far as delay in maintaining the instant petition is concerned, especially in view of the fact that application dated 31.12.2004, filed by present petitioner for allotment of the Project in question, was rejected vide decision taken on 5.6.2006, which was never assailed before any Court of law.

18. Though this Court is fully convinced that the present petition deserves to be dismissed on the ground of delay itself, but, since this matter remained under active

consideration of this Court for a considerable time after filing of present petition w.e.f. 4.4.2015, this Court also examined genuineness and correctness of order impugned in this petition. Impugned order dated 24.2.2015 (Annexure P-14) clearly suggests that original application dated 31.12.2004 filed by the petitioner in the name and style of *`KKHPVPL'* was rejected by the Council of Ministers on 5.6.2006 for want of registration certificate from the *`ROC'*. This Court sees no illegality and infirmity in the decision of the Government while rejecting the proposal furnished by the petitioner vide application dated 31.12.2004 when admittedly Company was not registered with the *`ROC'*. Moreover, perusal of Annexure R-2 placed on record by the respondents clearly suggests that ample opportunity was given to the petitioner-Company to make available certificate of registration, if any, but despite reasonable opportunity, petitioner failed to place on record required documents, as a result of which Council of Ministers decided to reject the application.

19. Apart from above, it also emerged from the impugned order as well as detailed reply filed by the respondents that the petitioner, while filing application, suppressed material facts with regard to actual potential of the site of the proposed Project by mentioning that proposed Project has capacity of 1.5 MW, whereas lateron it came to the knowledge that capacity of the Project in question was 4.86 MW, as was divulged by the report submitted by the HPSEBL, hence application was rightly rejected by the competent authorities on account of suppression of material facts. Moreover, Project in question was re-advertised on 5.2.2007, wherein admittedly, present petitioner *`GHHPVPL'* never applied for the same and as such it has no right, whatsoever, to claim Project in question on the strength of initial application dated 31.12.2004.

20. In view of above, this Court sees no illegality and infirmity in the impugned order passed by the Principal Secretary (NES) to Government of Himachal Pradesh, wherein he concluded that original application of the petitioner-Company stands rejected in the year 2006 and subsequent guidelines issued on 12.11.2008 are not applicable.

21. Hon'ble Apex Court, while dealing with such like matters, has repeatedly held that the Courts have very-very limited powers while examining the issues with regard to policy decisions taken by the Government.

22. In this regard reliance is placed on ***Tata Cellular vs. Union of India, (1994)6 SCC 651,*** wherein the Court held:

> *"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.*
>
> *71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.*
>
> *77. The duty of the court is to confine itself to the question of legality. Its concern should be :*
>
> 1. *Whether a decision-making authority exceeded its powers?*
> 2. *Committed an error of law,*

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind, (1991)1 AC 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

(pp.675 & 677-678)

23. Similarly, the action of the State in the contractual matters is required to be tested on touchstone of Article 14 of the Constitution of India. But if the action of the State in the contractual matters are meant for public good and in public interest and are expected to be fair and just, no interference, whatsoever, of the Courts is called for. If the decision of the State is informed by the reason and same is in public interest, Courts have no occasion, whatsoever, to interfere in the same.

24. In this regard reliance is placed on the judgment of this Court in ***Raj Kumar vs. State of Himachal Pradesh and Others, 2014(2) Him.L.R.(DB) 1217,*** wherein this Court held as under:

"9. The action of the State even in contractual fields will have to be tested on the following touchstone:

(i) The State action in the contractual field are meant for public good and in public interest and are expected to be fair and just.

(ii) It would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 of the Constitution of India in contractual matters.

(iii) The fact that a dispute falls in the domain of contractual obligation, would make no difference to a challenge raised under Article 14 of the Constitution of India on the ground that the impugned act is arbitrary, unfair and unreasonable.

(iv) Every State action must be informed of reason and it follows that an act uninformed by reason is arbitrary.

(v) Where no plausible reason or principle is indicated (or is discernible), and where the impugned action ex facie appears to be arbitrary, the onus shifts on the State to justify its action as fair and reasonable.

(vi) Every holder of public office is accountable to the people in whom the sovereignty vests. All powers vested in a public office, even in the field of contract, are meant to be exercised for public good and for promoting public interest.

(vii) *Article 14 of the Constitution of India applies also to matters of governmental policy even in contractual matters, and if the policy or any action of the Government fails to satisfy the test of reasonableness, the same would be unconstitutional.*

(See: Shrilekha Vidyarthi vs. State of U.P. (1991) 1 SCC 212).

Thus, what is essential is that the State and its instrumentalities and their functionaries while exercising their executive power in matters of trade or business etc. including making of contracts, should bear in mind the public interest, public purpose and public good. This is so, because every holder of public office by virtue of which he acts on behalf of the State, or its instrumentalities, is ultimately accountable to the people in whom sovereignty vests and as such, all powers vested in the State are meant to be exercised for public good and in public interest. Therefore, the question of unfettered discretion in an executive authority just does not arise. The fetters on discretion are clear, transparent and objective criteria or procedure which promotes public interest, public purpose and public good. A public authority is ordained, therefore to act, reasonably and in good faith and upon lawful and relevant grounds of public interest. (Refer: Reliance Natural Resources Ltd. vs. Reliance Industries Ltd. (2010) 7 SCC 1). Bearing in mind the guiding principles laid down in the Constitution of India alongwith law laid down by the Hon'ble Supreme Court from time to time, we proceed to determine the writ petition." (pp.1219-1220)

25. In this regard reliance is also placed on the judgments of the Hon'ble Supreme Court as well as of this Court in ***S.G.Jaisinghani vs. Union of India and Others, AIR 1967 SC 1427, Satwant Singh Sawhney vs. D.Ramarathnam, Assistant Passport Officer, New Delhi and Others, AIR 1967 SC 1836, Namit Gupta vs. State of H.P. and Others, AIR 2014 HP 49, Pritam Singh vs. State of Himachal Pradesh, (2013)1 Him.L.R. 130 and Saroj Garg vs. State of H.P. & Ors., AIR 2011 HP 94.***

26. Apart from above, it is the domain of the Department to prescribe conditions, factors and guidelines while inviting applications for ***Self Identified Hydel Power Project*** and petitioner has no right, whatsoever, to challenge the terms and conditions contained in the notice inviting applications, save and except, if the same are shown to be against the basic principles of law.

27. In this regard reliance is placed upon ***Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Paritosh Bhupeshkumar Sheth and Others and Alpana V.Mehta vs. Maharashtra State Board of Secondary Education and Another, (1984)4 SCC 27,*** wherein the Hon'ble Supreme Court held:

"16. In our opinion, the aforesaid approach made by the High Court is wholly incorrect and fallacious. The Court cannot sit in judgment over the wisdom of the policy evolved by the Legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that, in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The Legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution. None of these vitiating factors are shown to exist in the present case

and hence there was no scope at all for the High Court to invalidate the provision contained in clause (3) of Regulation 104 as ultra vires on the grounds of its being in excess of the regulation-making power conferred on the Board. Equally untenable, in our opinion, is the next and last ground by the High Court for striking down clause (3) of Regulation 104 as unreasonable, namely, that it is in the nature of a bye-law and is ultra vires on the ground of its being an unreasonable provision. It is clear from the scheme of the Act and more particularly, Sections 18, 19 and 34 that the Legislature has laid down in broad terms its policy to provide for the establishment of a State Board and Divisional Boards to regulate matters pertaining to secondary and higher secondary education in the State and it has authorised the State Government in the first instance and subsequently the Board to enunciate the details for carrying into effect the purposes of the Act by framing regulations. It is a common legislative practice that the Legislature may choose to lay down only the general policy and leave to its delegate to make detailed provisions for carrying into effect the said policy and effectuate the purposes of the Statute by framing rules/regulations which are in the nature of subordinate legislation. Section 3(39) of the Bombay General Clauses Act, 1904, which defines the expression 'rule' states: Rule shall mean a rule made in exercise of the power under any enactment and shall include any regulation made under a rule or under any enactment." It is important to notice that a distinct power of making bye-laws has been conferred by the Act on the State Board under Section 38. The Legislature has thus maintained in the Statute in question a clear distinction between 'bye-laws' and 'regulations'. The bye-laws to be framed under Section 38 are to relate only to procedural matters concerning the holding of meetings of State Board, Divisional Boards and the Committee, the quorum required, etc. More important matters affecting the rights of parties and laying down the manner in which the provisions of the Act are to be carried into effect have been reserved to be provided for by regulations made under Section 36. The Legislature, while enacting Sections 36 and 38, must be assumed to have been fully aware of the niceties of the legal position governing the distinction between rules/regulations properly so called and bye-laws. When the statute contains a clear indication that the distinct regulation-making power conferred under Section 36 was not intended as a power merely to frame bye-laws, it is not open to the Court to ignore the same and treat the regulations made under Section 36 as mere bye-laws in order to bring them within the scope of justiciability by applying the test of reasonableness.

21. The legal position is now well-established that even a bye-law cannot be struck down by the Court on the ground of unreasonableness merely because the Court thinks that it goes further than "is necessary" or that it does not incorporate certain provisions which, in the opinion of the court, would have been fair and wholesome. The Court cannot say that a bye-law is unreasonable merely because the judges do not approve of it. Unless it can be said that a bye law is manifestly unjust, capricious, inequitable, or partial in its operation, it cannot be invalidated by the Court on the ground of unreasonableness. The responsible representative body entrusted with the power to make by laws must ordinarily be presumed to know what is necessary, reasonable, just and fair. In this connection we may usefully extract the following off-quoted observations of Lord Russell of Killowen in Kruse v. Johnson, (1898) 2 QB 91, 98, 99 (quoted in Trustees of the Port of Madras v. Adminchand Pyarelal, (1976)! SCR 721, 733) (SCC p.178, para 23):

> *(1) "When the Court is called upon to consider the byelaws of public representative bodies clothed with the ample authority which I have described, accompanied by the checks and safeguards which I have mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if*

possible. They ought to be, as has been said, 'benevolently interpreted' and credit ought to be given to those who have to administer them that they will be reasonably administered."

"The learned Chief Justice said further that there may be cases in which it would be the duty of the court to condemn by-laws made under such authority as these were made (by a county council) as invalid because unreasonable. But unreasonable in what sense? If for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this and this sense only, as I conceive, that the question of reasonableness or unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient or because it is not accompanied by an exception which some judges may think ought to be there'.

" We may also refer with advantage to the well-known decision of the Privy Council in Slattery v. Naylor, (1988) 13 AC 446, where it has been laid down that when considering whether a bye-law is reasonable or not, the Court would need a strong case to be made against it and would decline to determine whether it would have been wiser or more prudent to make the bye-law less absolute or will it hold the bye-law to be unreasonable because considerations which the court would itself have regarded in framing such a bye-law have been over looked or reflected by its framers. The principles laid down as aforesaid in Kruse v. Johnson, (1898) 2 QB 91, 98, 99 and Stattery v. Naylor, (1988) 13 AC 446 have been cited with approval and applied by this Court in Trustees of the Port of Madras v. Aminchand Pyarelal & Ors.,(1976) 1 SCR 721, 733."

28. In ***Parisons Agrotech Private Limited and Another vs. Union of India and Others, (2015)9 SCC 657,*** the Hon'ble Supreme Court held:

"14. No doubt, the writ court has adequate power of judicial review in respect of such decisions. However, once 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 determine 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. Once we find that parameters of Article 14 are satisfied; there was due application of mind in arriving at the decision which is backed by cogent material; the decision is not arbitrary or irrational and; it is taken in public interest, the Court has to respect such a decision of the Executive as the policy making is the domain of the Executive and the decision in question has passed the test of the judicial review.

15. In Union of India v. Dinesh Engg. Corpn., (2001)8 SCC 491, this Court delineated the aforesaid principle of judicial review in the following manner: (SCC pp.498-99, para 12)

"12……There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to the policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the courts have to abdicate their right to scrutinize whether the

policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record. ….. Any decision be it a simple administrative decision or 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."

16. The power of the Court under writ jurisdiction has been discussed in Asif Hameed. v. State of J&K, 1989 Supp.(2) SCC 364: 1 SCEC 358 in paras 17 and 19, which read as under: (SCC pp. 373-74)

"17. Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.

* * *

19. 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. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the government. While exercising power of judicial review of administrative action, the court is not an appellate authority. 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."

17. The aforesaid doctrine of separation of power and limited scope of judicial review in policy matters is reiterated in State of Orissa v. Gopinath Dash, (2005) 13 SCC 495 : (SCC p.497, paras 5-7)

"5. While exercising the power of judicial review of administrative action, the Court is not the Appellate Authority and the Constitution does not permit the Court to direct or advise the executive in the matter of policy or to sermonise qua any matter which under the Constitution lies within the sphere of the legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. (See Asif Hameed v. State of J&K; 1989 Supp (2) SCC 364 and Shri Sitaram Sugar Co. Ltd. v. Union of India;

(1990) 3 SCC 223). 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. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court, it cannot interfere.

6. The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

7. 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. In the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown the courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government."

29. The Hon'ble Apex Court in ***Census Commissioner and Others vs. R.Krishnamurthy, (2015)2 SCC 796*** held as under:

"23. The centripodal question that emanates for consideration is whether the High Court could have issued such a mandamus commanding the appellant to carry out a census in a particular manner.

24. The High Court has tried to inject the concept of social justice to fructify its direction. It is evincible that the said direction has been issued without any deliberation and being oblivious of the principle that the courts on very rare occasion, in exercise of powers of judicial review, would interfere with a policy decision.

25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.

26. In this context, we may refer to a three-Judge Bench decision in Suresh Seth V. Commr., Indore Municipal Corporation, (2005)13 SCC 287, wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from

simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held: (SCC pp.288-89, para 5)

> *"In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under our constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of India, (1989)4 SCC 187 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in state of J & K v A.R. Zakki,1992 Supp(1) SCC 548. In A.K. Roy v. Union of India, (1982)1 SCC 271it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."*

30. Consequently in view of the detailed discussions made hereinabove, we do not see any reason to interfere with the decision taken by the respondents and to invoke extra ordinary jurisdiction as prayed for by the petitioner in the present petition. Accordingly, the writ petition is dismissed.

31. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Geeta Devi ....Petitioner
Versus
State of H.P. & Another ....Respondents

CWP No.6760 of 2010
Judgment Reserved on: 06.09.2016
Date of decision: 07.10.2016

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 65 and 118- Petitioner executed an agreement to sell the land and put one J in possession – inquiry was conducted and it was found that there was violation of Section 118 of the Act- proceedings were initiated, which resulted in confiscation of the land along with the building in favour of the State- an appeal was filed before Divisional Commissioner, which was dismissed – appeal and revision were dismissed – held, that transfer of land by way of sale, gift, will, exchange, lease, mortgage with possession, creation of tenancy or in any other manner is not valid in favour of a person, who is not an agriculturist - there was no bar of transfer by way of an agreement and this bar was created in the year 1994 by amending the Act- the agreement was executed in the year 1990 – the amendment Act is not retrospective- the order passed by the authorities cannot be sustained- petition allowed.(Para-12 to 27)

Cases referred:

Santosh Malhotra vs. State of H.P. and Others, 2003(3) Shiml. L.C. 342
Som Kirti alias Som K.Nath and Others vs. State of H.P. and Others, Latest HLJ 2013 (HP) 1223

Garikapatti Veeraya vs. N.Subblah Choudhury, 1957 SCR 488
Dhyan Singh vs. State of Himachal Pradesh and Others, 2012 (3) Shim.L.C. 1741

For the Petitioner: Mr.Sunil Mohan Goel, Advocate.
For the Respondent No.1: Mr.Rupinder Thakur, Additional Advocate General with Mr.Rajat Chauhan, Law Officer.
For Respondent No.2: Nemo.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

By way of present writ petition filed under Article 226/227 of the Constitution of India, petitioner, who is owner of land in dispute, has laid challenge to the order dated 27.7.2010 passed by Financial Commissioner (Appeals), H.P. in Revision Petition No.132 of 2009, filed under Section 65 read with Section 118 sub-section 3(C) of H.P. Tenancy and Land Reforms Act, 1972 *(hereinafter referred to as the `Act'),* whereby he upheld the order of Divisional Commissioner, Shimla Division, Shimla, affirming the order of Collector, Solan, holding the petitioner herein responsible for violation of Section 118(1) of the `Act' and accordingly ordered for confiscation/vesting of the property in dispute in State of Himachal Pradesh alongwith building constructed thereon free from all encumbrances.

2. The genesis of the entire case is based on the order of Collector, Solan, passed in case No.25/13 of 1999. In nutshell case of respondent-State was that the petitioner herein, resident of village Manjhu, Tehsil Arki, District Solan, H.P., executed an agreement to sell qua the land comprised in Khasra No.531/472/422/389/59, measuring 0-2 Bigha, situated in Mauza Abadi Village Hatkot (Kunihar), Tehsil Arki, District Solan, and put one Shri J.P. Shah in possession of the same in violation of Section 118 of the Act without obtaining prior sanction of the Government, as required under Section 118 of the Act. Respondent-State, before initiating proceedings under Section 118 of the Act, got the matter inquired from Sub Divisional Officer(C), Arki on two occasions, who vide communication dated 27.1.2000 reported to the Deputy Commissioner, Solan that *"in the light of above statements recorded by the undersigned, it is revealed that both Smt.Geeta Devi and J.P. Shah claimed themselves to be owner and tenant of the house under report respectively".* He further reported that, *"no deed has been executed for the transfer of the land as yet, therefore, the case does not fall within the ambit of Section 118 of the Act".* He also reported that, *"the parties have entered into an agreement of Rs.14000/- and they may execute sale deed for which permission is reported to have been sought by Sh.J.P. Shah".* SDO(C) further suggested that, *"when the deed will come for registration before the Sub Registrar, the matter could be examined at that time".* But, it appears that matter was again inquired into by SDO(C), Arki, who vide communication dated 7.4.2000, addressed to the Deputy Commissioner, Solan, reported that in view of contradictory statements of the parties, it emerges that house has been constructed by Shri J.P. Shah and not by Smt.Geeta Devi and as such plea of Shri J.P. Shah's being tenant does not sustain in view of the statement of Shri Radhe Shyam and Shri J.P. Shah himself. Subsequent to aforesaid reports submitted by SDO(C), present petitioner was served with show cause notice calling upon her that why proceedings be not initiated against her under Section 118 of the Act.

3. Perusal of Annexure P-2 suggests that present petitioner filed reply to the notice dated 23.4.1999, wherein she claimed her to be exclusive owner in possession of the land described in the notice. She also claimed that she has raised/constructed a house over the suit land by spending her own money and by taking loans from the others. She also denied that she has sold property to J.P. Shah by way of agreement after receiving consideration. Rather, she stated that J.P. Shah is tenant in the house, existing over the suit land in question, and in no manner any transfer of land having been made by the replying respondent to anyone. To substantiate her aforesaid plea, she also stated that till date she is exclusive owner in possession

of the land and the house in question and as such provisions of Section 118(3) of the Act are not applicable in the present case. However, fact remains that Collector concerned, being not satisfied with the reply submitted by the present petitioner, initiated proceedings under Section 118 of the Act against the present petitioner and vide order dated 31.7.2006 ordered that the land comprised in Khasra No.531/472/422/398/59, measuring 0-2 Bigha, situated in Mauza Abadi Village Hatkot (Kunihar) is hereby confiscated in the State of Himachal Pradesh alongwith building constructed thereon free from all encumbrances.

4. Petitioner, being dissatisfied with the aforesaid order passed by Collector, Solan, filed a Revenue Appeal No.100/2009 under Section 118(3)(b) of the Act, as amended up to 1994, before Divisional Commissioner, Shimla Division, Shimla. However, the same was dismissed on 10.8.2009 by the Divisional Commissioner, Shimla, by holding that fact of possession, having been transferred to Shri J.P. Shah for long time, has not been disputed by the appellant and as such there is a violation of provisions of the Act.

5. Feeling aggrieved and dissatisfied with the aforesaid orders passed by the Collector and Divisional Commissioner, present petitioner filed a Revision Petition under Section 118(3)(C) of the Act, specifically assailing therein order dated 10.8.2009 passed by the Divisional Commissioner, Shimla Division in Revenue Appeal No.100 of 2009, which came to be registered as Revision Petition No.132 of 2009. But learned Financial Commissioner (Appeals) dismissed the revision petition filed by the present petitioner and held that since Shri J.P. Shah, in whose favour present petitioner allegedly made sale, was not an agriculturist, as such, transaction was ab-initio void as per provisions of Section 118(3)(C) and (D) of the Act and as such land alongwith the building will vest in the State.

6. In the aforesaid background, present petitioner, being aggrieved with the orders passed by Financial Commissioner (Appeals) in Revision Petition, referred hereinabove, whereby he, while rejecting the revision petition preferred on behalf of the present petitioner, upheld the orders passed by Divisional Commissioner as well as Collector, wherein they had come to the conclusion that the present petitioner, Smt.Geeta Devi, put Shri J.P. Shah into possession of suit land in violation of provisions of Section 118(3) and as such ordered for confiscation of the property, preferred this writ petition.

7. Mr.Sunil Mohan Goel, learned counsel representing the petitioner, vehemently argued that the impugned order passed by Financial Commissioner (Appeals), whereby he upheld the orders passed by the Divisional Commissioner and Collector, is not sustainable in the eye of law as the same is in grave violation of provisions of the Act. Mr.Goel contended that bare perusal of order passed by Collector itself suggests that it was not proved on record that present petitioner had made any sale in favour of J.P. Shah in violation of Section 118 of the Act, rather property in question was given on monthly rent to Shri J.P Shah. He also contended that at no point of time respondent-State was able to prove on record by leading cogent and convincing evidence that any deed was executed for transfer of land in violation of the provisions of Section 118 of the Act and as such no action could be initiated against the petitioner in terms of Section 118(3) of the Act. To substantiate his aforesaid plea, he invited the attention of this Court to Annexure P-3 i.e. communication dated 27.1.2000, whereby SDO(C) Arki, had submitted his report to Deputy Commissioner, Solan, stating in uncertain terms that no deed has been executed for transfer of land as yet, therefore, the case does not fall within the ambit of Section 118 of the Act.

8. Mr.Goel further argued that if for the sake of arguments, case of the respondent-State is taken to be correct that petitioner Smt.Geeta Devi had executed an agreement to sell in favour of J.P. Shah for sale of suit land, even in that eventuality no action could be taken against present petitioner for violation of Section 118 of the Act because Section 118 of the Act prevalent at the time of alleged execution of agreement did not contemplate any penal action in case land is intended to be sold in favour of non- Himachali by way of agreement. In the aforesaid background, Mr.Goel prayed that impugned orders passed by the Financial Commissioner, Divisional Commissioner and Collector are required to be quashed and set aside.

9. Mr.Goel, while concluding his arguments, invited the attention of this Court to para-13 of the orders passed by the Financial Commissioner (Appeals) in Revision Petition, whereby he allegedly dealt with aforesaid fact of amendment in the Act, to demonstrate that Financial Commissioner below miserably failed to make distinction between the provisions contained in un-amended Section 118 of the Act and subsequent amendment in the Act. Mr.Goel also stated that learned authorities below failed to take note of judgment passed by this Court in ***Smt.Santosh Malhotra vs. State of H.P. and Others, 2003(3) Shiml.L.C. 342,*** wherein, issue, involved in the present case, has been elaborately dealt with by this Court.

10. Mr.Rupinder Singh Thakur, learned Additional Advocate General, argued that impugned orders passed by the Authorities below are based on correct appreciation of evidence available on record as well as law, as such, no interference, whatsoever, of this Court is warranted in the facts and circumstances of the present case. Mr.Thakur vehemently argued that it stands duly proved on record that present petitioner put non-agriculturist into possession of the land in dispute in violation of Section 118 of the Act without taking prior permission from the authorities as envisaged under Section 118 of the Act and as such no illegality and infirmity can be found in the impugned orders passed by the authorities as referred hereinabove. He also invited the attention of this Court to the latest judgment passed by the Division Bench of this Court in ***Som Kirti alias Som K.Nath and Others vs. State of H.P. and Others, Latest HLJ 2013 (HP) 1223 and other connected matters***, whereby validity of Section 118 of the Act has been upheld. In the aforesaid background he prayed for dismissal of instant writ petition.

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

12. Before adverting to the merits of the case, it may be stated that there is no dispute as far as validity of Section 118 of the Act ibid is concerned. Though issue with regard to validity of Section 118 of the Act has been examined by the Division Bench of this Court in many cases, but recently, while dealing with the batch of writ petitions, wherein vires of Section 118 of the Act were challenged by many parties, Division Bench of this Court vide judgment dated Ist October, 2013 passed in ***CWP No.443 of 1995, titled Som Kirti alias Som K.Nath and others vs. State of H.P. and others*** upheld the validity of Section 118 of the Act and as such this Court has no occasion, whatsoever, to examine validity, if any, of Section 118 of the Act.

13. This Court solely with a view to test the correctness and genuineness of arguments having been advanced on behalf of the petitioner that no penal action in terms of Section 118 of the Act could be taken against the present petitioner even if it is presumed that she had executed agreement to sell in favour of J.P. Shah for selling property in terms of un-amended Section 118 of the Act, would be examining issue at hand in light of the Section 118 of the Act.

14. The State of Himachal Pradesh enacted H.P. Tenancy and Land Reforms Act, 1972, Chapter-XI deals with Control on transfer of land, wherein under Section 118 transfer of land to non-agriculturists is prohibited, it would be relevant to reproduce herein below Section 118 amended by amendment Act, 1988:-

> *"118. Transfer of land to Non-agriculturists Barred.- (1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, on transfer of land (including sales in execution of a decree of a civil Court or for recovery of arrears of land revenue), by way of sale, gift, exchange, lease, mortgage with possession or creation of a tenancy shall be valid in favour of a person who is not an agriculturist.*
>
> *(2). Nothing in sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of-*
>
> *(a) to (h)…………….*

(i) a non-agriculturist with the permission of State Government for the purpose that may be prescribed:

Provided…………

(3) No Registrar or the Sub-Registrar appointed under the Indian Registration Act, 1908 (16 of 1908), shall register any document pertaining to a transfer of land, which is in contravention to sub-section (1) and such transfer shall be void ab initio and the land involved in such transfer, if made in contravention of sub-section (1), shall, together with structures, buildings or other attachments, if any, vest in the State Government free from all encumbrances."

15. Perusal of aforesaid amended Act of 1988 provides that no transfer of land by way of sale, gift, Will, exchange, lease, mortgage with possession, creation of tenancy or in any other manner shall be valid in favour of a person who is not an agriculturist.

16. However, proviso to aforesaid provisions suggests that non-agriculturist can purchase land with the prior permission of the State Government. But close scrutiny of aforesaid provisions, as amended; nowhere suggest that there is any bar to transfer the land by way of agreement. But, at this stage, it may be noticed that H.P. Tenancy and Land Reforms (Amendment) Act, 1994 came into force on 22.3.1995, wherein explanation of Section 118(1) of Amendment Act was incorporated as under:

"Explanation.- For the purpose of this sub-section, the expression "transfer of land" shall include:-

(a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non-agriculturist, and

(b) an authorization made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in the like manner as if he is a real owner of that land."

17. Perusal of aforesaid amendment, which came into force on 22.3.1995, suggests that after amendment no transfer of land could be made by way of Special or General Power of Attorney or by an agreement with the intention to put an non-agriculturist in possession of the land and allow him to deal with the land in like manner as if he is real owner of that land.

18. Perusal of aforesaid explanation, which came into force on 22.3.1995, certainly suggests that after 22.3.1995 no transfer of land could be made by way of agreement also.

19. But in the present case, as clearly emerged, that alleged agreement to sell was entered into by the petitioner herein with J.P.Shah in the year 1990 i.e. admittedly before coming into operation of H.P. Tenancy and Land Reforms (Amendment) Act, 1994, wherein transfer of land was made prohibited even by way of agreement.

20. Hence, in view of aforesaid, this Court sees substantial force in the contention put forth on behalf of the counsel representing the petitioner. This Court, after perusing aforesaid amendment as well as case law referred by petitioner before Commissioner i.e. ***Smt.Santosh Mahlotra vs. State of H.P. and Others, 2003 (3) Shim.L.C. 342***, has no hesitation to conclude that learned Financial Commissioner has fallen in grave error while concluding that *"the amendments to the Act carried out in 1994 (and valid from 4.4.1995) do not come into play; the transaction between the petitioner took place around 1990 and the provisions incorporated by the 1987 amendments (valid from 14.4.1988 onwards) would cover the case fully. Section 118(3) of the amended Act provides for vesting of the land and structures/buildings in the State".* Had Financial Commissioner (Appeals), while examining revision petition preferred on behalf of petitioner herein, bothered/cared to take into consideration the law referred by petitioner in ***Santosh Mahlotra's*** case supra, he would have not passed order which is impugned before this Court by way of present petition.

21. At this stage, this Court deems it necessary to refer to the law made by this Court in the aforesaid case of ***Santosh Mahlotra,*** where this Court has held as under:-

"12. I have duly considered the respective contentions of the learned counsel for the parties. From the perusal of the original record of the Collector, Shimla, it is not in dispute that notices were issued by the collector to Jaidev Malhotra, Sh.B.N. Malhotra, Smt.Santosh Malhotra and Suresh Kumar Shukla under Section 119(1) of 'the Act' and Rule 38(B) of H.P. Tenancy and Land Reforms Rules, 1975. All the parties have appeared before the Collector. Sh.B.N. Malhotra made the specific statement that his son Jaidev Malhotra purchased land in Kachhighati on which building had been constructed Jaidev Malhotra made the statement that the land in dispute belongs o his mother Smt.Santosh Malhotra on which he constructed the building. The Collector Shimla passed the order dated 20.2.1995 (Annexure P-2) in case No.1/94 against Jaidev Malhotra on the basis of the Income-tax returns filed by him before the Income Tax Department for the assessment years 1993-94 and 1994-95 in which he had shown having spent a sum of Rs.1,90,000/- on the construction of the building. The Collector Shimla in his order recorded the findings that as the General Power of Attorney (Anenxure P-1) has been executed by Suresh Kumar Shukla owner of the land in favour of Smt.Santosh Malhotra keeping in view the fact that no sale deed could be executed in favour of Smt.Santosh Kumar Mahlotra as she is not the agriculturist of State of H .P. and Jaidev Malhotra invested a sum of Rs.1,90,000/- for the construction of the building, therefore, the land has been acquired by him in violation of Section 118 of 'the Act'. The order of the Collector has been affirmed both by the Divisional Commissioner and by the Financial Commissioner in appeal.

13. The State of Himachal Pradesh enacted the H.P. Tenancy and Land Reforms Act, 1972. Chapter XI deals with Control on transfer of land. Section 118 prohibits the transfer of land to non-agriculturists which reads as under:

"118. Transfer of land to Non-Agriculturists Barred-(1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, on transfer of land (including sales in execution of a decree of a civil court or for recovery of arrears of land revenue), by way of sale, gift, exchange, lease, mortgage with possession or creation of a tenancy shall be valid in favour of a person who is not an agriculturist.

(2) Nothing in sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of—

(a) to (h)...................

(i) a non-agriculturist with the permission of State Government for the purpose that may be prescribed:

Provided..........

(3) No Registrar or the Sub-Registrar appointed under the Indian Registration Act, 1908 (16 of 1908), shall register any document pertaining to a transfer of land, which is in contravention to sub-section (1) and such transfer shall be void ab initio and the land involved in such transfer, if made in contravention of sub-section (1), shall, together with structures, buildings or other attachments, if any, vest in the State Government free from all encumbrances."

14. The revenue authorities below have mis-directed themselves in applying the above extracted provisions of Section 118 of the 'Act' in the present case. Suresh Kumar Shukla has not transferred his ownership rights and interest in the property in favour of Smt. Santosh Malhotra by way of General Power of Attorney (Annexure:P1) and the transfer by way of execution of the General Power of

Attorney is not incorporated in Section 118(1) of the 'Act'. The transfer of land to non-agriculturist is only barred under Section 118(1) if the transfer is by way of sale gift, exchange, lease, mortgage with possession or creation of tenancy including sales in execution of a decree of a Civil Court or for recovery of arrears of Land Revenue. The General Power of Attorney has been executed on 7.11.1991 by Suresh Kumar Shukla the owner of the property in favour of Smt.Santosgh Malhotra in which she has only been authorized to look after, manage, sell or construct the building on the piece of land, to enter into agreement, to sell, to receive the earnest money, to execute or sign on the sale deed etc. etc. On bare reading of the General Power of Attorney it cannot be concluded that Suresh Kumar Shukla has transferred the land by way of sale, gift, etc. etc. envisaged in Section 118(1) of the Act in favour of Smt. Santosh Malhotra or in favour of Jai Dev Malhotra nor it is proved on record that Smt. Santosh Malhotra has sold the land to her son Jaidev Malhotra on the strength of the General Power of Attorney. The reasoning of the Collector that as Jaidev Malhotra had spent a sum of Rs.1,90,000/- on the construction of the building on the land as reflected by him in his Income-tax returns will not be a sufficient proof that Suresh Kumar Shukla has transferred the land to Jaidev Malhotra on the basis of the General Power of Attorney executed in favour of his mother. The H.P. Tenancy and Land Reforms (Amendment) Act, 1994 came into force on 22.3.1995 whereas the General Power of Attorney (Annexure P-1) has been executed on 7.11.1991 as noticed above and the Collector passed the order (Annexure-P2) on 20.2.1995 prior to the date of the enforcement of the amended Act. Explanation of Section 118(1) of the Amendment 'Act' reads as under:

"Explanation – For the purpose of this sub-section, the expression "transfer of land" shall include:-

(a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non-agriculturist, and

(b) an authorization made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in the like manner as if he is a real owner of that land." (Pp.347,348 & 349)

22. Careful perusal of aforesaid judgment passed by this Court in ***Santosh Mahlotra's*** case *supra* clearly suggest that provisions incorporated in the principal Act by amendment Act 1994, which came into force on 22.3.1995 could not be made applicable in the cases which pertained to years prior to amendment carried out on 22.3.1995. Hence, this Court has no hesitation to conclude that revenue authorities have passed impugned orders against the petitioner herein, contrary to the provisions of Section 118 of 1988 Act, because amendment Act, which came into force on 22.3.1995, could not be made applicable retrospectively in the present case.

23. At this stage, it may be stated that though respondent, while opposing present petition, did not raise issue, if any, of retrospectively as far as amendment Act, 1994 is concerned, which came into force on 22.3.1995, but it is well settled law that in the absence of anything in enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to claim under litigation at the time when the Act was passed ***(See: Garikapatti Veeraya vs. N.Subblah Choudhury, 1957 SCR 488).***

24. Since this Court had an occasion to peruse H.P. Tenancy and Land Reforms (Amendment) Act, 1994, wherein expression 'transfer of land' was amended, but this Court was unable to find any specific clause stating therein that amendment would have retrospective operation and as such it can be inferred that Amendment Act, 1994 was prospective in nature.

25. As clearly emerged from the judgment passed by this Court, referred hereinabove, the issue at hand is not more res intigra, rather pursuant to aforesaid judgment, this Court in number of judgments reiterated the view taken in *Santosh Mahlotra's* case supra.

26. Reliance is placed on the judgment of our own High Court in ***Dhyan Singh vs. State of Himachal Pradesh and Others, 2012 (3) Shim.L.C. 1741,*** wherein this Court, while dealing with the aforesaid aspect of amendment, has also dealt with issue of retrospectivity and as such it would be profitable to refer to para-6 of the judgment:-

> *"6. Learned Counsel also places reliance on the decision of the Supreme Court in Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar and others, (1999)8 SCC 16. The Court holds:*
>
> *22. In view of the facts and circumstances of the case and in the alternative Mr. Agarwal, the learned counsel for the respondent has urged that the amending Act being substituted legislation would have retrospective effect.*
>
> *23. In Garikapatti Veeraya v. N. Subbiah Choudhury, [1957] SCR 488, Chief Justice S.R. Das speaking for the Court observed as follows :*
>
> *"The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed."*
>
> *24. We may also refer to Francis Bennion's Statutory Interpretation, 2nd Edn.,at p. 214 wherein the learned author commented as follows :*
>
> *"The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of expost facto law is enshrined in the United States Constitution and in the Constitutions of many American States, which forbid it. The true principle is that Lex prospicit non respicit (law looks forward not back). As Willes, J. said, retrospective legislation is `contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."*
>
> *25. This Court in Hitendra Vishnu Tlutkur and Others v. State of Maharashtra and Others, [1994] 4 SCC 602 has culled out the principles with regard to the ambit and scope of an amending Act and its retrospective operation as follows :*
>
> *(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is tex-tually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.*
>
> *(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.*
>
> *(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.*

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication." [P.25 & 26)

27. After bestowing my thoughtful consideration qua the fact and circumstances of the case, especially proposition of law as discussed in detail hereinabove, I find that case at hand was squarely covered by decision of this Court in ***Santosh Mahlotra's*** case *supra* and as such Financial Commissioner (Appeals) has erred in law while holding that amendments to Act carried on in the year 1994 do not come into play and provisions incorporated in 1987 of the amendment covers the case fully.

28. This Court is of the view that amendment in the Act, made on 22.3.1995 prohibiting transfer of land by way of agreement, is not retrospective and as such agreement to sell made, if any, by present petitioner prior to amendment Act, 1994, cannot be said in violation of provisions of Section 118 of the Act. Accordingly, order of Financial Commissioner, affirming the orders of authorities below, is quashed and set aside. This petition is allowed with no order as to costs.

29. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

****

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

M/s.Cosmo Ferrites Ltd. ....Petitioner
Versus
State of H.P. & Others ....Respondents

CWP No. 5982 of 2010.
Judgment Reserved on: 26.08.2016
Date of decision: 07.10.2016

Industrial Disputes Act, 1947- Section 25- The workman had joined the service in the month of June, 1989 and continued till 19.1.1999, when his services were terminated without resorting to the provisions of the Act – Departmental proceedings were initiated against the petitioner but the proceedings were not fair – proper opportunity was not granted to the petitioner to defend himself- Industrial Tribunal directed the reinstatement of the workman in service with seniority and continuity along with back wages from the date of illegal termination- Tribunal concluded that proper opportunity of cross-examination of the witnesses was not afforded to the workman- an opportunity to defend his case throughdefence assistance was also not afforded – proceedings were conducted in English and there is no evidence that petitioner knew English language- other infirmities were also pointed out in the proceedings – held, that Tribunal had fallen in error in pointing out the irregularities in the cross-examination- workman had not objected to the appointment of the Inquiry Officer or conducing the proceedings in English – Workman had not requested for the appointment of the defence assistance- the provisions of the Indian Evidence Act are not applicable in the domestic inquiry – the order passed by Tribunal set aside- however, compensation of Rs.1.5 lacs ordered to be paid in lieu of 10 years service rendered by him.
(Para-10 to 43)

Cases referred:

North-East Karnataka Road Transport Corporation vs. M.Nagangouda, (2007)10 SCC 765
Bhuvnesh Kumar Dwivedi vs. M/s.Hindalco Industries Ltd. 2014 AIR SCW 315

South Indian Cashew Factories Workers' Union vs. Kerala State Cashew Development Corpn.Ltd. and Others, (2006) 5 SCC 302
Bharat Petroleum Corporation Ltd. Vs. Maharashtra General Kamgar Union and Others, (1999)1 SCC 626
D.G. Railway Protection Force and Others vs. K.Raghuram Babu, (2008)4 SCC 406
State of Haryana and Another vs. Rattan Singh, (1977)2 SCC 491
Workmen of Balmadies Estates vs. Management, Balmadies Estates and Others, (2008)4 SCC 517
Om Parkash vs. Delhi Transport Corporation, 2016 LLR 683
Divisional Controller, Karnataka State Road Transport Corporation vs. M.G. Vittal Rao, (2012)1 SCC 442
Om Parkash vs. Delhi Transport Corporation, 2016 LLR 683
E.P. Royappa vs. State of Tamil Nadu and Another, (1974)4 SCC 3
Gulam Mustafa and Others vs. The State of Maharashtra and Others, (1976)1 SCC 800
Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant and Others, (2001)1 SCC 182
J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, (2007)2 SCC 433
Bhuvnesh Kumar Dwivedi vs. Hindalco Industries Limited, (2014)11 SCC 85
Mackinnon Mackenzie and Company Limited vs. Mackinnon Employees Union, (2015)4 SCC 544
Tota Ram vs. Belliss India (Private) Limited, (2016)6 SCC 406

For the Petitioner: Mr.Rahul Mahajan, Advocate.
For Respondent No.1: Mr.Rupinder Singh Thakur, Additional Advocate General with Mr.Rajat Chauhan, Law Officer.
For Respondent No.2: Mr.Rohit Sharma & Mr.Anuj Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

By way of present petition filed under Article 226/227 of the Constitution of India, the petitioner-Company has laid challenge to the award dated 30th June, 2010 passed by Labour Court-cum-Industrial Tribunal, Shimla, H.P. *(for short `Tribunal')* in Ref.No.93 of 2000, whereby the learned Tribunal below, while allowing the claim put forth on behalf of respondent-workman, has held him entitled for reinstatement in service with seniority and continuity alongtwith full back wages from the date of his illegal termination i.e 19th January, 1999.

2. Documents available on record suggest that appropriate government made reference under Section 10(1) of the Industrial Disputes Act, 1947 *(hereinafter referred to as the `Act')* in the following terms:

> *"Whether the termination of services of Shri Om Prakash ex worker by the Management of M/s.Cosmo Ferrities Ltd. Parwanoo, District Solan, HP w.e.f. 19.1.1999, without compliance of section 25F of the Industrial Disputes Act, 1947 by holding the enquiry ex parte without affording the reasonable opportunity of being heard to the worker in consonance with the principles of fair-play and natural justice, is legal and justified? If not to what relief of service benefits and amount of compensation, Shri Om Prakash is entitled to?"*

3. In nutshell, respondent-workman claimed that he had joined services of the petitioner-Company in the month of June, 1989 and continued as such till 19th January, 1999, when his services were dispensed with illegally without resorting to the provisions of the Act. Respondent-workman further set up a case before the learned Tribunal below that the Management of the petitioner-Company always intended to dispense with his services due to his involvement in Trade Unions. Accordingly, Management in pre-planned manner constituted

domestic inquiry against him, which was merely an eyewash. Respondent-workman further contended that even the charge-sheet issued vide letter dated Ist November, 1998 was biased, unfair, vague and defective for the reason that it was in English language and as such, he, being illiterate person, was unable to understand the contents contained in the same. He also claimed that list of witnesses of the Management as well as documents in support of charges were not supplied to him at any point of time by the Management before initiating alleged disciplinary proceedings against him. Respondent-workman further contended that in the charge-sheet, Management itself declared strike to be illegal for the purpose of specifically framing charges against him. Moreover, Management of the petitioner-Company got appointed Senior Manager of the Factory as an Inquiry Officer with a view to get desired results. He further stated that Inquiry Officer conducted the proceedings without settlement of procedure because at no point of time he was made aware that what kind of procedure would be adopted in the disciplinary proceedings initiated against him at the behest of Management. He also alleged that no opportunity of being heard was ever afforded to him because despite his specific request, no Defence Assistant was provided to him. Similarly, he claimed that Management despite knowing fully well that respondent-workman was not conversant with English language, Inquiry Officer conducted the proceedings in English, as a result of which great prejudice is caused to him. Respondent-workman further claimed that Management witnesses were partial and at no point of time independent witnesses were examined and as such inquiry, if any, conducted against him was eyewash and one side story put forth on behalf of the Management of the petitioner-Company.

4. Apart from above, respondent-workman also claimed that he was not afforded proper opportunity to cross-examine witnesses of the Management solely for the reason that he could not have known as to what had been written in the proceedings which were in English. Since inquiry report was also prepared in English, he was not aware with regard to the discussion, if any, qua the version put forth by him during alleged disciplinary proceedings. Respondent-workman claimed that since entire inquiry proceedings were conducted in violation of principle of natural justice, same deserves to be quashed and set aside. Respondent-workman also stated before the Tribunal below that punishment imposed against him by the disciplinary authority is not in consonance with the alleged charges leveled against him and as such dismissal order issued vide order dated 19th September, 1999 deserves to be quashed and set aside and he deserves to be reinstated with seniority, continuity, full back wages and other consequential service benefits by setting aside the inquiry proceedings.

5. Petitioner-Company by way of counter claim/written statement disputed the claim of respondent-workman by raising preliminary objections qua the maintainability of dispute, if any, before the Tribunal. On merits, petitioner-Company while refuting the allegations made in the claim specifically stated that all the relevant material was duly supplied to respondent-workman during the inquiry proceedings conducted by the Inquiry Officer. Petitioner-Company also contended that inquiry proceedings were conducted in most fair and proper manner by following the principles of natural justice and there is no merit in the claim put forth on behalf of respondent-workman. Petitioner-Company specifically stated before the Tribunal below that at no point of time during inquiry, objection, if any, was ever raised by the workman that proceedings should be conducted in Hindi and he be allowed to be represented through authorized representative. Similarly, petitioner-Company stated before Tribunal that no objection was ever raised with regard to appointment of Inquiry Officer and as such at this stage no objection, if any, with regard to appointment of Mr.Yatish Khurana can be raised, who was admittedly Senior Manager in the Company at that relevant time. Petitioner-Company also contended that the petitioner had participated in inquiry proceedings and he was duly supplied show cause notice, charge sheet, list of witnesses and other relevant record in Hindi also and as such it is not justified on his part to allege that he had been condemned unheard, rather record would go to show that fair and reasoned inquiry had been conducted and due and admissible opportunity was afforded to respondent-workman to defend himself. Petitioner-Company specifically contended before Tribunal below that since respondent-workman never objected for holding inquiry in English, there was no occasion for the Management to conduct inquiry

proceedings in Hindi. In the aforesaid back ground petitioner-Company sought dismissal of the claim put forth on behalf of respondent-workman.

6. Respondent-workman, by way of rejoinder, reaffirmed and reiterated his claim by denying the reply filed on behalf of the petitioner-Company. Learned Tribunal on the basis of pleadings available on record framed following issues:-

> *"1. Whether the termination o the petitioner is illegal and unjustified as alleged?*
>
> *2. Whether the petition is not maintainable as alleged?*
>
> *3. Whether termination was ordered by respondent aftr holding a fair and legal enquiry as alleged?*
>
> *4. Relief."*

7. Subsequently, learned Tribunal below vide impugned award dated 30th June, 2010 upheld the claim of the respondent-workman, as a result of which, present petitioner-Company was directed to reinstate respondent-workman in service with seniority and continuity alongwith full back wages from the date of his illegal termination i.e. 19th January, 1999.

8. In the aforesaid background, present petitioner-Company, being aggrieved and dissatisfied with the impugned award, approached this Court by way of present writ petition, praying therein for quashing and setting aside of award dated 30th June, 2010 passed in reference no.93/2000 by learned Tribunal below by issuing writ in the nature of certiorari.

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

10. Close scrutiny of material available on record clearly suggests that respondent-workman was engaged by the petitioner-Company in the month of June, 1989, where he continued to work till 19th January, 1999, when he was ordered to be dismissed from his service, pursuant to disciplinary proceedings initiated against him. It also emerge from the record that since respondent-workman was involved in illegal strike, disciplinary proceedings were initiated against him and on the basis of material adduced therein by the Management, Inquiry Officer held him guilty of misconduct, as a result of which he was awarded penalty of dismissal from service vide order dated 19th January, 1999.

11. Careful perusal of impugned award passed by learned Tribunal below suggests that learned Tribunal below, on the basis of evidence led on record by respective parties, came to the conclusion that petitioner was not afforded any opportunity to get his case defended through Defence Assistant. Learned Tribunal below also came to the conclusion that proper opportunity of cross-examining the witnesses of Management, who were not independent, was also not afforded to respondent-workman. Accordingly, learned Tribunal, while upholding the claim put forth on behalf of the respondent-workman, came to the conclusion that inquiry conducted against respondent-workman cannot be said to have been conducted by following the principle of natural justice. Similarly, learned Tribunal below, while examining the letter dated 26th November, 1998 (Ex.RC), whereby Shri Yatish Khurana was appointed as Inquiry Officer to conduct inquiry into the charges leveled against respondent-workman, observed that since Mr.Yatish Khurana was not examined as witness by the petitioner-Company in support of its contentions, inquiry proceedings, if any, conducted by petitioner-Company cannot be said to have been proved in accordance with law for the reasons that Shri Yatish Khurana, Inquiry Officer, was the best person to depose before the Court that whether proper procedure was followed at the time of inquiry or not.

12. Similarly, Tribunal below came to the conclusion that Inquiry Officer had not made known to respondent-workman as to what procedure he was to follow while conducting the inquiry. In this regard learned Tribunal, on the basis of material made available to it, came to the conclusion that no statement of respondent-workman had been recorded that he did not choose/opt to get the services of Defence Assistant despite the fact that in this regard, request

was made by respondent-workman. Similarly, Tribunal came to the conclusion that there is nothing in the inquiry proceedings that respondent-workman had agreed to get conducted the inquiry proceedings in English, which he was unable to understand. Learned Tribunal below, while placing reliance upon school leaving certificate Ex.P-2, concluded that it stands duly proved on record that the respondent-workman had studied up to 3rd standard and as such it can be safely inferred that he was unable to understand English. Tribunal below, while allowing claim put forth on behalf of the respondent-workman, also came to the conclusion that no counter evidence has been led by petitioner-Company in order to show that respondent-workman was qualified enough to know English language and as such great prejudice was caused to him.

13. At this stage, it may be noticed that petitioner-Company, by way of placing entire inquiry proceedings, made an attempt to prove before Tribunal below that copies of day to day proceedings, including statements of the witnesses, were supplied to the respondent-workman, on which he appended his signatures, but learned Tribunal was of the view that it was obligatory upon the Inquiry Officer to have supplied to the respondent-workman, copies of those proceedings. For the failure of the Inquiry Officer to supply the copies, great prejudice has been caused to the respondent-workman, who was unable to defend himself in the enquiry, which was conducted against him.

14. Similarly, Tribunal concluded that perusal of Ex.PB, copy of charge-sheet, itself suggests that no documents as well as list of witnesses of the Management were supplied to respondent-workman and as such, it cannot be said that due and proper procedure was followed by the petitioner-Company while conducting disciplinary proceedings against respondent-workman. Apart from above, Tribunal also observed that it is revealed from the record that Management examined witnesses i.e. Ashok Dhiman (MRW-1), Ved Ram (MRW-2), Rajinder Tahkur (MRW-3) and Bhim Dutt (MRW-4), during enquiry proceedings. Perusal of their statements clearly shows that the same were recorded in question and answer form, which were in English. Hence, it cannot be said that the respondent-workman was afforded opportunity to cross-examine them in question and answer form, which were admittedly in English.

15. Learned Tribunal, after perusing the inquiry record, also found that one Shri S.C. Katoch, who had conducted inquiry proceedings on behalf of the Management, was also not examined as a witness and as such Management was not able to prove inquiry proceedings, which as per them was conducted in most fair manner after following due procedure. As per Tribunal, had the Management examined Shri S.C. Katoch, Inquiry Officer, it could have been known that whether the Inquiry Officer had followed the proper procedure while conducting the inquiry or not.

16. If the impugned award passed by the learned Tribunal below is read in its entirety, it clearly emerge that following factors weighed heavily with the Tribunal while allowing the claim of the respondent-workman:-

1. Charge sheet served upon the respondent-workman was not accompanied with any document or list of witnesses.
2. Respondent-workman was not informed about the procedure which was to be followed by the Inquiry Officer in order to conduct the inquiry.
3. Inquiry proceedings were conducted in English by Inquiry Officer fully knowing that respondent-workman is only studied up to 3rd standard.
4. Despite there being specific request by the respondent-workman, he was not provided with Defence Assistant during inquiry proceedings.
5. Shri Yatish Khurana, Inquiry Officer was not examined by the petitioner-Company before the Tribunal below, who could prove that inquiry proceedings placed on record by the petitioner-Company was conducted in fair and proper manner by following due procedure as laid down.

6. Lastly petitioner-Company failed to examine Shri S.C. Katoch, representative of the Management, who could depose before the Tribunal below that Inquiry Officer had followed due procedure while conducting inquiry.
7. No proper opportunity was afforded to respondent-workman to cross-examine the witnesses of petitioner-Company since they all were examined and their statements were recorded in question and answer form, which was in English

17. On the aforesaid points, as have been culled out by this Court, after reading award of the Labour Court in its entirety, learned Tribunal below accepted the claim of the respondent-workman and held him entitled for reinstatement with benefit of continuity of service and seniority with full back wages.

18. Now, this Court would be examining the aforesaid illegalities pointed out by Tribunal in the light of the defence taken by the petitioner-Company before learned Tribunal below as well as submissions having been made on behalf of Shri Rahul Mahajan, learned counsel representing the petitioner-Company before this Court.

19. If, in nutshell, written statement of petitioner-Company is perused, it emerge that the petitioner-Company submitted before the Tribunal below that inquiry was conducted in most proper and fair manner and due opportunity of being heard was afforded to the respondent-workman by the Inquiry Officer and as such there is no violation of principle of natural justice. Petitioner-Company also claimed that since charge against the respondent-workman was duly proved and thereafter on having served a notice upon him and receiving reply, his services were discharged by imposing lesser punishment. Petitioner-Company also contended before the Tribunal below that respondent-workman was served with charge-sheet alongwith documents and he was afforded opportunity to examine defence witnesses and further opportunity to cross-examine the witnesses and it cannot be said that Inquiry Officer had not followed the prescribed procedure. Close scrutiny of written statement filed on behalf of petitioner-Company suggests that it stated before the Tribunal that since respondent-workman at no point of time objected during inquiry proceedings before the Inquiry Officer that the same should not be conducted in English. At no point of time he made any request to authorities to conduct inquiry in Hindi and as such there was no occasion for them to conduct the enquiry proceedings in Hindi.

20. Shri Rahul Mahajan, learned counsel representing the petitioner-Company, vehemently argued that bare perusal of impugned award dated 30th June, 2010 suggests that the same is wrong, illegal, bad in law based upon surmises and conjectures, non-appreciation and mis-appreciation of oral and documentary evidence on record and as such same deserves to be quashed and set aside.

21. Mr.Mahajan, further contended that learned Tribunal has miserably failed to appreciate that respondent-workman was issued charge-sheet in respect of misconduct, which was serious in nature of inciting, instigating the workers of the petitioner-Company to restrain from work, abetting, organizing meeting and demonstration inside the petitioner-company/industrial establishment with a view to intimidate the Management so that it concedes to the unreasonable, unjustified demand of the workmen, shouting and slogans against the executive of the company in abusive defamatory language and to resort to illegal tool down/strike and to threaten the workers to stop works, as such he was rightly dismissed from service that too after completion of disciplinary proceedings, which were conducted in most fair and proper manner as is evident from the complete inquiry proceedings placed on record by the petitioner-Company.

22. Mr.Mahajan further contended that once respondent-workman failed to reply to the charge sheet, he was given reminder and ultimately he filed reply, which was found unsatisfactory and therefore domestic inquiry was conducted, wherein charges in respect of the charge-sheet Ex.RB stood duly proved and thereafter 2nd show cause notice was issued and services of respondent-workman were dispensed with after receipt of his reply, which was found unsatisfactory.

23. Mr.Mahajan further contended that learned Tribunal below has fallen in grave error while not appreciating that it had very limited power under the Act to interfere in the matter of punishment imposed upon the delinquent workers as far as penalty qua the major misconduct is concerned. In the present case, it stood duly proved on record that respondent-workman insisted or abetted his fellow workers in the Company against the Management and as such there is no illegality and infirmity in dismissal order issued against him by the Management which was passed after following due procedure of law. While adverting to the findings returned by the Tribunal below that Defence Assistant was not made available to respondent-workman despite his request, Mr.Mahajan strenuously argued that aforesaid finding is contrary to documentary and oral evidence available on record because respondent-workman at no point of time ever asked to be represented through the Defence Assistant. To substantiate his aforesaid arguments, he invited the attention of this Court to the cross-examination conducted on respondent-workman, wherein he specifically admitted that he had not given in writing to the Inquiry Officer to provide a Defence Assistant but orally requested him. Similarly, Mr.Mahajan stated that right to be represented in an inquiry by Defence Assistant is not a statutory right, rather, the same depends upon the Rules and Regulations. Thus, it is evident from the statement of respondent-workman himself, who appeared as PW-1, that at no point of time he ever made any request to be represented through a Defence Assistant and as such learned Tribunal below has fallen in grave error while concluding that no Defence Assistant was made available to respondent-workman on his behalf.

24. Similarly, Mr.Mahajan stated that learned Tribunal failed to appreciate that just, fair and proper domestic inquiry was conducted, wherein day to day inquiry proceedings were duly signed by respondent-workman, the representatives of petitioner-Company and Inquiry Officer. He also invited the specific attention of this Court to the cross-examination conducted on respondent-workman wherein he stated that *"charge sheet was received and reply was given".* In his cross-examination, respondent-workman also admitted that *"when inquiry was started, I signed every day inquiry proceedings and all the proceedings bear my signatures as the Inquiry Officer used to take my signatures in the proceedings every day."* Similarly, Mr.Mahajan invited the attention of this Court to the admission made by respondent-workman in cross-examination, wherein he stated that "*it is correct that he was I was informed by the Management about the Enquiry Officer and I received the letter."*

25. Mr.Mahajan forcefully contended that since respondent-workman in his cross-examination himself admitted his signatures on the cross-examination of the witnesses, Suresh, Mukesh at point B & C, findings returned by the learned Tribunal below cannot be said to be based upon proper appreciation of evidence, wherein it has been concluded that no opportunity of cross-examination was afforded to respondent-workman while cross-examining the witnesses produced on behalf of the petitioner-Company. Mr.Mahajan made this Court to travel through inquiry proceedings Ex.RD-1 to RD-16 to demonstrate that on each and every order respondent-workman has appended his signatures, meaning thereby that he was made aware of each and every order passed on day to day basis during inquiry proceedings.

26. Mr.Mahajan also contended that bare perusal of proceedings, as referred hereinabove, nowhere suggests that at any point of time, objection, if any, was raised by the respondent-workman with regard to conducting of disciplinary proceedings in English.

27. This Court, after hearing aforesaid submissions having been made on behalf o of Mr.Mahajan as well as documents referred by him, is of the view that learned Tribunal has fallen in error while concluding that no fair and proper domestic inquiry was held, wherein day to day inquiry proceedings were not supplied to respondent-workman because this Court had an occasion to peruse Ex.RD-1 to RD-16 i.e. inquiry proceedings, perusal whereof clearly suggests that on each and every day proceedings, respondent-workman had appended his signatures alongwith Inquiry Officer and other relevant persons. Similarly, this Court nowhere finds that at any point of time respondent-workman raised objection with regard to holding of inquiry in English. If respondent-workman had any difficulty in understanding proceedings in English, he

could always lodge his protest in writing to the Inquiry Officer with a request to conduct inquiry in Hindi but same was not done by him. Similarly, careful perusal of cross-examination conducted on this witness itself suggests that when inquiry was started respondent-workman signed everyday inquiry proceedings and he was also informed by the Management with regard to appointment of Inquiry Officer. Respondent-workman categorically admitted in his cross-examination that he received letter in this regard. Hence, in view of candid admission having been made on behalf of respondent-workman, this Court really finds it difficult to accept the conclusion drawn by the learned Tribunal below, while allowing the claim of the respondent-workman, wherein it concluded that inquiry was not conducted in proper and fair manner and no opportunity of being heard was afforded to respondent-workman. Similarly, respondent-workman himself in his cross-examination admitted that at no point of time he i.e. PW-1 made request to be represented through the Defence Assistant. In his cross-examination he specifically admitted that he never made any request in writing but orally he requested the Inquiry Officer, but after perusing the entire evidence and proceedings, this Court really find it difficult to accept the version put forth on behalf of respondent-workman that he had orally asked the Inquiry Officer to provide him Defence Assistant.

28. Mr.Mahajan vehemently argued that the impugned award is not based on the correct appreciation of oral and documentary evidence produced on the record. He also stated that bare perusal of impugned award itself suggests that the same is contrary to the facts as well as material placed on record by the petitioner-Company and as such same deserves to be quashed and set aside. Mr.Mahajan, with a view to demonstrate that learned Tribunal has fallen in grave error while returning the findings contrary to record, invited the attention of this Court to various documents available on record. Apart from above, Mr.Mahjajan made various submissions to prove that the impugned judgment is perverse and is a result of misreading and misinterpretation of facts as well as of law, which are not being reproduced for the sake of brevity and same would be dealt with specifically by this Court while examining the correctness and genuineness of the impugned award passed by the Tribunal below.

29. Mr.Mahajan further argued that respondent-workman was not able to prove on record that he was not gainfully employed during period of termination and as such learned Tribunal below had no reason to grant him full back wages while holding him entitled for reinstatement.

30. Mr. Mahajan stated that respondent-workman himself admitted that during period of termination he was doing agricultural work at home, meaning thereby that he was gainfully employed in terms of the aforesaid judgment.

31. In this regard Mr.Mahajan placed reliance on ***North-East Karnataka Road Transport Corporation vs. M.Nagangouda, (2007)10 SCC 765***, wherein the Hon'ble Supreme Court has held as under:-

> *"17. On the said question, we are unable to accept the reasoning of the Labour Court that the income received by the respondent from agricultural pursuits could not be equated with income from gainful employment in any establishment. In our view, "gainful employment" would also include self- employment wherefrom income is generated. Income either from employment in an establishment or from self-employment merely differentiates the sources from which income is generated, the end use being the same. Since the respondent was earning some amount from his agricultural pursuits to maintain himself, the Labour Court was not justified in holding that merely because the respondent was receiving agricultural income, he could not be treated to be engaged in "gainful employment".*

32. Per contra, Mr.Anuj Gupta vehemently argued that bare perusal of the award passed by Tribunal below itself suggest that same is based upon correct appreciation of the evidence adduced on record by the respective parties and as such no interference, whatsoever, of this Court warranted in the facts and circumstances of the case. While referring to the impugned

award, Mr.Gupta forcefully contended that each and every aspect of the matter has been dealt with meticulously by the Tribunal below while answering the reference referred to by the appropriate Government and as such present petition deserves to be dismissed being devoid of merit. Mr.Gupta also reminded this Court of its limited powers under Article 226 of the Constitution of India to re-appreciate evidence as well as findings of fact recorded by the learned Tribunal below while examining the genuineness and correctness of the petition preferred under Article 226 of the Constitution of India.

33. This Court is conscious of the fact that it has very limited jurisdiction to re-appreciate the findings of fact returned by learned Tribunal below, while exercising its jurisdiction under Article 226 of the Constitution of India, in terms of judgment passed by the Hon'ble Apex Court in ***Bhuvnesh Kumar Dwivedi vs. M/s.Hindalco Industries Ltd. 2014 AIR SCW 315,*** wherein the Court held as under:-

"16. ....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. nA error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

17. The judgments mentioned above can be read with the judgment of this Court in Harjinder Singh's case (supra), the relevant paragraph of which reads as under:

21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and / or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare

of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:

10.... The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State.

18. A careful reading of the judgments reveals that the High Court can interfere with an order of the Tribunal only on the procedural level and in cases, where the decision of the lower Courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant."[Emphasis added]

34. However, careful perusal of the aforesaid judgment suggests that if Court, while examining the award, comes to the conclusion that same is perverse and is not based upon the correct appreciation of evidence/material available on record, it can look into the evidence with a view to ensure that the award passed by the Tribunal below is not perverse and same is based upon correct appreciation of evidence. In the present case, this Court, after hearing the submissions having been made on behalf of petitioner-Company and perusing documentary evidence available on record, is of the firm view that learned Tribunal below has fallen in grave error while not appreciating the material evidence adduced on record by the petitioner-Company to substantiate that due and proper procedure was followed by the Management of the petitioner-Company before dismissing respondent-workman.

35. At this stage, this Court solely with a view to examine correctness of the award passed by learned Tribunal below deems it fit to reproduce here-in-below the statement of PW-1 respondent-workman:

"I was appointed as Operator in the respondent company since January, 1989, as per my appointment letter Ex.P-1. I was removed from the service on 20.1.1999 after holding the enquiry. I am educated upto 3rd standard, as per my certificate Ex.P-2. Our union was formed in 1997 and I was elected as a Joint Secretary. Again said the union was already existing in the factory prior to my joining. We were demanding the over time as per law as the company was not making the payment as per norms. We have gone with this demand to the Labour Officer who did nothing. The strike was called for non payment of over time. The matter was compromised on 20.11.1998 as per compromise Mark-X. (Objected to). Rs.1500/- were paid to us and we were asked to join the duties. Objected to nothing has been mentioned in the settlement. After two months the re-conciliation enquiry was instituted against me and Factory Manager, Mr.Yatish Khurana was the Inquiry Officer. No procedure of enquiry was explained to me by the Inquiry Officer. No document was given to me by the Inquiry Officer even no document was supplied alongwith the Charge-sheet. No list of witness was supplied to me. No witness was recorded in my presence. I was not afforded any opportunity to examine my witnesses. My statement was not recorded in the enquiry. I am unable to read the enquiry proceedings given to me. No quarrel had taken place during the strike period. I had given application Mark-X-1 to the Inquiry Officer. The Inquiry Officer had not supplied me the hindi version of the show cause notice. I had given the reply of the show cause notice which is the original and is Ex.P-3. Similar charge sheet was given to Pammi Dutt, who was the President of the Union. Pammi Dutt

was retained after enquiry, but I was removed. Enquiry of Pammi was also conducted. No proper enquiry was conducted against me. All the allegations leveled against me are false. I may be re-instated with all benefits.

Xxxxxxx xxxxxxx xxxxxxx

All the documents Ex.R-1 to Ex.R-14 are received by me and bears my signatures. I was aware about my salary and could read the figure. Volunteered I could not read that what is written in Ex.R-1 to Ex.R-14. It is correct that I received the charge-sheet and given the reply, but it had not written by me that I am unable to read English and I may be given the Hindi version of the document. When the enquiry was started, I signed the every day enquiry proceeding. All the proceedings bear my signatures as the Inquiry Officer was taking the signatures on the proceedings every day. Volunteered I told the Inquiry Officer that it may be written in Hindi, as I could not understand English. There is no document vide which I requested the Inquiry Officer for Hindi version except letters dated 12.1.1999 and 15.1.1999. It is correct that I signed the application in English on 12.1.1999 which is at Point 'A'. It is wrong to suggest that I was asked by the Inquiry Officer for my evidence. It is wrong to suggest that I was given due opportunity to produce my evidence. It is also wrong that I failed to produce my evidence. It is wrong that the management has supplied the list of witnesses to the Inquiry Officer as well as to me. It is correct that I received the 2nd show cause notice dated 6.1.1999 after the conclusion of the enquiry, which is Ex.R-15. I have received the second show cause notice in Hindi when I asked for the same, which is Ex.R-16. It is correct that I was given the termination order in Hindi as well as English, which is Ex.R-17 and Ex.R-18. No enquiry report in Hindi was received, but enquiry report in English was received. My application for appointment is Ex.R-19 which is signed by me. I cannot state that in the settlement, it was decided that only the suspension orders against me and the President Pammi Dutt were reviewed, but the disciplinary enquiry would continue. I had not signed the settlement. No letter was received from Labour Officer regarding illegality of strike. The letter is Mark-RX. It is correct that I was informed by the management about the Inquiry Officer and I received the letter. Suresh and Mukesh witness were not examined in my presence. It is also wrong that the stated before the Inquiry Officer that they were threatened by me. I admit my signatures on the cross-examination of the witnesses at Point 'B' and 'C'. Volunteered that I had not cross-examined the witnesses. I admit my signatures in all the enquiry proceedings. Volunteer that I was signing the documents as and when asked by the Inquiry Officer. I had not given any complaint against the Inquiry Officer and the management to the Labour Officer that my signatures are being taken forcibly by the Inquiry Officer. Leave application Ex.R-20 is signed by me, which is for leave. Volunteer I got the application written from other colleagues. It is correct that I had not mentioned in my petition that I was removed and Pammi Datt was kept in service. My petition is in English, but signed by me, but I do not know what is written in my petition. No suit was filed against me and Pammi Dutt restraining us not to interfering us in the affairs of the workers. Copy of which is Mark RY. It is wrong that at the time of strike I was simply member and not the Joint Secretary. It is wrong to suggest that proper enquiry was conducted against me and proper opportunity to cross-examine the witnesses were given to me. I had not given in writing to the Inquiry Officer to provide me Defence Assistant but orally I requested the Inquiry Officer. It is wrong that I was removed due to my misconduct."

36. Bare perusal of the aforesaid statement of PW-1 itself suggests that learned Tribunal has fallen in grave error while returning findings that irregularities (as have been numbered above) were committed by the Inquiry Officer while conducting disciplinary proceedings. Similarly, this Court after perusing the statement, as referred to above, finds that

respondent-workman never objected to the appointment of Mr.Yatish Khurana as Inquiry Officer. Rather, in cross-examination he himself admitted that he was informed by the Management about the Inquiry Officer and he had received the letter. Had he any objection in the appointment of Yatish Khurana as Inquiry Officer, he could have then and there objected to the same by making written communication to the Management. This Court also finds that respondent-workman participated in each and everyday inquiry and signed each and everyday inquiry proceedings. Vide letter dated 12.1.1999, workman objected to the proceedings conducted by the Inquiry Officer in English but by that time inquiry proceedings had already come to an end. After concluding the inquiry proceedings, respondent-Company had issued second show cause notice dated 6.1.1999 directing therein the respondent-workman to explain that why he be not punished for major mis-conduct as has been concluded by the Inquiry Officer. Issuance of show cause notice dated 6.1.1999 itself suggests that inquiry proceedings had come to an end before 6.1.1999 and as such there was no occasion, whatsoever, for respondent-workman to write letter dated 12.1.1999 requesting therein to conduct inquiry proceedings in English. Rather perusal of letter dated 12.1.1999 compel this Court to infer that it was after thought by the respondent-workman to create evidence in his favour that petitioner-Company purposely to its advantage conducted proceedings in English fully knowing well that respondent-workman does not know English. Similarly, this Court noticed that on letter dated 12.1.1999, respondent-workman has appended his signatures in English. In cross-examination, respondent-workman himself admitted that there is no document vide which he requested the Inquiry Officer to conduct proceedings in Hindi version except letters dated 12.1.1999 and 15.1.1999. This Court has already discussed hereinabove that letter dated 12.1.1999 had no relevance because by that time inquiry proceedings had already been concluded. Similarly, this Court finds that learned Tribunal has fallen in error while concluding that no opportunity of producing evidence was afforded to respondent-workman by the Inquiry Officer. It is not understood that how Inquiry Officer could compel the delinquent employee to produce evidence. It is not the case of the respondent-workman that he was prevented by the Inquiry Officer for leading evidence in his support, rather perusal of record suggests that Inquiry Officer afforded reasonable opportunity to respondent-workman to produce the evidence, which he failed to produce. But delinquent official himself stated that he does not want to produce any evidence.

37. Now, adverting to another illegality having been pointed out by Tribunal that Inquiry Officer was not examined, this Court is of the view that once Management by way of placing on record Ex.RD-1 to RD-16 had made available complete inquiry proceedings before the Tribunal, which was admittedly signed by the respondent-workman, there was no necessity, if any, for Management to site Mr.Yatish Khurana as a witness in the case. Respondent-workman in his statement has categorically admitted that he appended his signatures on each and every day's proceedings and he identified all the signatures of Mr.Yatish Khurana in inquiry proceedings Ex.RD-1 to RD-16 as such there was no question of adverse inference having been drawn against the petitioner-Company for not citing Mr.Yatish Khurana as witness. This Court, while perusing inquiry proceedings, also found that respondent-workman has signed all the exhibits in English. Similarly, leave application (Ex.R-20) sent by petitioner is also written and signed in English and as such this Court finds it difficult to be in agreement with the findings returned by the learned Tribunal below that the petitioner-Company knowing fully well that respondent-workman did not know English, conducted inquiry proceedings in English. Rather, petitioner-Company by placing on record certain documents, especially Ex.R-20 has been able to prove on record that respondent-workman use to write, sign and could read English and was aware about the documents, which were in English and similarly second show cause notice dated 6.1.1999, which was issued to the respondent-workman, was in English. But interestingly at no point of time, during proceedings of the case, respondent-workman raised issue with regard to conducting of proceedings in English or making available the services of Defence Assistant. It stands admitted in his cross-examination by respondent-workman that charge-sheet was received and reply was made by him and he signed every day inquiry proceedings.

38. In view of his specific admission that he had not made any written request to make available the services of Defence Assistant and to conduct inquiry in Hindi, this Court really finds it difficult to accept the findings returned by the learned Tribunal below and this Court after perusing the record made available is of the view that learned Tribunal below has misread and misinterpreted the evidence led on record which was sufficient to conclude that petitioner-Company dismissed the respondent-workman after following due procedure of disciplinary proceedings.

39. This Court, after carefully perusing the evidence available on record as well as submissions having been made on behalf of learned counsel representing the parties, is not in a position to concur with the findings returned by the Tribunal below that Inquiry Officer committed illegalities while conducting disciplinary proceedings because bare perusal of statement made by PW-1 i.e. respondent-workman, itself suggests that at no point of time he raised issue, if any, with regard to holding of inquiry in Hindi during proceedings. He categorically admitted in cross-examination that he had not sent any communication to Inquiry Officer praying therein for providing Defence Assistant as well holding of inquiry proceedings in Hindi and as such this Court is of the view that learned Tribunal below failed to appreciate the evidence on record in its right perspective, rather it drawn its own inferences and conclusions which are admittedly contrary to the records as has been discussed in detail hereinabove.

40. Otherwise also, Defence Assistant cannot be claimed as a matter of right by the delinquent official. Rather, decision, if any, with regard to providing of Defence Assistant depends upon the standing order of a particular organization/management. In the present case, this Court was unable to lay its hands to any document placed on record by respondent-workman suggestive of the fact that management in its standing order had specific provisions of providing Defence Assistant to a delinquent official during disciplinary proceedings. Similarly, in the absence of specific prayer having been made on behalf of delinquent official to conduct proceedings in Hindi, there was no occasion for Inquiry Officer to conduct proceedings in English, on which admittedly respondent-workman appended his signatures daily without any demur. Though respondent-workman raised issue with regard to appointment of Officer of Management as Inquiry Officer but interestingly there is nothing on record suggestive of the fact that delinquent official at no point of time raised issue of malafide, if any, against Inquiry Officer and as such this Court sees no illegality in appointing officer of the Management as an Inquiry Officer.

41. At this stage, this Court, in support of aforesaid reasoning/findings returned by it while holding that impugned award passed by the learned Tribunal is not based upon correct appreciation of facts as well as law, intends to place reliance upon following judgments passed by the Hon'ble Apex Court:-

42. In ***South Indian Cashew Factories Workers' Union vs. Kerala State Cashew Development Corpn.Ltd. and Others, (2006) 5 SCC 302,*** the Hon'ble Apex Court has held as under:-

> *"10. Learned counsel for the appellant submitted that the fact that the enquiry officer was an officer of the management itself affected the fairness of the enquiry. Further his biased approach was evident from the unnecessary observations made by him. He, therefore, contended that the view of the learned Single Judge was the correct one and should be restored. Learned counsel for the respondent No.1 on the other hand supported the impugned order of the High Court.*
>
> *11. In Delhi Cloth and General Mills Co. Ltd. v. Labour Court, (1970) 1 LLJ 23 (SC) this Court has held that merely because the Enquiry Officer is an employee of the Management it cannot lead to the assumption that he is bound to decide the case in favour of the Management.*
>
> *12. In Saran Motors (P) Ltd. v. Vishwanath, (1964)2 LLJ 139 (SC) this Court held as follows: (LLJ p.141)*

> *"It is well-known that enquiries of this type are generally conducted by officers of the employer companies and in the absence of any special bias attributable of a particular officer, it has never been held that the enquiry is bad just because it is conducted by an officer of the employer."*

13. *Therefore, finding of the Labour Court that enquiry was vitiated because it was conducted by an officer of the Management cannot be sustained.*

14. *The only other ground found by the Labour Court against the enquiry officer is that he made some unnecessary observations and, therefore, he was biased. The plea that enquiry officer was biased was not raised during the enquiry or pleadings before the Labour Court or in earlier proceedings before the High Court. The bias of the enquiry officer has to be specifically pleaded and proved before the adjudicator. Such a plea was significantly absent before the Labour Court. We also note that the Labour Court itself found that the enquiry officer relied on the evidence adduced in the enquiry and its findings were not perverse. After such a finding, even if he has stated some unwarranted observations, it cannot be stated that report is baised. In TELCO v. S.C. Prasad, (1969) 3 SCC 372 this Court held that : (SCC pp.380-81, para 13)*

> *"13. Industrial Tribunals, while considering the findings of domestic enquiries, must bear in mind that persons appointed to hold such enquiries are not lawyers and that such enquiries are of a simple nature where technical rules as to evidence and procedure do not prevail. Such findings are not to be lightly brushed aside merely because the enquiry officers, while writing their reports, have mentioned facts which are not strictly borne out by the evidence before them."*

15. *In this case for finding the employee guilty, the enquiry officer relied on the evidence adduced in the enquiry and Labour Court itself found that the findings were not perverse. In such circumstances, the preliminary order of the Labour Court setting aside the enquiry on the ground that enquiry was conducted by an officer of the Management and he had made some observations in the enquiry report which were not warranted in the case is not a vitiating factor and these reasons are not sufficient to set aside the enquiry.*

16. *The Labour Court had earlier held that the enquiry was properly held and there was no violation of the principles of natural justice and that the findings were not perverse. The vitiating facts found by the Labour Court against the enquiry are erroneous and are liable to be set aside. If enquiry is fair and proper, in the absence of any allegations of victimization or unfair labour practice, the Labour Court has no power to interfere with the punishment imposed. Section 11A of the Act gives ample power to the Labour Court to re-appraise the evidence adduced in the enquiry and also sit in appeal over the decision of the employer in imposing punishment. Section 11-A of the Industrial Disputes Act is only applicable in the case of dismissal or discharge of a workman as clearly mentioned in the Section itself. Before the introduction of Section 11-A in Indian Iron and Steel Co. Ltd. Workmen (1958) SCR 667 this Court held that the Tribunal does not act as a Court of appeal and substitute its own judgment for that of the Management and that the Tribunal will interfere only when there is want of good faith, victimisation, unfair labour practice, etc. on the part of the management. There is no allegation of unfair labour practice, victimisation etc. in this case. The powers of the Labour Court in the absence of Section 11-A is illustrated by this Court in Workmen v. Firestone Tyre and Rubber Co.of India (P) Ltd., (1973) 1 SCC 813. When enquiry was conducted fairly and properly, in the absence of any of the allegations of victimisation or malafides or unfair labour practice, Labour Court has no power to interfere with the punishment imposed by the management. Since Section 11-A is*

not applicable, Labour Court has no power to re-appraise the evidence to find out whether the findings of the enquiry officer are correct or not or whether the punishment imposed is adequate or not. Of course, Labour Court can interfere with the findings if the findings are perverse. But, here there is a clear finding that the findings are not perverse and principles of natural justice were complied with while conducting enquiry."

43. Reliance is also been placed upon the judgment of the Hon'ble Supreme Court in ***Bharat Petroleum Corporation Ltd. Vs. Maharashtra General Kamgar Union and Others, (1999)1 SCC 626,*** wherein the Hon'ble Apex Court has held as under:-

"25. Section 10 provides for duration and modification of Model Standing Orders. The Standing Orders finally certified under the Act cannot be modified except on an agreement between the employer and the workmen or a Trade union or other representative body of the workmen until the expiry of six months from the date on which they came into operation.

26. Before coming to the core question, we may first consider the right of an employee to be represented in the disciplinary proceedings and the extent of the right.

27. The basic principle is that an employee has no right representation in the departmental proceedings by another person or a lawyer unless the Service Rules specifically provide for the same. The right to representation is available only to the extent specifically provided for in the Rules. For example, Rule 1712 of the Railway Establishment Code provides as under:

"The accused railway servant may present his case with the assistance of any other railway servant employed on the same railway preparatory to retirement) on which he is working.

28. The right to representation, therefore, has been made available in a restricted way to a delinquent employee. He has a choice to be represented by another railway employee, but the choice is restricted to the Railway on which he himself is working, that is, if he is an employee of the western Railway, his choice would be restricted to the employees working on the Western Railway. The choice cannot be allowed to travel to other Railways.

29. Similarly, a provision has been made in Rule 14(8) of the Central Civil Services (Classification, Control & Appeal) Rules, 1965, where too, an employee has been given the choice of being represented in the disciplinary proceedings through a co-employee.

20. In N.Kalindi v. Tata Locomotive & Engineering Co.Ltd., AIR 1960 SC 914, a Three-Judge Bench observed as under:-

"Accustomed as we are to the practice in the courts of law to skilful handling of witnesses by lawyers specially trained in the art of examination and cross-examination of witnesses, or first inclination is to think that a fair enquiry demands that the person accused of an act should have the assistance of some person, who even if not a lawyer may be expected to examine and cross-examine witnesses with a fair amount of skill. We have to remember however in the first place that these are not enquiries in a court of law. It is necessary to remember also that in these enquiries, fairly simple questions of fact as to whether certain acts of misconduct were committed by a workman or not only fall to be considered, and straightforward questioning which a person of fair intelligence and knowledge of conditions prevailing in the industry will be able to do will ordinarily help to elicit the truth. It may often happen that the accused workman will be best suited, and fully able to cross-examine the witnesses who have spoken against him and to examine witnesses in his favour.

It is helpful to consider in this connection the fact that ordinarily in enquiries before domestic tribunals the person accused of any misconduct conducts his own case. Rules have been framed by Government as regards the procedure to be followed in enquiries against their own employees. No provision is made in these rules that the person against whom an enquiry is held may be represented by anybody else. When the general practices adopted by domestic tribunals is that the person accused conducts his own case, we are unable to accept an argument that natural justice demands that in the case of enquiries into a charge-sheet of misconduct against a workman he should be represented by a member of his Union. Besides it is necessary to remember that if any enquiry is not otherwise fair, the workman concerned can challenge its validity in an industrial dispute.

Our conclusion therefore is that a workman against whom an enquiry is being held by the management has no right to be represented at such enquiry by a representative of his Union: though of course an employer in his discretion can and may allow his employee to avail himself of such assistance."

(Emphasis supplied)

31. In another decision, namely Dunlop Rubber Co. (India) Ltd. v. Workmen, AIR 1965 1392 it was laid down that there was no right to representation in the disciplinary proceedings by another person unless the Service Rules specifically provided for the same."

44. In ***D.G. Railway Protection Force and Others vs. K.Raghuram Babu, (2008)4 SCC 406,*** the Hon'ble Supreme Court has held as under:-

"9. It is well settled that ordinarily in a domestic/departmental inquiry the person accused of misconduct has to conduct his own case vide N. Kalindi v. Tata Locomotive and Engg.Co. Ltd., AIR 1960 SC 914. Such an inquiry is not a suit or criminal trial where a party has a right to be represented by a lawyer. It is only if there is some rule which permits the accused to be represented by someone else, that he can claim to be so represented in an inquiry vide Brook Bond India (P) Ltd. v. Subba Raman, (1961)2) LLJ 417(SC)."

45. In ***State of Haryana and Another vs. Rattan Singh, (1977)2 SCC 491,*** the Hon'ble Apex Court has held as under:-

"4. It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. Ail materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act. For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fairplay is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding,even though of a domestic tribunal, cannot be held good. However, the courts below mis-directed themselves, perhaps, in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The 'residuum' rule to which counsel for the respondent referred, based upon certain passengers from American jurisprudence does not go to that extent nor does the passage from Halsbury insist on such rigid requirement. The simple point is, was there some evidence or was there no evidence not in the sense of the technical rules governing

regular court proceedings but in a fair common-sense way as men of understanding and wordly wisdom will accept. Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a ending is certainty available for the court to look into because it amounts to an error of law apparent on the record. We find, in this case, that the evidence of Chamanlal, Inspector of the flying squad, is some evidence which has elevance to the charge leveled against the respondent. Therefore, we are unable to hold that the order is invalid on that ground."

46. In ***Workmen of Balmadies Estates vs. Management, Balmadies Estates and Others, (2008)4 SCC 517,*** the Hon'ble Apex Court held as under:-

"10. It is fairly well settled now that in view of the wide power of the Labour Court it can, in an appropriate case, consider the evidence which has been considered by the domestic Tribunal and in a given case on such consideration arrive at a conclusion different from the one arrived at by the Domestic Tribunal. The assessment of evidence in a domestic enquiry is not required to be made by applying the same yardstick as a Civil Court could do when a lis is brought before it. The Indian Evidence Act, 1872 (in short "the Evidence Act") is not applicable to the proceeding in a domestic enquiry so far as the domestic enquiries are concerned, though principles of fairness are to apply. It is also fairly well settled that in a domestic enquiry guilt may not be established beyond reasonable doubt and the proof of misconduct would be sufficient. In a domestic enquiry all materials which are logically probative including hearsay evidence can be acted upon provided it has a reasonable nexus and credibility."

47. In ***Om Parkash vs. Delhi Transport Corporation, 2016 LLR 683***, the Hon'ble Delhi High Court has held as under:-

"17. The materials on record by way of award show that the Tribunal was unduly influenced only by the evidence of the workman who deposed on oath. Furthermore, the Tribunal doubted the statement on behalf of the DTC by its witness that the checking staff found only 16 passengers in the bus without ticket. These, in the opinion of the Tribunal, were insufficient evidence to establish guilt. The Tribunal also based its findings on the submission of the workman that if he could sign the challan under protest then he could have also put signatures on the statement of the passengers by mentioning that it was "under protest". The absence of these and the fact that the DTC examined only one witness was held to be insufficient to bring home the charge.

18. The management's witness had deposed that the passengers were divided into two groups –as noted earlier. One passenger from each of these groups – 5 and 11 respectively, had stated in writing that money had been collected from the passengers but the appellant did not issue them tickets. Copies of those statements were produced as Ex.AW-1/R1 and AW-1/R2. The challan too was exhibited as Ex.1/19. There were 16 other documents; besides, there were 16 unpunched tickets, Ex.AW-1/1 to exhibit AW-1/16. The checking staff's report dated 14.10.1991 is also on the record. The management witness clearly stated during the course of his deposition before the Tribunal that 16 passengers had boarded the bus from Kalkaji temple and that they had not been issued tickets despite having paid for them. There were two members of the checking staff, i.e. Kishan Lal Saluja, ATI and Om Prakash, ATI (not to be confused with the appellant, who was a conductor). Om Prakash, ATI deposed in the course of the proceedings under Section 33(2)(b).

19. Given the clear enunciation of law in Rattan Singh (supra) that the Court has to be alive to the realities in certain circumstances (and not insist upon the strict rules of evidence and procedure which govern other Court proceedings)the conclusion of the

Tribunal that misconduct had not been proved, in our opinion, could not have been sustained. As held in Vijay Kumar Tiwari (supra), under Section 33(2)(b), the Tribunal could not have insisted on strict proof of facts – much less insisted upon production of the original passengers. The checking staff had clearly deposed in the proceedings and another member of the checking staff had clearly deposed in the domestic enquiry. The appellant did not attribute mala fideson the part of members of the checking staff. Furthermore, this Court notices that the appellant had previously been cautioned repeatedly and even censored. Apparently, on more than one occasion, disciplinary proceedings were initiated for similar charges.

20. Having regard to all these circumstances, this Court is of the opinion that the conclusion of the learned Single Judge that the Tribunal fell into error in refusing the approval, cannot be found fault with. The appeal consequently fails and is dismissed with no order as to costs."

48. In ***Divisional Controller, Karnataka State Road Transport Corporation vs. M.G. Vittal Rao, (2012)1 SCC 442,*** the Hon'ble Apex Court has held as under:-

"LOSS OF CONFIDENCE

25. Once the employer has lost the confidence in the employee and the bona fide loss of confidence is affirmed, the order of punishment must be considered to be immune from challenge, for the reason that discharging the office of trust and confidence requires absolute integrity, and in a case of loss of confidence, reinstatement cannot be directed. (Vide: Air India Corpn. v. V.A. Ravellow, (1972)1 SCC 814, Francis Kalein & Co. (P) Ltd. v. Workmen, (1972) 4 SCC 569 and BHEL v. M. Chandrashekhar Reddy, (2005)2 SCC 481).

26. In Kanhaiyalal Agrawal v. Gwalior Sugar Co.Ltd., (2001)9 SCC 609, this Court laid down the test for loss of confidence to find out as to whether there was bona fide loss of confidence in the employee, observing that, (SCC p.614, para 9) (i) the workman is holding the position of trust and confidence; (ii) by abusing such position, he commits act which results in forfeiting the same; and (iii) to continue him in service/establishment would be embarrassing and inconvenient to the employer, or would be detrimental to the discipline or security of the establishment. Loss of confidence cannot be subjective, based upon the mind of the management. Objective facts which would lead to a definite inference of apprehension in the mind of the management, regarding trustworthiness or reliability of the employee, must be alleged and proved.

(See also: Sudhir Vishnu Panvalkar v. Bank of India, (1997) 6 SCC 271).

27. In SBI v. Bela Bagchi, (2005)7 SCC 435, this Court repelled the contention that even if by the misconduct of the employee the employer does not suffer any financial loss, he can be removed from service in a case of loss of confidence. While deciding the said case, reliance has been placed upon its earlier judgment in Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik, (1996) 9 SCC 69.

28. An employer is not bound to keep an employee in service with whom relations have reached the point of complete loss of confidence/faith between the two. (Vide: Binny Ltd. v. Workmen, (1972)3 SCC 806; Binny Ltd. v. Workmen, (1974)3 SCC 152; Anil Kumar Chakraborty v. Saraswatipur Tea Co.Ltd., (1982)2 SCC 328; Chandu Lal v. Pan American World Airways Inc., (1985)2 SCC 727; Kamal Kishore Lakshman v. Pan American World Airways Inc., (1987)1 SCC 146 and Pearlite Liners (P) Ltd. v. Manorama Sirsi, (2004)3 SCC 172.

29. In Indian Airlines Ltd. v. Prabha D. Kanan, (2006)11 SCC 67, while dealing with the similar issue this Court held that: (SCC p.90, para 56)

"56.….loss of confidence cannot be subjective but there must be objective facts which would lead to a definite inference of apprehension in the mind of the employer regarding trustworthiness of the employee and which must be alleged and proved."

30. In case of theft, the quantum of theft is not important and what is important is the loss of confidence of employer in employee. (Vide: A.P. SRTC v. Raghuda Shiva Sankar Prasad, (2007)1 SCC 222).

31. The instant case requires to be examined in the light of the aforesaid settled legal proposition and keeping in view that judicial review is concerned primarily with the decision making process and not the decision itself. More so, it is a settled legal proposition that in a case of misconduct of grave nature like corruption, theft, no punishment other than the dismissal may be appropriate. (Vide: Pandiyan Roadways Corpn. Ltd. V. N.Balakrishnan, (2007) 9 SCC 755 and U.P. SRTC v. Suresh Chand Sharma, (2010) 6 SCC 555)."

49. It is well settled that in a domestic inquiry, the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials, which are logically probative for a prudent mind, are permissible. It is trite law that strict rules of evidence are not applicable to the proceedings before the Industrial Tribunal/Labour Court and they are free to devise rules of procedure in accordance with principles of natural justice.

50. In the present case, factum of non-examination of Inquiry Officer by the Management during proceedings before Tribunal has weighed heavily, with the learned Tribunal, as a result of which learned Tribunal while drawing adverse inference, upheld the claim put forth on behalf of the respondent-workman. In an application under Section 33(2)(b) of the Act, it is not the requirement of law that the Tribunal will insist for proof of the inquiry conducted strictly in terms of provisions contained in Indian Evidence Act by examining the Inquiry Officer and exhibiting the report.

51. In this regard reliance is placed on ***Om Parkash vs. Delhi Transport Corporation, 2016 LLR 683,*** wherein the Hon'ble Delhi High Court has held as under:-

"10. The Labour Court, to begin with, is required to enquire if a proper, valid enquiry was conducted: whether order of the dismissal based on legal evidence adduced before domestic tribunal and is not based on extraneous considerations and the order of dismissal is not an act of victimization or unfair labour practice. In order to reach to a conclusion as regards validity of the domestic enquiry, the Labour Court has to analyze the enquiry proceedings placed on record alongwith the application. The insistence on formal proof of enquiry proceedings runs contrary to the rules of evidence governing the proceedings before Labour Courts. The Industrial Disputes Act empowers the Labour Court to formulate its own procedure with the object to do justice. The Labour Court can examine any document produce in this Court without its formal proof (where genuineness of document is not disputed).

11. This Court has also in the case of Vijay Kumar Tiwari v. Lt.Governor & Ors, LPA 394/2002 held as under:-

6. "It is trite law that strict rules of evidence are not applicable to the proceedings before the Industrial Tribunal/Labour Court and they are free to devise rules of procedure in accordance with principles of natural justice. Thus, in an application under Section 33(2)(b) ID Act, it is not the requirement of law that the Tribunal will insist proof of the enquiry conducted in accordance with Indian Evidence Act by examining the Inquiry Officer and exhibiting the report. Suffice it is that the enquiry report and the proceedings conducted by the Inquiry Officer are produced before the Industrial Tribunal/Labour Court. The Constitution Bench in JT 2010 (5) 553 Union of India v. R.Gandhi, President,

> *Madras Bar Association noting the distinction between a Court and Tribunal held that while Courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and Evidence Act requiring an elaborate procedure in decision making, Tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of Evidence Act."*

(See: E.P. Royappa vs. State of Tamil Nadu and Another, (1974)4 SCC 3, Gulam Mustafa and Others vs. The State of Maharashtra and Others, (1976)1 SCC 800, Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant and Others, (2001)1 SCC 182, J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, (2007)2 SCC 433, Bhuvnesh Kumar Dwivedi vs. Hindalco Industries Limited, (2014)11 SCC 85 and ***Mackinnon Mackenzie and Company Limited vs. Mackinnon Employees Union, (2015)4 SCC 544).***

52. Consequently, in view of the detailed discussion made hereinabove, present petition is allowed and the impugned award passed by the learned Tribunal below is quashed and set aside. However, at this stage, it may be noticed that the petitioner-Company in the instant petition has submitted that it had made an alternate submission before the learned Tribunal below that without conceding that the inquiry is just, fair and proper, if Court comes to the conclusion that the inquiry is bad then respondent-workman be given compensation in lieu of reimbursement. Relevant portion of ground (r) of the petition is reproduced hereinbelow:

> *"(r) ……The petitioner company had also submitted as an alternate arguments before the Industrial Tribunal-Cum-Labour Court that without conceding that the enquiry is just fair and proper but if the court comes to the conclusion the enquiry is bad then petitioner be given compensation in lieu of reimbursement. …."*

53. Accordingly, in view of aforesaid, this Court, keeping in view the fact that the respondent-workman has uninterruptedly worked w.e.f. June, 1989 till 19.1.1999 i.e. about 10 years deems it fit to award one time fair compensation amounting to Rs.3.5 lacs in terms of judgment passed by the Hon'ble Apex Court in ***Tota Ram vs. Belliss India (Private) Limited, (2016)6 SCC 406*** case. Accordingly the petitioner-Company is directed to pay an amount of Rs.3.5 lacs to the respondent-workman by way of a fair compensation in lieu of 10 years service rendered by him.

54. All the interim orders are vacated. All miscellaneous applications are disposed of.

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

Arun Kumar ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Cr. Appeal No. 181 of 2015
Reserved on : 21.07.2016
Decided on: 21st October, 2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1 kg. charas- he was tried and convicted by the trial Court- held, in appeal that prosecution version regarding the recovery was duly proved by oral testimonies and the documents – minor contradictions in the testimonies of the prosecution witnesses are not sufficient to discard them- link evidence is also established – recovery was effected without any prior information and provision of Section 42 is not applicable – charas was found to be 920 grams in the FSL, which is less than commercial

quantity – sentence modified – proceedings ordered to be initiated against the conductor for making a false statement in the Court.(Para-12 to 24)

Cases referred:
Dharam Pal Singh V. State of Punjab (2010) 9 SCC 608
Jagdish Raj V. State of Punjab (2011) 4 SCC 571
Kulwinder Singh and another V. State of Punjab (2015) 6 SCC 674
State of Rajasthan V. Parmanand and another (2014) 5 SCC 345
Yashihey Yobin and another V. Department of Customs, Shillong (2014) 13 Supreme Court Cases 344
Ratto V. State of H.P. 2003(2) Shim.L.C. 161.

For the appellant: Mr. Anoop Chitkara, Advocate.
For the respondent: Mr. D.S. Nainta, Addl. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Appellant Arun Kumar herein is a convict. He has been convicted by learned Special Judge Mandi, District Mandi under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'NDPS Act' in short) vide judgment dated 17.04.2015 passed in Sessions Trial No. 51/2010 and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay Rs. 1,00,000/- as fine.

2. On 26.04.2010, a Police party comprising lady PSI Reeta Devi, PW-9 ASI Mohan Lal (II), PW-1 Head Constable Kamal Kant, HHC Prakash Chand and Constable Puran Chand of Police Station, Balh District Mandi left towards village Nagchala side at about 3.00 p.m. for laying 'nakka' and conducting traffic checking. Rapat Ext. PW-5/A in this regard was entered in daily diary. They laid 'nakka' at Nagchala and started traffic checking there. Around 4.15 p.m. HRTC bus bearing registration No. HP65-1768 enroute Manali to Delhi reached at the place of 'nakka'. The bus was got stopped at the place of 'nakka'. The police party started checking the bus. The convict allegedly occupying seat No. 36 was found to be holding a black, red and grey coloured rucksack (bag) on his legs. On seeing the police party, he became nervous and behaved in a suspicious manner. Looking such behaviour of the convict, the I.O PW-9 suspected some incriminating substance in his possession. Therefore, his antecedents were inquired into in the presence of Shri Hari Singh, driver of the bus and PW-6 Bakshi Ram its conductor. Thereafter, the police personnel offered their search first, however, nothing incriminating was recovered from their possession. Memo Ext. PW-6/C was prepared in this regard. It is thereafter the rucksack, the convict was holding on his legs was searched and one polythene packet wrapped in a white colour cloth was recovered therefrom. On opening the said packet, charas in the shape of sticks was recovered in presence of S/Shri Hari Singh and Bakshi Ram aforesaid. The recovered charas was weighed and found one kilogram. PW-9 resorted to the sampling and sealing process and sealed the recovered charas in a parcel with 15 impressions of seal 'D'. The sample of seal Ext. PW-9/A was drawn separately. The recovered charas was taken in possession vide seizure memo Ext. PW-6/A. The NCB-I forms Ext. PW-7/E were filled in on the spot in triplicate. The facsimile of seal 'D' was also put on these forms. It is thereafter rukka Ext. PW-7/A was prepared and sent to the Police Station through HC Kamal Kant, PW-1. On the basis of rukka FIR Ext. PW-7/B came to be recorded by PW-7 Surinder Pal, the then Station House Officer, Police Station, Balh. PW-7 had also made endorsement Ext. PW-7/C over the rukka. The case file was taken to the I.O on the spot by PW-1. The I.O. PW-9 had prepared the spot map Ext. PW-8/B. The ticket of bus Ext. PA was recovered from the convict and taken into possession vide memo Ext. PW-6/C. The grounds of arrest were disclosed to the convict vide memo Ext. PW-6/D and he was arrested. The personal search of the convict was also conducted vide memo Ext. PW-6/B.

3. On the completion of investigation at the spot, the convict along with case property was brought to Police Station, Balh. The IO PW-9 has produced the case property along with sample of seal, NCB forms and seizure memo etc., before PW-7 the Station House Officer. Rapat Ext. PW-5/B was entered in this regard in daily diary. PW-7, the Station House Officer has re-sealed the parcels containing the recovered charas with seal 'A'. He has also drawn the sample of seal, which is Ext. PW-7/D. It is thereafter the case property along with sample of seals, NCB forms and seizure memo was handed over to PW-4 Head Constable Prabhakar, the then additional MHC, Police Station, Balh for safe custody in the Malkhana. Rapat Ext. PW-5/C in this regard was also entered in daily diary. A memo Ext. PW-4/A to this effect was also prepared. PW-4 has received the case property and entered the same at Serial No. 116 of the Malkhana register. The extract whereof is Ext. PW-4/B. On 29.04.2010, the parcel containing the case property was sent to State Forensic Science Laboratory, Junga for analysis vide RC No. 100/10, Ext. PW-2/A through PW-2 Constable Vijay Kumar. The special report Ext. PW-8/A was prepared and forwarded to D.S.P. Mandi, the Supervisory Officer. The entry qua receipt of the special report in the office of D.S.P. Mandi in the relevant register is at Serial No. 90, Ext. PW-8/B. The detail of other articles forwarded to the Laboratory along with the parcel containing charas find mention on the reverse of RC Ext. PW-2/A. The case property forwarded to the laboratory vide RC Ext. PW-2/A was received there duly sealed with seals 'D' and 'A', however, when weighed the same was found to be 928grams, whereas, the actual weight of the exhibit was found to be 972grams. The recovered charas was analyzed in the laboratory and as per report Ext. PW-3/A found to be extract of cannabis and as such the sample of charas.

4. On the completion of investigation, report under Section 173 of the Code of Criminal Procedure was filed against the convict in the Court of learned Special Judge, Mandi, Distt. Mandi. Learned Special Judge after observing all the codal formalities and hearing the prosecution as well as learned defence counsel has prima-facie found the involvement of the convict in the commission of an offence punishable under Section 20 of the NDPS Act. The charge against him was, therefore, framed accordingly.

5. The accused on hearing and understanding the charge has not admitted the same to be correct nor pleaded guilty and as such, learned trial Court has proceeded further in the trial by calling upon the prosecution to produce evidence in support of its defence against the convict. The prosecution in turn has examined nine witnesses in all. The material prosecution witnesses are HC Kamal Kant PW-1, Sh. Bakshi Ram, the conductor of the bus PW-6 and the Investigating Officer the then ASI Mohan Lal of Police Station, Balh PW-9. The remaining prosecution witnesses are formal because they remained associated in one way or the other during the investigation of the case. Any how, the evidence as has come on record by way of their testimony can be looked into as link evidence.

6. Learned trial Court after holding full trial and affording opportunity of being heard to the parties on both sides as well as taking into consideration the evidence available on record and also the law applicable has arrived at a conclusion that the charas weighing one kilogram has been recovered from the conscious and physical possession of the convict. He was accordingly convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay Rs. 1,00,000/- as fine.

7. The convict, however, being aggrieved and dissatisfied with the findings of his conviction recorded by learned trial Court has preferred this appeal in this Court with a prayer to quash and set aside the same and to set him free by acquitting from the charge under Section 20 of the NDPS Act.

8. The legality and validity of the impugned judgment though has been questioned on several grounds, however, mainly that it was a case of prior information and the Investigating Officer has failed to report compliance to the provisions contained under Sections 42 of the NDPS Act. The story has been concocted as the police has been doing in such like cases in the State of Himachal Pradesh. The allegations leveled against the convict have been concocted and engineered and the convict was illegally apprehended and searched without there being any

search warrant. Without conceding or admitting the recovery of alleged substance, it is pointed out that same has not been proved to be charas within the meaning of NDPS Act. The chemical examiner's report is in admissible. The findings recorded by learned trial Court are vitiated on account of placing reliance on the testimony of official witnesses. In order to hold the convict guilty, corroboration to the prosecution story from some independent source was required. The proceedings also vitiated on account of non-compliance of Section 50 of the NDPS Act. The link evidence is also missing since the independent witness PW-6 has not supported the prosecution case, therefore, two possible views as emerges on record, the benefit of doubt has erroneously been withheld from the convict. It is also claimed that some incriminating circumstances appearing in the prosecution evidence have not been put to the convict in his statement recorded under Section 313 of the Code of Criminal Procedure. The evidence of official witnesses highly contradictory has erroneously been relied upon to record the findings of conviction. Being so, the impugned judgment has been claimed to be not legally sustainable and as such, sought to be quashed and set aside and in the alternative keeping in view the charas when weighed in the laboratory was found to be 972grams, the quantity thereof being less than commercial quantity, the sentence imposed upon the convict has been sought to be reduced.

9. Mr. Anoop Chitkara, learned counsel representing the appellant-convict has strenuously contended that the present is a case of recovery of contraband allegedly charas below commercial quantity in view of its weight when weighed in the State Forensic Science Laboratory was found to be 972grams. Therefore, according to Mr. Chitkara, the convict could have not been sentenced to undergo rigorous imprisonment for a period of 10 years and pay Rs. 1,00,000/- as fine. The recovery of charas from the exclusive and physical possession of the convict is stated to be not proved because as per the evidence produced by the prosecution itself, few of the passengers ran away from the spot where the bus was stopped. The contradictions qua arrival of the bus at the place of 'nakka' have also been pointed out. It is also contended that when the ticket was issued at 16:07:37 hours (04:07:37), how the bus could have reached at Nagchala at 4.00 p.m. The trend of writing of seizure memo Ext. PW-6/A, memo Ext. PW-6/B qua personal search of the accused, memo Ext. PW-6/C whereby the police officials were searched and arrest memo Ext. PW-6/D has also been pointed out to urge that initially the spacing while writing these memos was quite wide, however, in the end squeezed considerably. According to Mr. Chitkara this shows that the signatures of the witnesses were obtained on blank papers. The version of conductor PW-6 that they were made to sign document, therefore, according to learned counsel is true and correct. The contradictions in the testimony of the I.O. PW-9 and that of HC Kamal Kant PW-1 have also been pointed out. It has, therefore, been urged that no findings of conviction could have been recorded against the convict in this case.

10. On the other hand, Mr. D.S. Nainta, learned Additional Advocate General has pointed out from the record that all the documents bear the signatures of Hari Singh and also that of PW-6 Bakshi Ram. There was no pressure on them of any kind, which according to learned Additional Advocate General shows that the search and seizure has taken place in the manner as claimed by the prosecution. The contradictions as pointed out are stated to be minor in nature and have rightly been ignored. it is also argued that variation in weight of recovered charas seems to have occurred on account of the same when recovered was weighed with a traditional weighing scale and weights, whereas, in the laboratory the same was weighed with electronic scale. Therefore, according to Mr. Nainta, the judgment passed by learned trial Court is absolutely legal and valid, hence calls for no interference.

11. What could be gathered from the grounds of appeal and also the arguments addressed on behalf of the appellant-convict is that the findings of conviction and sentence recorded against the convict are sought to be quashed and set aside allegedly being not legally sustainable for want of cogent and reliable evidence in support of the prosecution case qua recovery of charas weighing one kilogram from the exclusive and physical possession of the convict, for want of compliance of the provisions contained under Sections 42 and 50 of the NDPS Act and that the quantity of charas allegedly recovered being 928grams is not commercial quantity and rather greater than the small quantity and lesser than the commercial quantity.

Being so, the sentence awarded does not commensurate with the offence allegedly committed. The testimony of PW-6 who has not supported the prosecution case and the alleged contradictions in the statements of prosecution witnesses PW-1 and PW-9 have also been pressed in service to assail the impugned judgment.

12. Now if coming to the first point urged on behalf of the appellant-convict, admittedly he was traveling in HRTC bus bearing registration No. HP65-1768 enroute Manali to Delhi. PW-6 Bakshi Ram is the conductor of the bus, whereas, Hari Singh was its driver. As per prosecution case which even has been admitted by the convict also while answering question No. 3 in his statement recorded under Section 313 of the Code of Criminal Procedure, the bus reached at village Nagchala where the police had laid the 'nakka' at 4.15 p.m. No doubt, PW-6 Bakshi Ram who has been associated as an independent witness has stated that the bus reached at the place of 'nakka' i.e. Nagchala at 4.00 p.m., however, when he had already issued the ticket to the convict at 16:07:37 hours (04:07:37 pm) well before the arrival of the bus at Nagchala, as is apparent from the xeroxed copy of the original ticket Ext. PA allowed to be placed on record by learned defence counsel, how the bus could have reached at Nagchala at 4.00 p.m. The ticket has been recovered from the convict vide memo Ext. PW-6/C. PW-6 though has denied this aspect of the prosecution case, however, in the same breath when he has admitted that ticket Ext. PA was issued by him, his testimony to the contrary is absolutely false. It would not be improper to conclude that he has deposed falsely in connivance with the convict may be for some extraneous considerations. The bus was fully packed because as per admitted case of the parties on both sides, some passengers were even standing also in the bus. The prosecution case that during the checking of the bus the convict occupying seat No. 36 was found to be holding a bag on his legs find support from the documentary evidence such as seizure memo Ext. PW-6/A and the rukka Ext. PW-7/A. Such version even finds corroboration from the testimony of PW-1 HC Kamal Kant and the I.O. PW-9. The seizure memo Ext. PW-6/A and other documents such as Ext. PW-6/B, Ext. PW-6/C and Ext. PW-6/D bear signature of Hari Singh, the driver of the bus and its conductor Bakshi Ram PW-6. Bakshi Ram PW-6 has admitted so while in the witness box. Sh. Bakshi Ram in his cross-examination conducted on behalf of the prosecution has stated that the contents of these documents were not gone into by him when put his signatures thereon. He admits that he is matriculate and can read as well as understand Hindi language. He is a conductor, therefore, he is not expected to have signed the documents, that too, in a case of this nature involving the freedom and liberty of an individual without going through the contents thereof. Being so, to our mind he is a liar and to the reasons best known to him, he has concealed the factual position from the Court. Neither in his examination-in-chief nor in his cross-examination conducted on behalf of the prosecution, he has no-where stated that papers on which aforesaid documents i.e. Ext. PW-6/A, Ext. PW-6/B, Ext. PW-6/C and Ext. PW-6/D have been reduced into writing were blank. However, when cross-examined by learned defence counsel, he has come-forward with altogether different story that on the recovery of charas from a bag brought down by the police party from the shelf of the bus, the police inquired as to whom the bag belongs and when all the passengers did not claim the bag to be theirs, the police officials directed the driver of the bus to drive the same to Police Station and on their request that few of the passengers are foreign nationals traveling in the bus had to board flights to their nation, the bus was allowed to be driven from the police station to its destination, however, only after obtaining his signatures and that of driver of the bus Hari Singh on blank papers as well as on piece of cloth. Such plea raised by the convict in his defence is an afterthought because had the signatures of PW-6 Hari Singh been obtained on blank papers, similar suggestions should have also been given to Kamal Kant PW-1. No such suggestions, however, were given to this witness and the suggestions to this effect given to PW-9, however, were denied being wrong. The suggestions that the police directed the driver to drive the bus to police station at such stage when the recovered charas remained unclaimed are contradictory to the suggestions given to PW-1 that when on being signaled the driver stopped the bus at the place of 'nakka', the I.O. PW-9 proclaimed that he had information of illicit trafficking of some drug or narcotic substance in the bus and asked the driver to drive the bus to police station. Also that the I.O. PW-9 had conducted the checking of the bus at the place of 'nakka' for 35-40 minutes. The bus on long

route like Manali Delhi could have not been driven by its driver to the police station without seeking permission from his superiors for the reasons that police station Balh does not situate on Manali Delhi highway but on Ner Chowk-Kalkhar Jahu road at village Ratti i.e. at a distance of about one kilometer from Ner Chowk from where the road bifurcates from the national highway to village Ratti. Therefore, it cannot be believed by any stretch of imagination that search and seizure did not take place at the place of 'nakka' in the presence of PW-6 and rather false case was foisted on the convict by fabricating the documents in the police station. The convict has not produced any evidence to show that there was animosity of the police with him and it is for this reason the charas weighing one kilogram has been falsely planted on him.

13. If coming to the testimony of PW-1 Head Constable Kamal Kant and the I.O. PW-9, they both in one voice tell us that rucksack in which the recovered charas found to be kept in a white coloured polythene bag was being held by the convict on his legs. The suggestions to the contrary put to them in their cross-examination have been denied being wrong. The contradictions that as per I.O. PW-9 by the time the bus in question arrived at the place of 'nakka' the police party had already checked 25-30 vehicles, whereas, as per that of PW-1, only 2-3 vehicles were checked and that as per the testimony of PW-9 the I.O. Ritta Devi the lady PSI was searched by a lady passenger traveling in the bus, whereas, as per that of PW-1 she was searched by a police official are not of such a nature so as to belie the prosecution case qua the recovery of charas from the bag which was being held by the convict. The recovery of charas form the exclusive and physical possession of the convict stands satisfactorily proved from the evidence available on record. Learned trial Judge has, therefore, rightly held that the prosecution in this case has successfully established the culpable mental state of the convict to commit the offence while placing reliance on the judgment of the Hon'ble Apex Court in ***Dharam Pal Singh*** V. ***State of Punjab (2010) 9 SCC 608*** and in ***Jagdish Raj*** V. ***State of Punjab (2011) 4 SCC 571***.

14. The link evidence in this case is also complete because it is satisfactorily proved that the parcel containing the recovered charas was sealed with 15 impressions of seal 'D' by the I.O. PW-9, whereas, re-sealed with 5 impressions of seal 'A' by the Station House Officer, PW-7 from the testimony of PW-1, the I.O. PW-9 and that of the Station House Officer, PW-7 and also the seizure memo Ext. PW-6/A, rapat Ext. PW-5/B, rapat Ext. PW-5/C and the re-seal certificate Ext. PW-4/A. The facsimile of seals 'D' and 'A' have even been put on the NCB forms and the sample thereof Ext. PW-9/A and Ext. PW-7/D have also been drawn. The entries Ext. PW-4/B in the malkhana register reveal that the case property duly sealed with seals 'D' and 'A' was handed over to PW-4, the Moherer Head Constable for safe custody in the malkhana along with sample of seal 'D' and sample of seal 'A' and also the NCB forms in triplicate on 26.04.2010 itself at 7.35 p.m. The case property was sent to Forensic Science Laboratory, Junga on 29.04.2010 through PW-2 Constable Vijay Kumar vide RC Ext. PW-2/A. The docket, samples of seals 'D' and 'A', copy of FIR, copy of seizure memo, re-sealing memo and NCB-I forms in triplicate were also sent to Forensic Science Laboratory. The report of chemical examiner Ext. PW-3/A reveals that the parcel containing recovered charas was duly sealed with seals 'D' and 'A' when received in the laboratory along with NCB-I forms and other documents as aforesaid. The endorsement in the extract of malkhana register Ext. PW-4/B reveals that the parcel containing the case property duly sealed with the seal of laboratory after analysis was returned to the malkhana in safe custody through HHC Pritam Lal, PW-3. The report Ext. PW-3/A reveals that the exhibit (recovered charas) on analysis was found to be the extract of cannabis and being so charas. Not only this but when as per rapat Ext. P-X the case property was produced by HHC Ram Lal in the trial Court, the same was duly sealed with six seals of Forensic Science Laboratory. In this case, the prosecution case qua prepration of special report Ext. PW-8/A and its delivery to the D.S.P. (HQ), Mandi is also proved from the testimony of Narender Kumar, PW-8.

15. Now if coming to the second limb of arguments addressed on behalf of the convict-appellant, the present is not a case of prior information and rather a case of chance recovery because as per the rapat in daily diary Ext. PW-5/A, the police party headed by ASI Mohan La PW-9 and PSI Ritta Devi being on routine traffic checking duty had laid 'nakka' at

village Nagchala. True it is that PW-1 in his examination-in-chief has stated that the I.O. PW-9 had told them that he had information qua trafficking of some narcotic drug and psychotropic substance in the HRTC bus, however, in the very opening sentence in his cross-examination by learned defence counsel he has expressed his inability to tell that the I.O. had told the other police officials that he had prior information qua transportation of contraband in HRTC bus, whereas, as per the version of the I.O. PW-9 in his cross-examination he had no prior information regarding transportation of charas in the bus. No such suggestion was, however, given to Bakshi Ram PW-6. Therefore, the only sentence in the examination-in-chief of PW-1 that the I.O. told the police party about he was having prior information qua charas being carried in the bus cannot be believed as gospel truth to conclude that the I.O. PW-9 had prior information that the charas was being carried by the convict in HRTC bus. Being so, there is no question of violation of the provisions contained under Section 42 of the NDPS Act.

16. Now if coming to the alleged violation of the provisions under Section 50 of the NDPS Act. The plea so raised on behalf of the appellant-convict is again without any substance for the reason that firstly the present is a case of chance recovery and the charas has been recovered from the bag being carried by the convict with him and secondly that charas has not been recovered during personal search of the convict and rather during the search of the bag he was carrying with him. In a case of this nature, the compliance of Section 50 of the NDPS Act is not required. We can draw support in this regard from the judgment of the Hon'ble Apex Court in ***Kulwinder Singh and another*** V. ***State of Punjab (2015) 6 SCC 674***, wherein it has been unequivocally held that Section 50 applies only in a case where the personal search of the accused is required to be conducted for recovery of incriminating circumstance, if any, from him. The same as per ratio of this judgment cannot be extended to the search of a vehicle or container or bag or premises. Since, in the case in hand, it is only the search of rucksack the convict was holding with him has been conducted and the charas recovered therefrom, hence there was no question of compliance of Section 50 of the Act. True it is that personal search of the accused has also been conducted, however, after the recovery of charas from the rucksack he was carrying with him i.e. after his arrest vide memo Ext. PW-6/B. The same was only for the purpose to ascertain the personal belongings with him before lodging him in lockup. The relevant portion of the judgment reads as follows:

> "20. The next contention that has been raised by the learned counsel for the appellants relates to non-compliance of Section 50 of the NDPS Act. It is undisputed that the bags containing poppy husk were seized from the truck. Thus, it is not a case of personal search of a person. In Megh Singh v. State of Punjab, it has been held that Section 50 only applies in case of personal search of a person, but it is not extended to a search of a vehicle or a container or a bag or premises.
>
> 21. In *State of H.P. v. Pawan Kumar*, it has been held that:-
>
> > "10. We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common-sense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilised society. Therefore, the most appropriate meaning of the word "person" appears to be — "the body of a human being as presented to public view usually with its appropriate coverings and clothing". In a civilized society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear

also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothings and also footwear.

11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

Similar view has been expressed in *Jarnail Singh v. State of Punjab* and *Ram Swaroop v. State* (*Government of NCT of Delhi*)

22. In view of the aforesaid, the submission that non-compliance of Section 50 vitiates the conviction, leaves us unimpressed."

17. Similar is the view of the matter taken by the Hon'ble Apex Court in ***State of Rajasthan*** V. ***Parmanand and another (2014) 5 SCC 345*** and in ***Yashihey Yobin and another*** V. ***Department of Customs, Shillong (2014) 13 Supreme Court Cases 344***. The relevant extract of this judgment reads as follows:

"9. The Trial Court and the High Court while answering the aforesaid issues have concurrently come to the conclusion that accused No.2 was not searched by the custom officers but it was only the bag in possession of A2 containing contraband which was searched and seized. The language employed "any person" under Section 50 of the Act would naturally mean a human being or a living individual unit and not an artificial person. It would not bring within its ambit any non-living creature viz.; bags, containers, briefcase or any such other article. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be a part of the body of a human being. The scope and ambit of Section 50 was examined in considerable detail in the case of State of Haryana v. Suresh, AIR 2007 SC 2245 and in a three judges bench decision in State of Himachal Pradesh v. Pawan Kumar, 2005 4 SCC 350, wherein it is observed that when a person is not searched, only the bag, container or the suitcase is searched, the provisions of Section 50, cannot be pressed into service. The items like bag, briefcase, or any such article or container, etc. are not a part of a human being as it would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. In common parlance it could be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head,

etc. but it is not possible to include these articles within the ambit of the word "person" defined in Section 50 of the Act.

10. This position in law is settled by the Constitution Bench in the case of State of Punjab v Baldev singh, AIR 1999 SC 2378 and in Megh Singh v State of Punjab, 2003 8 SCC 666, where application of Section 50 is only in case of search of a person as contrasted to search of premises, vehicles or articles. But in cases where the line of separation is thin and fine between search of a person and an artificial object, the test of inextricable connection is to be applied and then conclusion is to be reached as to whether the search was that of a person or not. The above test has been noticed in the case of Namdi Francis Nwazor v. Union of India and Anr.,(1998) 8 SCC 534, wherein it is held that if the search is of a bag which is inextricably connected with the person, Section 50 of the Act will apply, and if it is not so connected, the provisions will not apply. It is when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that the bag was not found on the accused person."

18. We, however, find considerable force in the arguments addressed on behalf of the convict-appellant that quantity of recovered charas is not at all commercial for the reason that the charas when weighed in the laboratory its actual weight was found to be 928grams, whereas, that of the exhibit i.e. the parcel, 972grams. The explanation that the charas when recovered was weighed by the I.O with traditional scale and weights, whereas, in the laboratory with electronic scale is neither reasonable nor plausible for the reason that the I.O. while in the witness box has said that the recovered charas was weighed by him with scale available in the I.O. kit. It cannot be believed by any stretch of imagination that in the I.O kit a traditional scale and weights could have been kept and taken with him by the I.O to the spot. One can understand that with the passage of time on account of the substance get dried, its weight may decrease, however, in the case in hand, the charas which was recovered on 26.04.2010 was dispatched to the laboratory after 2-3 days i.e. on 29.04.2010. The present as such is not a case of recovery of charas weighing commercial quantity and rather the quantity of the recovered charas being less than one kilogram is no doubt greater than small quantity, however, lesser than the commercial quantity. Even if it is believed that the recovered charas was one kilogram, in that event also, in terms of Section 2(viia) of the NDPS Act "commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette. Now if Notification issued by the Central Government is seen, charas weighing one kilogram has been shown therein as commercial quantity. However, within the meaning of Section 2(viia), in order to constitute the quantity of the recovered charas as commercial, its weight should have been greater than one kilogram. Therefore, on this score also, the recovered charas by any stretch of imagination cannot be termed to be commercial quantity. We find support in this regard from the judgment of a Full Bench of this Court in ***Ratto*** V. ***State of H.P. 2003(2) Shim.L.C. 161***. This judgment reads as follows:

"***40***. We feel that there is no ambiguity in the language of Section 2(viia), supra. As such, simple and literal meaning has to be given to the words 'quantity greater than', so as to hold what would he the commercial quantity.

41. As already noted there is hardly any ambiguity, muchless conflict between Section 2(viia) and the notification as extracted here-in-above for determination of what would be the commercial quantity, By virtue of powers conferred under sub-section (viia) of Section 2, Central Government is authorized to notify as to what would be the commercial quantity. Because the "commercial quantity" on a plain reading of its definition amongst other things has to be "…greater than the quantity specified by the Central Government by notification…..". Under 2001 Act notification supra was issued specifying the quantity for the purpose of

Section 2(viia) of the Act. A perusal of this notification indicates that quantity specified is one kilogram. Various columns of the notification extracted hereinabove have to be read in conjunction with the substantive provision of Section 2(viia) of the Act. This also puts a harmonious construction on both, notification as well as Section 2(viia). While determining the quantity under this sub-section, it has to be greater than One Kg. There is hardly any doubt regarding either the words one kg.", or the "commercial quantity" which has to be 'greater than", which in our considered view would always mean any quantity more than/bigger than/larger than one kg. We are further of the view that this provision, and for that matter, notification admits of no other interpretation on its reading. Thus, it cannot be said that one Kg. would be the commercial quantity for the purpose of Section 2(viia), as added by 2001 Act.

42. Another reason to take this view is, that substantive and main provision of the Act is Section 2(viia) which is subject matter of the discussion in this judgment. It is also well known and accepted rule of interpretation of statutes that rules, regulations as well as notifications issued thereunder are meant to sub-serve the purpose of main provision of law and not other way round. Notification in the instant case, as extracted hereinabove, is a delegated legislation. Therefore, it can in no case bye-pass or over-ride the substantive provision of law and in case of conflict, delegated legislation has to give way to the main provision of law.

43. In this behalf, we may also observe that legislature in its wisdom has used the words in this sub-section knowing there significance, as well as import and at the cost of repetition, it needs to be noted that when language is clear, then ordinary meaning to the words needs to be given. As such, no aids either internal or external need to be pressed into service as was urged on behalf of the respondent to give another meaning."

19. In view of the above, the appellant-convict could have not been sentenced under Section 20(b)i) of the Act and rather under (ii) of Clause (b) of Section 20 of the Act. We, therefore, are in agreement with Mr. Chitkara, learned counsel representing the appellant-convict that sentence awarded against the convict is required to be reduced. Having regard to the age of the convict i.e. approximately 23 years on 26.04.2010 when he was arrested in connection with the case registered against him under Section 20 of the NDPS Act and also that he remained in custody during the pendency of the trial and after his conviction and sentence is serving out sentence in jail and he is in custody for a period over six years, we find the present a case where the sentence already undergone by the convict would serve the ends of justice. As such, he needs to be set free from the custody forthwith if not required in any other case. So far as the sentence of fine is concerned, in the given facts and circumstances, we reduce the same also to Rs. 10,000/-

20. In view of the findings recorded hereinabove, we sentence the convict to the imprisonment he has already undergone and to pay Rs. 10,000/- as fine. The convict as such be set free and released from custody forthwith, if not required in any other case. However, on his failure to pay the amount of fine, he shall have to undergo rigorous imprisonment for a further period of three months. Accordingly the appeal is partly allowed and stands disposed of.

21. Before parting with the case, we would be failing in our duty, if ignore the manner in which PW-6 Bakshi Ram, the conductor of the bus has conducted himself while in the witness box. Taking note of the statement, he made while in the witness box, we have prima-facie formed an opinion that he is a liar and has not disclosed true facts to the Court. Admittedly, he was on duty as conductor with HRTC bus intercepted by the police at the place of 'nakka' at village Nagchala. As per the prosecution case, during the checking of luggage charas was recovered from the bag which the convict was holding on his legs. As we already observed in earlier part of this judgment, PW-6 is a liar and has deposed falsely to help the convict to the

reasons best known to him, may be for some extraneous considerations. In our opinion, he while in the witness box has made a false statement, most probably, at the behest of the convict. When he has issued the ticket Ext. PA at 16:07:37 hours (04:07:37 pm) i.e. in all probability at Mandi or on the way at a place behind Nagchala, how he could have said while in the witness box that the bus reached at Nagchala at 4.00 p.m. that too, well before the issuance of ticket to the convict. According to him, the charas was recovered from the bag on the spot itself. When no evidence to the contrary that the police had enmity with the convict has come on record, it is proved that the charas was recovered from the bag which the convict was carrying with him. His denial to this part of the prosecution case itself speaks in plenty about his conduct and credibility. In his cross-examination conducted on behalf of the convict, he has introduced a new story that when the bag from which the charas recovered was not claimed by any passenger, the police directed the driver to take the bus to police station. Such plea in his defence raised by the convict is an afterthought because had it been so, he could have examined someone to substantiate this aspect of this matter. Had the bus been taken to police station, some record like entries in the log book of the bus etc., would have been there with the HRTC. Otherwise also, some evidence that permission was sought by the driver to take diversion from Ner Chowk for driving the bus to police station should have been there and produced during the course of trial. He has admitted the issuance of ticket, however, denied the same having been taken into possession in his presence, irrespective of he has admitted his signature on the recovery memo Ext. PW-6/C. It was no-where his version in his examination-in-chief or in his cross-examination conducted on behalf of the prosecution that he along with the driver of bus Hari Singh were made to sign blank papers. Interestingly enough, in his cross-examination conducted on behalf of the prosecution, he has admitted his signature on the seizure memo Ext. PW-6/A, personal search of accused vide memo Ext. PW-6/B, search of police officials given vide memo Ext. PW-6/C and arrest of accused vide memo Ext. PW-6/D. When he tells us that he has not gone through the contents of these documents, it leads to the only conclusion that contents were duly written in these documents. He is a matriculate and as per his version, not only he can read and write Hindi but he can also understand the same. When he is conductor, it cannot be expected that he would have signed blank papers, that too, at the instance of police and in a case of recovery of charas involving the freedom and liberty of an individual. Therefore, to our mind PW-6 has intentionally and deliberately made a false statement with a view to screen the evidence and to save the convict from the prosecution and as such liable himself to be dealt with in accordance with law.

22. Section 340 of the Code of Criminal Procedure takes care of such a situation. The provisions contained under the Section ibid reveal that if on an application made to it or otherwise, the Court is of the opinion that it is expedient and in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code, which appears to have been committed in relation to proceedings of a case in that Court, the Court shall hold a preliminary inquiry and after recording a finding that by producing a document or giving a statement in evidence, an offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code is made out, order to make a complaint in writing to a Magistrate of the first class having jurisdiction over the matter.

23. Section 340 of the Code of Criminal Procedure Code contemplates a preliminary inquiry to be conducted by the Court to form an opinion that it is expedient and in the interest of justice to hold inquiry into the offence which appears to have been committed. It is not mandatory for the trial Court to hold preliminary inquiry, because it has the opportunity to see the witness while in the witness box and to observe his demeanour. We, however, feel that the appellate Court, having no such opportunity to observe the demeanour of the witness, should hold an inquiry and give an opportunity of being heard to him, before forming an opinion that an offence within the meaning of clause (b) of sub-Section(1) of Section 195 of the Code of Criminal Procedure appears to have been committed by him. It is only thereafter, an order qua filing a complaint, as contemplated under Section 340 of the Code of Criminal Procedure, should be passed.

24. Therefore, before initiating any action against PW-6 Bakshi Ram, we deem it expedient and in the interest of justice to call upon him to show cause as to why an action be not initiated against him in the light of the observations in this judgment. Consequently, there shall be a direction to the Registry to issue show cause notice to PW-6 Bakshi Ram for ***30.12.2016*** and the proceedings be registered against this witness separately. A copy of judgment be also sent to him alongwith show cause notice. Office of learned Advocate General to collect notice from the Registry of this Court for onward transmission to the Superintendent of Police, Mandi, for effecting service thereof upon the witness aforesaid well before the date fixed. The record of the trial Court be retained for being referred to at the time of further consideration of the matter, after taking on record the version of the witness, to be referred to as 'the respondent' in the proceedings ordered to be drawn separately against him.

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

Karam Chand …..Petitioner.

Versus

State of H.P. …. Respondent.

Cr. Revision No. 155 of 2011.
Date of Decision: 21st October, 2016.

Indian Penal Code, 1860- Section 279 and 304-A- **Motor Vehicles Act, 1988-** Section 181- Accused was driving a motorcycle and hit A, who died in the hospital – the accident had taken place due to rash and negligent driving of the accused – he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held in revision that post mortem report shows that cause of death was head injury leading to subdural haematoma, which could have been caused by striking with the motorcycle – PW-1 proved that motorcycle was being driven in high speed and on inappropriate side – his testimony was not shaken in cross-examination- the prosecution version was proved beyond reasonable doubt and accused was rightly convicted – revision dismissed.(Para- 9 to 12)

For the Petitioner: Mr. Naveen K. Bhardwaj, Advocate.
For the Respondent: Mr. R.S. Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The learned trial Court convicted the accused/revisionist for his committing offences punishable under Sections 279, 304-A of the Indian Penal Code and under Section 181 of the Motor Vehicles Act. It also imposed upon the accused/convict consequent sentences for his committing the afore referred penal misdemeanors. The learned trial Court proceeded to hence sentence him to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.1000 for commission of an offence punishable under Section 279 of the IPC. In default of payment of fine amount, he was sentenced to undergo simple imprisonment for a period of one month. He was further sentenced to undergo simple imprisonment for a period of six months and to a pay fine of Rs.500/- for commission of an offence under Section 337 of the IPC. In default of payment of fine he was sentenced to undergo simple imprisonment for a period of one month. He was further sentenced to undergo simple imprisonment for a period of six months and to pay a fine of Rs.500/- for commission of an offence punishable under Section 304-A of the IPC and in default of payment of fine he was sentenced to undergo further imprisonment for one month. He was further sentenced to pay a fine of Rs.500/- for commission of an offence punishable under Section 181 of the Motor Vehicles Act and in default of payment of fine he was

sentenced to undergo further imprisonment for one month All the sentences were directed to run concurrently. The accused/convict preferred an appeal therefrom before the learned Sessions Judge, Kullu, H.P. The Appellate Court rendered a judgment in affirmation to the verdict of conviction and consequent sentences recorded against him by the learned trial Court. The accused/convict has been hence led to therefrom institute the instant revision petition before this Court seeking therein the setting aside of the concurrently recorded findings of convictions and consequent sentences imposed upon him by both the learned Courts below.

2. The facts relevant to decide the instant case are that on 23.11.2009 an information was received from the Hospital that one person had succumbed to his injuries sustained in an accident. PW7 alongwith HHC Gautam visited Mission Hospital, Kullu in connection with the investigation of the present case and recorded statement of PW1 Sunny Kumar under Section 154, Cr.P.C. As per statement of PW-1, he had gone in his taxi along with a passenger towards Bahang on 20.11.2009. At about 9 a.m., he was taking tea at Bahang. At the relevant time, one person came on motor cycle from Palchan side and deceased Angchuk was hit with the motor cycle bearing No. HP34A-833. The injured Angchuk was shifted to hospital by PW1 in his taxi. The deceased died in the Mission Hospital on 22/23/11/2009. The Investigating Officer sent the statement to the police station and FIR Ex.PW6/A was prepared. The documents of the motor cycle were seized and mechanical report was procured. Statements of the witnesses were recorded as per their version. In the investigation the police came to the conclusion that due to rash and negligent driving of the motor cyclist the accident has occurred, hence, the accused was arrested on 25.11.2009. The police completed all the codel formalities.

3. On conclusion of investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed before the learned trial Court.

4. The accused was charged by the learned trial Court for his committing offences under Sections 279, 304-A of the IPC and Section 181 of the Motor Vehicles Act. In proof of the prosecution case, the prosecution examined 8 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused/convict under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court in which the accused claimed innocence and pleaded false implication in the case.

5. On an appraisal of evidence on record, the learned trial Court, returned findings of conviction against the accused/convict. In an appeal preferred by the accused/revisionist before the learned Sessions Judge, Kullu, the latter affirmed the verdict of conviction and consequent sentences recorded against the accused/convict by the learned trial Court for his committing offences punishable under Sections 279, 304-A of the IPC and under Section 181 of the Motor Vehicles Act.

6. The accused/convict is aggrieved by the judgments of conviction recorded by both the learned courts below. The learned counsel for the accused/convict has concertedly and vigorously contended qua the findings of conviction recorded by both the learned Courts below standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction standing 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 Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by both the Courts below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The deceased, one Angchuk, in sequel to his standing struck with the motor cycle driven at the relevant time by the accused/revisionist sustained injuries on his person, injuries whereof stand depicted in MLC, Ex.PW5/A. For receiving treatment for the injuries gained by him in the alleged occurrence, he was taken to Mission Hospital, Kullu whereat he succumbed to them. In sequel thereto PW-4 Dr. Raj Kumar conducted postmortem examination on the body of deceased Angchuk. Postmortem report is comprised in Ex.PW4/A. A perusal whereof discloses qua the demise of Angchuk standing sequelled by a head injury leading to subdural haematoma intracesebral haematoma. The aforesaid cause as stands ascribed in Ex.PW4/A qua the demise of Angchuk holds a nexus with the injuries depicted in MLC, Ex.PW5/A, injuries wehreof stand proven to be suffered by him in sequel to his person standing struck with a motor cycle allegedly driven in a rash and negligent manner by the accused/revisionist. A careful perusal of the statement of the accused recorded under Section 313, Cr.P.C., specifically with his answering in the affirmative, the apposite question No.2 occurring therein wherewithin recitals occur of his on the relevant day driving motorcycle bearing No. HP-34A-833, is per se a pronounced portrayal of his acquiescing to the factum of his at the relevant time driving the aforesaid motorcycle. However, the learned counsel appearing for the accused/revisionist contends of the aforesaid acquiescence of the accused/revisionist would not ipso facto beget a conclusion qua the charge for which accused/revisionist stood tried standing unflinchingly proven. He contends of with PW-1 Sunny Kumar making a report qua the ill-fated occurrence which took place on 20.11.2009 belatedly on 23.11.2009 also when no sound tangible explanation stands purveyed by the prosecution in explication of the aforesaid delay, concomitantly renders the belated recording of the statements of PW-1 Sunny Kumar and PW-8 Vikas Thakur by the Investigating Officer being construable to be a clever ploy deployed by the Investigating Officer for falsely implicating the accused/revisionist, whereupon, he contends qua their depositions qua the ill-fated occurrence recorded before the learned trial Court also losing their creditworthiness.

10. The aforesaid submission addressed by the learned counsel appearing for the accused/revisionist ought to suffer the ill-fate of it warranting negation significantly when PW-1 in his examination-in-chief has made vivid echoings therewithin qua the accused/revisionist while driving his motorcycle at the relevant time his being negligent in driving it, negligence whereof stands bespoken therein to stand comprised in his driving his vehicle at an excessive brazen pace besides his being unmindful to the fact of the deceased occupying the road while his concerting to cross over to its other side. The aforesaid ascription by PW-1 qua hence the accused/revisionist despite sighting the deceased to occupy the road his hence abandoning to adhere to the standards of due care and caution, abandonment whereof qua his enjoined duty to adhere to the standards of due care and caution stands pronounced by his omitting to apply the brakes of the motorcycle whereat he was atop whereupon, hence, the ill-fated mishap may stand obviated, has remained unconcerted to be repulsed by the learned defence counsel while holding him for cross-examination, significantly when therewithin there is no apposite suggestion put to PW-1 by the learned defence counsel while subjecting him to cross-examination in portrayal of the accused/revisionist in the manner aforesaid concerting to obviate the ill-fated mishap. Contrarily, in the cross-examination to which PW-1 stood subjected to by the learned defence counsel a suggestion stood put to him qua his at the relevant time standing positioned at the dhaba of a Nepali located adjoining a curve. PW-1 answered the aforesaid suggestion in the affirmative. The effect of the aforesaid suggestion answered in the affirmative by PW-1 when read in coagulation with the further affirmative suggestion put to him by the learned defence counsel while his standing held to cross-examination by the learned defence counsel, suggestion whereof stands couched in a phraseology qua the deceased while standing by the side of the curve his being sightable from the dhaba whereat he stood positioned, suggestion whereof stood answered affirmatively, is a magnifying display of the defence conceding to the factum of PW-1 rendering a credible ocular account qua the occurrence. Furthermore, the effect of the aforesaid inference is of the delay, if any, occurring in the lodging of the FIR holding no consequence, especially when PW-1 pronounces in his examination-in-chief qua in sequel to the deceased standing struck with the motorcycle allegedly driven rashly by the accused/revisionist his suffering injuries on his person, for treatment whereof his carrying him to hospital wherefrom it

can be concluded qua his hence standing precluded to promptly report the incident. Consequently, reinforcingly it can be concluded qua the Investigating Officer not by sheer contrivance introducing PW-1 as a witness to the occurrence also his belatedly recording his statement qua the occurrence holds no element of his employing a stratagem for falsely implicating the accused nor it can be concluded therefrom of PW-1 being an invented witness to the occurrence.

11. The learned counsel appearing for the accused/revisionist has contended of with another eye witness to the occurrence, who deposed as PW-8 making communications in his testification qua the deceased proceeding to tread upon the road without holding any awareness qua the occupation of the road at the relevant time by the motorcycle on which the accused/revisionist was atop also his exculpating the purported penal misdemeanor of the accused/revisionist, scuttling the effect of the testimony of PW-8. However, even if, the aforesaid communication qua the occurrence stand testified by PW-8, nonetheless, the counsel for the accused cannot make any capitalization therefrom, significantly when for the reasons aforestated (a) the learned counsel while holding PW-1 to cross-examination has been unable to tear the efficacy of his testimony qua the ill-fated occurrence comprised in his examination-in-chief; (b) when for reasons aforestated the defence concedes to the factum of PW-1 at the relevant time sighting the occurrence and (c) even if, PW-8 has not deposed a version qua the occurrence with omnibus parameteria affinity vis-a-vis the testimony rendered qua it by PW-1 yet with the motorcycle driven by the accused/revisionist standing proven to at the relevant time occupy the road also with his at the relevant time provenly striking the deceased, who thereat was attempting to cross the road, the accused/revisionist was obliged to by applying the brakes of the motorcycle ensure obviation of the accident whereas he has evidently omitted to do so significantly when it was not incumbent upon the deceased pedestrian, who was concerting to cross the road, to obviate the mishap, especially when no evidence surges forth qua the deceased abruptly appearing on the road without giving any opportunity to the accused to apply the brakes of his motorcycle, contrarily is a omnibus display of the accused wantonly wandering astray from adhering to the standards of due care and caution. In aftermath his penal inculpation for the penal misdemeanors is warranted.

12. For the reasons which have been recorded hereinabove, this Court holds that both the learned Courts below have appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by both the learned Courts below does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

13. Consequently, there is no merit in the instant petition and the same is dismissed. In sequel, the judgments impugned hereat are maintained and affirmed. Records be sent back forthwith.

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

Sh. Bhagat Ram. ……Appellant.
Versus
Smt. Kanta Devi. ……Respondent.

FAO (HMA) No. 516 of 2008.
Date of decision: October 24, 2016.

Hindu Marriage Act, 1955- Section 13- Husband pleaded that wife had left her matrimonial home two months after giving birth to a child – she refused to accompany her husband despite requests to do so – she had abandoned the company of the husband without any reasonable cause – wife pleaded that husband had re-married during the subsistence of the marriage- four children were born to the husband from the marriage – husband had turned the wife out of the

matrimonial home at the instance of the second wife – the petition was dismissed by the Trial Court- held in appeal that husband had failed to prove the cruelty, rather it was proved that husband had treated the wife with cruelty – documents established the second marriage of the husband – wife has a reason to live separately from the husband as no lady would reside with another lady – the trial Court had properly appreciated the evidence- appeal dismissed.

(Para-10 to 13)

For the appellant : Mr. Neeraj Gupta, Advocate.
For the respondent : Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

This appeal is directed against the judgment and decree dated 22.3.2005 passed by learned Additional District Judge, Mandi in a petition under Section 13 of Hindu Marriage Act registered as HMP No. 10 of 2005 whereby the petition has been dismissed and the decree for grant of divorce on the ground of cruelty sought by the appellant (hereinafter referred to as 'petitioner') against his wife the respondent has been declined.

2. The parties to the present *lis* have solemnized marriage on 13.10.1984 in accordance with Hindu customs and ceremonies. One son is born to them out of this wedlock in the year 1986. According to the petitioner the respondent allegedly left the matrimonial home after two months of the birth of child and started living in her parents' house at village Dehar, Tehsil Sundernagar District Mandi. He visited the place of his in-laws to bring her back to the matrimonial home, however she refused to do so. He accompanied by one Beli Ram and Kushal again went to the place of his in-laws and asked her to accompany him to the matrimonial home but she refused to do so. She is working as JBT teacher and posted as such in Govt. Primary School, Saul (Salapar). The complaint, therefore, is that respondent has abandoned his company without any justifiable cause and thereby treated him with cruelty. He, therefore, has sought the dissolution of his marriage with respondent by a decree of divorce.

3. The respondent when put to notice had contested the petition on the grounds, inter-alia, that the petitioner during subsistence of a valid marriage with her has remarried with another lady namely Tripta Devi. Four issues i.e. three daughters and one son is born to Tripta Devi from the loins of the petitioner. On merits, it is denied that she has abandoned the company of the petitioner without any justifiable cause as according to her it is rather the petitioner who himself has turned out her from the matrimonial home along with her son in the year 1988 and since then she is residing at her parental house along with her son. It is rather the petitioner who allegedly treated her with cruelty because according to her she has been turned out from the matrimonial home at the behest of Tripta Devi, his second wife.

4. On the pleadings of the parties, the following issues were framed:

1.Whether the petitioner is entitled for the decree of divorce as alleged? OPP

2.Whether this petition is not maintainable? OPR

3.Relief.

5. The petitioner-husband has stepped into the witness box as PW1 and examined Shri Beli Ram PW2. He has placed reliance on Ext.P1, birth certificate of Master Banti born to him out of his wedlock with the respondent, Ext.P2 the order passed by learned Sub Divisional Judicial Magistrate, Sundernagar dismissing thereby the complaint under Section 406 IPC filed by the respondent against the petitioner and his father, Ext.P3 the petition for seeking divorce which was filed previously by the petitioner against the respondent and Ext.P4 the order passed in the petition Annexure-P3 consequent upon the compromise arrived at between the parties.

6. The respondent on the other hand has examined RW1 Smt. Sharda Devi, Centre Head Teacher, Government Central School, Naulakha who has produced the admission certificate

and proved the extract thereof Ext.RW1/A. RW2 Shri Khub Ram was Election Kanungo in the office of SDM, Sundernagar. He has proved the voter list Ext.RW2/A. RW3 Dassu Ram is a witness examined by her in support of her case. She herself has stepped into the witness box as RW4.

7. Learned trial Judge on appreciation of the oral as well as documentary evidence has arrived at a conclusion that the petitioner has failed to prove that he has been treated with cruelty by the respondent, the petition as such has been dismissed.

8. The legality and validity of the impugned judgment and decree has been questioned on the grounds, inter alia, that learned trial Court has not appreciated the evidence available on record in its right perspective and placed undue reliance on the documents Ext.RW1/A and Ext.RW2/A while answering issue No. 1 against the petitioner. It is pointed out that Ext.RW1/A and Ext.RW2/A are not proved on record in accordance with the provisions contained under the Evidence Act. The same as such could have been ignored. No reliance could have also been placed on the testimony of RW3 and RW4.

9. Mr. Neeraj Gutpa, Advocate, learned counsel representing the petitioner has vehemently argued that the respondent as per the cogent and reliable evidence available on record has abandoned the company of the petitioner without any justifiable cause and thereby treated him with cruelty. Therefore, according to learned Counsel the petition in all probability was required to be allowed and the decree of divorce as sought by the petitioner granted in his favour. Mr. G.R. Palsra, learned Counsel representing the respondent has pointed out from the record that the another lady Smt. Tripta Devi is residing with the petitioner in the capacity of his wife and that four issues have been born to her from his loins. Therefore, according to Mr. Palsra it is rather the petitioner who has treated the respondent with cruelty.

10. On analyzing the rival submissions and also reappraisal of the evidence available on record, in the considered opinion of this Court learned trial Judge has not committed any illegality or irregularity while declining the decree of divorce for the reasons that he has miserably failed to prove that his wife the respondent has treated him with cruelty. The evidence as has come on record by way of own testimony of the petitioner and also by that of RW1 and RW2 as well as that of the respondent herself while in the witness box as RW4 make it crystal clear that it is rather the petitioner who has treated the respondent with cruelty because irrespective of the petitioner himself and PW2 Beli Ram having denied the suggestion that the petitioner has solemnized marriage with Tripta Devi, denied being wrong. It is proved from the documents Ext.RW1/A and Ext.RW2/A that Tripta has been shown the wife of the petitioner in the record of Govt. Central School, Naulakha, Tehsil Sundernagar District Mandi. Ext.RW1/A is the extract of the admission and withdrawal register which has been maintained in the school. As per the entries in this document Kumari Dimple is daughter of Bhagat Ram, though name of her mother is not there in this document. It has not been put to RW1 in her cross-examination that Dimple is not born to Tripta Devi from his loins. The extract of voter list Ext.RW2/A reveals that Tripta Devi has been shown wife of Bhagat Ram. No suggestion was given to RW2 that Tripta Devi in this document is some other lady and Bhagat Ram also is someone else. Such documentary evidence substantiates the claim of the respondent that Tripta Devi is living with the petitioner as his wife. Although the petitioner while in the witness box has denied the suggestion that the petitioner has brought to his house another lady Tripta Devi in the year 1986 and that they both are residing together as husband and wife. Similarly, the suggestion that from the loins of petitioner said Tripta Devi has given birth to three daughters and one son and that Dimple and Rajni two girls are residing with him in his house. Yet the documentary evidence discussed hereinabove reveal that he is treating Tripta Devi as his wife and she is living with him in his house. Kumari Dimple is born to said Tripta Devi from his loins. He has admitted that compromise was arrived at between him and the respodent in the divorce petition, HMP No. 2 of 1990 previously filed by him against the respondent and that the condition of the compromise was that in future he will not live in the company of some other lady. This also lead to the only conclusion that Tripta Devi is living with the petitioner in the capacity of his wife. Admittedly the

respondent is residing since 1987 in village Dehar at the place of her parents. She however, had abandoned the company of the petitioner for justifiable reasons because no wife will tolerate that during subsistence of the marriage her husband is having relations with some other lady.

11. True it is that a complaint under Section 406 IPC filed by the respondent against the petitioner has been dismissed at initial stage itself vide order Annexure-P2 because the preliminary evidence was not suggestive of that the respondent has entrusted the dowry articles to the petitioner and his father Dhungal Ram. The another complaint she filed under Section 494 of the Indian Penal Code has also been dismissed by learned Judicial Magistrate Ist Class vide judgment dated 26.11.2010 and the appeal she preferred also stand dismissed being not maintainable vide order dated 25.6.2016 passed by learned Additional Sessions Judge-I, Mandi Camp at Sundernagar. However, it is not known that any appeal is preferred by the respondent in this Court or not. Anyhow, the judgment Ext.P2 and the judgment of acquittal in complaint which was filed by the respondent against the petitioner and Tripta Devi under Section 494 of the Indian penal code cannot be taken to arrive at a conclusion that the petitioner is not living with Tripta Devi nor four issues born to her from his loins. It is a separate matter that respondent has failed to prove the solemnization of marriage by the petitioner with Smt. Tripta Devi because it is not so easy to prove the factum of solemnization of 2nd marriage. However, there cannot any bearing of dismissal of complaint under Section 494 of Indian Penal code, the respondent had filed against the petitioner in the preset proceedings.

12. The present as such is a case where the respondent has not treated the petitioner with cruelty and rather it is he who has subjected her to mental as well as physical cruelty because in view of he is living in the company of Tripta Devi in his house and four issues are born to them, the possibility of the respondent having been tortured by him and turned out from the matrimonial home cannot be ruled out. Learned trial Judge, therefore, has appreciated the evidence available on record in its right perspective. The findings recorded by learned trial Court cannot be said to be legally and factually unsustainable. Being so, the impugned judgment and decree deserves to be affirmed.

13. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. No order so as to cost.

14. Pending application(s), if any, also stands disposed of.

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

Col. Pawan Kumar Sharma ……Appellant/Petitioner.
Versus
Smt. Bhavna Sharma ……Respondent.

FAO No. 420 of 2009.
Reserved on : 05.10.2016.
Decided on : 25th October, 2016.

Hindu Marriage Act, 1955- Section 13- The marriage between the parties was solemnized according to Hindu Rites and Custom- two children were born from the wedlock – husband was posted as a captain in the army – the wife used to leave her matrimonial home on arrival of the husband and used to reside with her parents – wife left matrimonial home without any reasonable cause and did not join despite efforts- the wife pleaded that she was thrown out of her matrimonial home after her parents failed to fulfill the demand of dowry – the husband used to beat the children – the petition was dismissed by the Court- held in appeal that the wife had left her matrimonial home without any reasonable cause and had not returned despite the efforts made by the husband – the relationship between the parties had irretrievably broken down - the

wife is not willing to join the company of the husband – therefore, appeal allowed and the marriage between the parties ordered to be dissolved. (Para-9 to 14)

Cases referred:

Durga Parasanna Tripathy versus Arundhati Tripathy, AIR 2005 SC 3297
Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675
K. Vengadachalam versus K.C. Palanisamy and others, (2005)7 SCC 352
Statish Sitole v. Ganga, AIR 2008 SC 3093

For the Appellant: Mr. Bhupender Gupta, Sr. Advocate with Mr. Ajit Jaswal, Advocate.
For the Respondent : Mr. N.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered by the learned Additional District Judge, Fast Track Court, Chamba, Himachal Pradesh, on 14.07.2009 in H.M.A. Petition No. 27 of 2008, whereby it refused the according qua the petitioner, a decree for dissolution of his marital ties with the respondent.

2. The petitioner/appellant herein standing aggrieved by the rendition of the learned Additional District Judge, hence concerts to reverse it by preferring an appeal therefrom before this Court.

3. The brief facts of the case are that the petitioner claimed the respondent to be his legally wedded wife. Out of their wedlock two female children have born in the years 1986 and 1990 respectively and they are living with the respondent. It is averred that the petitioner was captain in Indian Army and the respondent was a regular Govt. servant in Education department at the time of her marriage. When he was posted in Hussainiwala Border in Firozpur in "operational Trident" and the family was not allowed to be kept there due to which, the respondent started living with her mother and occasionally visited his house. He provided each and every necessities of life to the respondent but she was not at all interested in him. Whenever, he used to come to Chamba on holidays, the respondent used to go to her parents' house on the same day or some times one day prior to his coming at Chamba and thus due to her this act, he had to stay alone at his own house during the holidays and only on his repeated requests she used to come back to the matrimonial house but that too not for more than two days. The petitioner has further pleaded and claimed that the second child was born in the year 1990 and after her birth, the respondent without any reasonable cause and without his consent left the matrimonial house and started living with her mother. However, the petitioner and his mother tried to bring her back and convince her that she should live in her matrimonial house. It is averred that in May, 1996, his nephew Chandan Koushik expired in an accident due to which the people from the locality and society used to come to his house to condole but she used to watch TV in her bedroom and did not participate in the mourning. The matter was reported to her mother but on next day, her brother came to his house and took all her belongings without his consent and she also left the matrimonial house without any reasonable cause and his consent. Since then she has failed to join his company and completely deserted him, although, he and his family members tried to reconcile the matter. It is further averred that his other nephews died in the years 1999 and 2001 but the respondent or her family members did not come to his house. On 15.9.2006 his mother also died but nobody from the respondent's house came to his house. It is further claimed that in the year 2003, on his persuasion, a meeting with the respondent was organized through one Shri Chaman Sharma for conciliation of the matter but in vain. It is averred that he has retired from the Indian Army on 1.2.2002 as Colonel and undergone mental pain and suffering due to the acts of the respondent, who has failed to join his

company since 1996 and as such, the marriage has broken down irreparably. Hence, he sought decree for divorce for dissolution of his marital ties with the respondent.

4. The respondent contested the petition and filed reply. In the reply, the respondent has admitted the relationship between the parties including the off spring as pleaded in the petition, however, the respondent has further pleaded and claimed that she had been living at her matrimonial house alongwith her daughters till date she was forcibly thrown out from the matrimonial house by the petitioner and his family members. She has pleaded that she being loyal Hindu wife served the petitioner as well as his family members like a humble daughter-in-law. It is also alleged that she maintained her daughters as well as her mother in law from her own hard earned money. It is alleged that she was maltreated by the petitioner and his family members. Her second daughter was born to her in the year 1991 and after her birth, the petitioner got annoyed as she had not given birth to a male child. It is alleged by her that the petitioner used to demand dowry by saying that since he is a captain in Army, her parents must provide good car alongwith diamond button on his coat. She has also alleged that the petitioner had given beatings to her elder daughter and in that process, her ear and face were hurt so badly that she had to be rushed to the District Hospital, where she was treated for her injuries by the lady doctor. She has further alleged that Chandan Koushik expired in May, 1996 and at that time relatives of the petitioner advised her not to disclose it to her mother in law who was an old lady and then the relatives along with her mother in law went to Nahan for condolence where the respondent also0 arrived but she was assigned the job of caretaker of house at Chamba. It is also alleged by her that after return from Nahan to Chamba, the petitioner and his family members started harassing and maltreating her and gave beatings to her and turned her and her minor daughters out from the matrimonial house. Thereafter, she requested number of times to the petitioner to allow her to live in the matrimonial house, but all efforts went to vain as the petitioner and his family members did not allow her to live in the matrimonial house. She has further alleged that one of the petitioner's cousin sister namely Rajnish Sharma invited her to Hotel Irawati, where the petitioner was present who forced her to sign customary divorce papers, which she flatly refused. Even prior to that, two notices along with customary divorce deed were sent to her which were never answered by her. She has denied the allegations of cruelty and desertion as pleaded by the petitioner and prayed for the dismissal of the petition.

5. The petitioner/appellant herein filed rejoinder to the reply of the respondent, wherein, he denied the contents of the reply and re-affirmed and re-asserted the averments, made in the petition.

6. 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 failed to join the company of the petitioner and completely deserted him as alleged? OPP

2. Whether the respondent after solemnization of the marriage has treated the petitioner with cruelty as alleged? OPP

3. Whether the petitioner has suppressed the material facts from the court, as alleged, if so, its effects? OPR

4. Relief.

7. On an appraisal of evidence, adduced before the learned Additional District Judge, he dismissed the petition of the petitioner/appellant herein.

8. Now the petitioner/appellant herein has instituted the instant appeal before this Court wherein he assails the findings recorded by the learned Addl. District Judge in his impugned judgment and decree.

9. The appellant herein/petitioner tied nuptial marital knots with the respondent herein in September, 1985. Two female children were born from their wedlock respectively in the year 1986 and 1991. The alienation of the respondent from the matrimonial company of the

appellant herein/petitioner, stands averred to commence in the year 1991 whereat the respondent herein delivered a female child whereafter she is averred to without any reasonable cause besides without the consent and against the wish of the petitioner/appellant herein, depart to her parental home. Apart from the aforesaid factum of the respondent herein deserting the matrimonial company of the appellant herein, the latter has averred qua in May, 1996 when his nephew met his end in an accident, hers remaining confined to a room whereat she continued to watch television rather than attend to people who had come to his residence for condoling the demise of his nephew Chandan Koushik. Though the apathetic attitude of the respondent herein was complained by the petitioner to her mother yet it sequeled the respondent's brothers to come to the matrimonial home of the respondent whereat they without the consent of the petitioner/appellant herein along with her belongings took the respondent with them to her parental home. Since, the departure of the respondent herein from her matrimonial home in May, 1996, the petitioner avers of the respondent, despite his concerting to regain her matrimonial company, she portraying stark obduracy in joining his company at her matrimonial home. Even in the years 1999 and 2001 whereat the demise of the nephews of the petitioner occurred, the latter avers qua neither the respondent nor her family members visiting him to condole their demise. He continues to aver of on 15th September, 2006, whereat the demise of his mother occurred neither the respondent nor her family members visiting his home to condole her demise. He also avers qua the respondent not permitting him to meet his children. He avers qua in the year 2003, on his persuasion through the aegis of one Chaman Sharma, a meeting with the respondent stood organized, for bringing amity in their relations yet his efforts in the aforesaid regard proving abortive. The prolonged separation since the year 1996 upto the date of institution of the instant petition, of the respondent from the matrimonial company of the petitioner stands espoused by him to ipso facto connote of their marital relations standing irretrievably broken down, whereupon he seeks dissolution of his marital ties with the respondent besides obviously contends qua, on score of desertion besides concomitant mental cruelty perpetrated upon him, his thereupon standing entitled to a decree of dissolution of his marital relations with the respondent.

10. The aforesaid averments constituted in the petition by the petitioner also stand communicated by him in his testification. His testification as also the averments constituted in the petition also stand corroborated by PW-2 and PW-3. The respondent herein for succoring her repudiation to the averments constituted in her reply to the apposite petition has testified as RW-1. For meteing corroboration thereto she has depended upon the testimonies of RW-2, RW-3 and RW-4. Since, the evidence adduced by the contestants herebefore does succor their respective espousals hence this Court is enjoined to with discerning circumspect care unearth therefrom the truth carried therein. However, before proceeding to discern the respective veracities of the evidence adduced herebefore by the contestants in substantiation of their respective espousals encapsulated in their respective pleadings, the effect of the alleged apathy of the respondent herein emanable from hers purportedly not attending to mourners, who visited the house of the appellant herein/petitioner, for condoling the demise of his nephew which occurred in the year 1996 besides her apathy emanable from hers not visiting her matrimonial home in the years 1999 and 2001 whereat also the demise of the nephews of the appellant herein occurred, lastly the effect of the apathy of the respondent herein to in September, 2006 not visit the house of the petitioner/appellant herein to mourn the demise of his mother, has to be pronounced upon, significantly when the aforesaid purported misdemeanors of the respondent herein beset the appellant herein with mental trauma. The effect of the aforesaid purported misdemeanors of the respondent herein even if assumingly carry any vigorous sinew, their tenacity omnibusly wanes with an imminent display of the appellant herein instituting the instant petition in the year 2007. The immense hiatus since the purported misdemeanors of the respondent herein vis-a-vis the institution of the instant petition by the appellant herein brings to the fore an inevitable inference of the appellant herein thereupon condoning the aforesaid purported misdemeanors which he ascribes to the respondent herein. Also as a corollary, their effect, if any, upon the mental psyche of the petitioner cannot be construed to be holding any enormity or gravity in both potency or in sinewed vigour wherefrom a deduction is derivable of theirs not hence purveying to the appellant

herein a formidable weapon for seeking dissolution of his marital ties with the respondent. Contrarily, for reasons aforestated the appellant herein is to be construed to be condoning the purported misdemeanors of the respondent herein besides at the time of institution of the petition at hand their concomitant bearing upon his psyche losing effect.

11. Dehors the aforesaid, the appellant herein has conceived a ground for annulling his marital ties with the respondent herein on the score of the respondent for an inordinately prolonged duration of time alienating herself from his matrimonial company whereupon he concerts to erect an argument qua his marital ties with the respondent herein standing irretrievably broken down wherefrom he on the anvil of a decision of the Hon'ble Apex Court reported in ***Durga Parasanna Tripathy versus Arundhati Tripathy, AIR 2005 SC 3297*** wherein the Hon'ble Apex Court on surging forth of evidence therebefore of the marital partners thereat living separately for 14 years besides prevalence thereat of evidence in portrayal of concerts made by the husband to retrieve his errant spouse to her matrimonial home proving abortive had thereupon construed qua their marriage standing irretrievably broken down, leading it to conclude of thereupon the husband proving the animus deserdendi of the errant spouse beside concluded qua given the prolonged estranged embittered relations inter se them, the refusal of a decree of dissolution of their marital ties begetting no fruitful purpose significantly when their matrimony was irreparable. Also he has depended upon a judgment of the Hon'ble Apex Court reported in ***Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675*** wherein the Hon'ble Apex Court has held qua with proof emanating qua irretrievable break down of marriage, besides proof erupting qua it standing damaged beyond repair warranting incorporation thereof in the relevant statute as a ground for dissolution of marriage, for incorporation whereof it made recommendations also it on emanation of proof aforesaid concluded qua the prolonged separation of the spouses ipso facto purveying succor to an inference of their marital ties standing irretrievably broken down whereupon it annulled the marital ties inter se the contestants thereat. The aforesaid pronouncements also stand pronounced by the Hon'ble Apex Court in ***K. Vengadachalam versus K.C. Palanisamy and others, (2005)7 SCC 352*** and ***Statish Sitole v. Ganga, AIR 2008 SC 3093***. The factum of prolonged separation of the spouses thereat provided impetus to the Hon'ble Apex Court to conclude of any concert to beget continuation of marital relations inter se spouses thereat by refusing to annul their marital ties per se tantamounting to cruelty whereupon it proceeded to annul the marital ties inter se the contesting parties thereat.

12. The learned trial Court by delving deep into the evidence adduced therebefore by the parties at contest had hence distinguished the ratio decidendi propounded by the Hon'ble Apex Court in the aforesaid citations whereupon it concluded of the version propounded in the testification of the petitioner/appellant herein standing gripped with falsity whereas the contentions reared by the respondent holding a virtue of truth. It also concluded of with the petitioner/appellant herein not adducing cogent evidence in display of the respondent herein while hers holding an animus deserdendi hers hence separating from his company, constraining it to hold of hence the petitioner/appellant herein contriving besides engineering a ground for divorce. The inference recorded by the learned trial Court of the petitioner/appellant herein inventing a ground for divorce stood anvilled upon the factum of his transmitting a notice, comprised in Ex.RB, to the respondent wherewithin he beseeched her to facilitate annulment of their marital ties by by their conjointly resorting to customary law also with enunciations occurring therein of the petitioner/appellant herein aspiring to solemnize a second marriage, reiteratedly whereupon it erected an inference of the petitioner contriving a ground for divorce. The aforesaid exhibits do bely the espousal of the petitioner/appellant herein qua his concerting to reclaim the matrimonial company of the respondent herein. Further more the deposition of RW-4, an adult daughter begotten from the wedlock of the contesting parties hereat wherewithin she succors the contentions held in the pleadings of the respondent herein beside imputes fault to the petitioner/appellant herein, provided impetus to the learned trial Court to form a conclusion of the appellant herein/petitioner derelicting to preserve his matrimony with the respondent herein, rather his aberrant behaviour bolstering the departure of the respondent

herein to her parental home wherefrom it concluded of the appellant herein failing to prove the trite factum of the respondent herein with an animus deserdendi departing to her parental home.

13. Be that as it may, dehors the tenacity of the conclusion formed by the learned trial Court also dehors the factum of the petitioner/appellant herein assumingly contriving a ground for annulment of his marital ties with respondent herein nonetheless the prolonged separation of the respondent from the matrimonial company of the appellant herein when stands unflinchingly proven also when their relations have developed acute estrangement besides stand painfully embittered also with the adult daughter of the contestants hereat imputing cruelty to the petitioner/appellant herein constitute hard realistic evidentiary data for bolstering a deduction qua the marriage inter se the parties at contest standing irretrievably broken down also it hence being unevacuable whereupon qua refusal of a decree of divorce would be a futile attempt to revive their capsized matrimony rather would perpetuate torment upon both of them. The learned trial Court has remained oblivious to the hard evidentiary realities as stand evinced from the record existing hereat rather it by drawing certain subtle distinctivities inter se the factual scenario prevailing hereat vis-a-vis the scenario prevailing in the citations relied upon by the learned counsel appearing for the appellant, has refused to annul their marital ties, refusal whereof is a futile attempt to preserve their dismantled marital relation.

14. The refusal by the learned trial Court to accord a decree qua annulment of martial ties inter se the petitioner and the respondent has erupted on its remaining unmindful of (a) suggestion put to the petitioner/appellant by the counsel for the respondent while holding him to cross-examination, wherewithin articulations are held qua existence of temperamental inconsistencies inter se them, suggestion whereof stood answered in the affirmative by the petitioner; (b) the effect of the aforesaid suggestion and the consequent answers in affirmation thereto rendered by the petitioner blunts the effect of the suggestion subsequently put to the petitioner by the counsel for the respondent during the course of his subjecting him to cross-examination qua his willingness to accept the respondent at her matrimonial home, besides the answer in the negative purveyed thereto by the petitioner holds no leverage to the respondent herein to contend qua the petitioner contriving a ground to annul his marital ties with her. The effect of the aforesaid evidentiary data existing herebefore is qua their existing mental incompatibility inter se the married spouses whereas mental compatibility is imperative for flourishing conviviality in matrimony. Since the institution of marriage would flourish only on survival of affability inter se married spouses whereas with affability inter se both provenly ebbing given their prolonged embittered estranged relations also when the adult daughter of the petitioner imputes cruelty to the petitioner whereas she along with her sister besides with her mother are enjoined to stay in harmony with the petitioner/appellant herein at his home, matrimonial harmony whereof when has suffered a deep fracture beside fissure, any refusal of a decree for annulment of marital ties inter se the petitioner/appellant and the respondent herein would be a futile exercise also would perpetuate agony and torment upon both. For obviating the aforesaid causality, it is deemed fit and proper to disregard the subtle distinctivities prevaling in the factual matrix propounded in the citations of the Hon'ble Apex Court vis-a-vis the factual matrix prevailing hereat rather with the predominant fact of both holding prolonged estranged relations whereupon their marriage has foundered constitute the solitary consideration for annulling their martial ties. Also it appears of the respondent not willing to join her matrimonial home significantly when despite this Court ordering on 6.9.2016 for hers recording her presence herebefore for facilitating this Court to beget a reconciliation inter se her and the appellant, hers omitting to record her presence hereat on 20.9.2016, omission whereof spurs an inference qua hers being uninterested in reviving her marital ties with the petitioner/appellant herein hence her aspiration also warrants vindication.

15. For the foregoing reasons, it is apt to clinchingly conclude of with the marital ties of the petitioner/appellant herein with the respondent herein standing broken down irretrievably hence, the rendition of a decree of severance of their marital ties would be both just and expedient. Consequently, the instant appeal is allowed. Accordingly, the marriage inter se the petitioner/appellant and the respondent herein is ordered to be dissolved subject to the

appellant herein/petitioner paying from 1st November, 2016 per mensem permanent alimony to her to the extent of 35% of the pensionary benefits received by him, defrayment whereof be made by his remitting per mensem in her savings bank account the aforesaid quantum of alimony assessed vis-a-vis the respondent herein, particulars whereof be supplied within one week from today by the learned counsel for the respondent herein to the learned counsel for the petitioner/appellant herein, further subject to his within two months from today preparing FDRs in the name of his adult daughters respectively each in a sum of Rs.5,00,000/- (Rs. Five lacs Only) towards the expenses of their marriage, FDRs whereof shall be deposited by the appellant herein in the Registry of this Court. In sequel, the judgment and decree impugned before this Court is quashed and set aside. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

National Insurance Company Ltd. ....Appellant.
Versus
Smt. Puran Dei and others ....Respondents.

FAO No. 153 of 2016.
Decided on : 25th October, 2016.

Workmen Compensation Act, 1923- Section 4- Deceased was engaged as a cleaner- he died in an accident- a claim petition was filed for seeking compensation- an amount of Rs.6,71,389/- was awarded along with interest @ 12% per annum- held in appeal that Commissioner had taken the income of the deceased as Rs.3,000/- per month- PW-1 had stated that deceased was earning Rs.3,000/- per month and Rs.50/- per day as diet money- therefore, income of Rs.3,000/- per month cannot be said to be excessive - driving licence remains effective for a period of 30 days from the date of expiry- therefore, it cannot be said that licence was not valid- appeal dismissed.
(Para-4 to 6)

For the Appellant: Mr. Rajiv Jiwan and Mr. Ajit Sharma, Advocates.
For Respondents No.1 and 2: Mr. Manoj Thakur, Advocate.
For Respondents No.3 to 5: Mr. T.S.Chauhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal arises from the impugned order of the learned Commissioner, under the Workmen's Compensation Act, 1923, Bilaspur, District Bilaspur, H.P. (for short the "Commissioner"), whereby he allowed the application preferred thereat by the claimants/respondents No.1 and 2 wherein they claimed grant of compensation vis-a-vis them under the Workmen's Compensation Act (for short the "Act").

2. The claimants/respondents No.1 and 2 herein are successors-in-interest of deceased Chaterpal, whose demise occurred in an ill-fated accident involving truck bearing No. HP-24-5291, whereon he stood at the relevant time engaged as a cleaner by respondents No.3 and 4. They had instituted a petition before the Commissioner staking a claim therein for assessment of compensation under the Act qua them. The learned Commissioner on standing seized with the relevant evidence, pronounced an award wherein he assessed compensation in a sum of Rs.6,71,389/- along with interest @ 12% per annum vis-a-vis the claimants/respondents No.1 and 2 herein besides liability thereof stood fastened upon the insurance company.

3. The Insurance company-appellant herein standing aggrieved by the rendition of the learned Commissioner hence concerts to assail it by preferring an appeal therefrom before this Court.

4. The learned Commissioner had while concluding qua the deceased drawing wages in a sum quantified @ Rs.3000/- per month had depended upon the testimony of PW-1 Puran Dei, the mother of deceased Chaterpal. She had therein pronounced qua the deceased drawing from his employment under his employer wages @ Rs.3000/- per month besides his employer defraying to him diet money quantified at Rs.50 per day. Though, the aforesaid articulations made by PW-1 in her testification qua hence deceased Chaterpal, the predecessor-in-interest of the claimants/respondents No.1 and 2 herein cumulatively drawing wages @ Rs.4500/- per month, yet the learned Commissioner concluded of the amount of wages per month drawn by the deceased from his employment as a cleaner in the truck owned by respondents No.3 and 4 standing comprised in a sum of Rs.3000/- whereon he applied the relevant statutory principles for determination of compensation vis-a-vis the claimants/respondents No.1 and 2 herein. Since, the learned Commissioner has taken only a sum of Rs.3000/- to be the per mensem wages drawn by the deceased from his employment as a cleaner under his employers, the aforesaid sum is visibly a just and reasonable sum of wages per mensem drawn by the deceased while his standing engaged as a cleaner in the ill-fated vehicle by his employers. In aftermath the aforesaid computation of wages per mensem drawn by the deceased while his standing engaged as cleaner in the ill fated vehicle by his employers does not warrant any interference. Even otherwise the Insurance company has not adduced the relevant best evidence comprised in its concerting to lead into the witness box the employers of the deceased wherefrom the apposite elicitations may have upsurged qua the deceased drawing wages per mensem in a figure lesser than Rs.3000/-. Consequently, reiteratedly, the conclusion drawn by the learned Commissioner qua the deceased drawing wages constituted in a sum of Rs.3000/- per mensem while his serving in the ill-fated vehicle as a cleaner under his employer warrants deference.

5. The learned counsel appearing for the Insurance Company has contended of with the driving licence held by the driver, who at the relevant time was driving the ill-fated vehicle, licence whereof stands comprised in Ex. RW1/A holding reflections therewithin qua it authorizing him to drive a heavy transport vehicle, validity whereof enduring upto 30.12.2006. whereas with the ill-fated occurrence taking place on 17.01.2007, qua hence thereat the driving licence held by the driver of the ill-fated vehicle not holding any valid subsisting force, whereafter, he contends qua the fastening of the relevant liability upon it by the learned Commissioner in the impugned rendition warranting interference. However, the aforesaid contention also warrants its standing discountenanced in the face of the provisions encapsulated in Section 14 of the Motor Vehicles Act, 1988, the relevant provisions whereof stand extracted hereinafter, mandating qua on an application standing preferred by a holder of a driving licence before the licencing authority concerned whereupon he on its validity expiring seeks its renewal therefrom, it holding an empowerment to renew it, renewal whereof holding validity besides effect from the date of its expiry. However, the aforesaid mandate held therewithin is subject to the mandate held in its proviso. The relevant provisions of Section 14 of the Motor Vehicles Act read as under:-

> " 14. Currency of licences to drive motor vehicles:-
>
> (1)......................................
>
> (2). A driving licence issued or renewed under this Act Shall,-
>
> (a) in the case of a licence to drive a transport vehicle, be effective for a period of three years"

The relevant provisions of Section 15 of the Motor Vehicles Act read as under:_

> "15. Renewal of driving licences.- (a) Any licensing authority may, on application made to it, renew a driving licence issued under the provisions of this Act with effect from the date of its expiry:

> Provided that in any case where the application of the renewal of a licence is made more than thirty days after the date of its expiry, the driving licence shall be renewed with effect from the date of its renewal:
>
> Provided further that where the application is for the renewal of a licence to drive a transport vehicle or where in any other case the applicant has attained the age of forty years, the same shall be accompanied by a medical certificate in the same form and in the same manner as is referred to in sub-section (3) of section 8 and the provisions of sub-section (4) of section 8 shall, so far as may be apply in relation to every such case as they apply in relation to a learner's licence."

The proviso to Section 15 wherewithin a mandate is held qua on more than 30 days elapsing since its expiry whereupon its renewal stands concerted by its holder, the renewal of his driving licence by the licencing authority concerned holding effect from the date of its renewal and not from the date of its expiry wherefrom the inevitable conclusion is of unless the holder of a driving licence within 30 days elapsing since its expiry prefers an application before the licencing authority concerned wherein he asks for its renewal therefrom, the renewal of the relevant driving licence by the licencing authority concerned being construable to hold effect from the date of its renewal. In other words, if only when the holder of a driving licence on expiry of his driving licence prefers an application within 30 days elapsing since its expiry concerting therein its renewal by the licencing authority concerned thereupon alone its renewal by the licencing authority concerned relating back to the date of its expiry otherwise not. Consequently, with reflections occurring in Ex.RW1/A qua the driving licence of the driver of ill-fated vehicle surviving upto 30.12.2006 whereas the vehicle which he was driving at the relevant time suffering an accident on 17.01.2007 hence with the ill-fated occurrence taking place with less than 30 days elapsing vis-a-vis the date of expiry of the apposite driving licence also when thereupto not more than 30 days elapsed therefrom, it cannot be concluded of hence (a) the relevant driver not preferring within 30 days since its expiry an apposite application before the licencing authority concerned for obtaining its renewal therefrom (b) of qua it holding force and validity at the time of the ill-fated occurrence significantly when its renewal stood concerted within 30 days elapsing since its expiry (c) besides its renewal relating back to the date of its expiry. Consequently, when only on 30 days elapsing since 30.12.2006 besides therewithin his omitting to seek its renewal from the licencing authority concerned, a conclusion was garnerable of hence renewal of his driving licence by the licencing authority concerned being effective from the date of its renewal. Contrarily, reiteratedly when RW-1 in his testification has not made any communication qua the driver of the ill-fated vehicle seeking renewal of his driving licence from the licencing authority concerned on more than 30 days elapsing since 30.12.2006, it has to be concluded qua hence his seeking renewal of the apposite driving licence within 30 days from the date of its expiry also therefrom it has to be concomitantly concluded qua his driving licence being construable to be effective vis-a-vis the date of its expiry i.e. 30.12.2006. In sequel, whereof it is to be concomitantly concluded qua at the time contemporaneous to the occurrence of the ill-fated incident, his holding a valid driving licence to drive the relevant vehicle. In aftermath, the findings recorded by the learned Commissioner on the aforesaid apt issue do not merit any interference.

6. For the reasons recorded hereinabove, no substantial question of law much less a substantial question of law arises for determination in the instant appeal. Consequently, there is no merit in the instant appeal and it is accordingly dismissed. In sequel, the order impugned hereat is maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

Satish Chander .....Appellant-Plaintiff.

Versus

Jagdish and others ......Respondents/defendants.

RSA No. 383 of 2007.
Reserved on : 06.10.2016.
Decided on : 25th October, 2016.

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that suit land was earlier owned by his mother V – she had executed a Will in favour of the plaintiff and defendant No.1- the other land was given to proforma defendants No. 2 and 3- defendant taking advantage of the absence of the plaintiff got executed a gift deed – the suit land was ancestral in the hands of V – the defendant pleaded that the Will and gift deed were executed in a free and disposing state of mind – the suit was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held in second appeal that the execution of the Will was not disputed – the gift deed was executed after the execution of the Will- the gift deed was registered and there is presumption of its due execution – however, it was recorded by the revenue officer that possession was delivered after receiving an amount of Rs.5,000/- - therefore, it has not been proved that the gift was executed without any consideration- the donee had failed to prove that no undue influence was exercised by him upon the donor – further, the scribe and the witnesses were common – the Sub Registrar was also not examined – the Courts had not properly appreciated the evidence – appeal allowed- judgments of the Courts below set aside and the suit of the plaintiff decreed. (Para-7 to 14)

Case referred:

Krishna Mohan Kul alias Nani Charan Kul and another versus Pratima Maity and others (2004)9 SCC 468

For the Appellant: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For Respondent No.1: Mr. Ashok Sharma, Senior Advocate with Ms. Sukarma Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Regular Second Appeal stands directed against the impugned judgement and decree recorded by the learned Additional District Judge, Fast Track Court, Kangra at Dharamshala in Civil Appeal No. 147-J/05/03, whereby he in affirmation to the verdict recorded by the learned trial Court dismissed the suit of the plaintiff wherein he had sought a declaration qua gift deed comprised in Ex.DW2/A being quashed and set aside. The plaintiff/appellant herein stands aggrieved by the concurrently recorded renditions of both the learned Courts below wherefrom he has instituted the instant appeal herebefore.

2. The brief facts leading to the lis inter se the parties were that the plaintiff sought declaration that he is joint owner to the extent of 435/924 shares in the suit land since the suit land was earlier owned by the mother of the parties Smt. Vidya Devi wife of late Dharam Vir. It had been averred that a Will was executed by Vidya Devi in favour of the plaintiff and defendant No.1 in full disposing mind on 9.4.1991 and as per that Will, the land to the extent of 0-02-85 hectares was given to defendant No.1 and 0-03-84 hectares was given to the plaintiff. The deceased had also executed a Will in respect of other land vide which the land had been given to the proforma defendants NO.2 and 3. The plaintiff was earlier residing at Patiala and thereafter shifted to Shimla as he was in government service. The defendant taking advantage of the

absence of the plaintiff by playing fraud upon Vidya Devi got a false and fictitious gift deed executed. The suit land in the hands of Vidya Devi was ancestral qua the plaintiff and defendant No.1 and proforma defendants who are governed by custom in the matter of alienation being agriculturists. It had also been averred that the land being ancestral property was to devolve upon the plaintiff and defendants but by way of Will executed by Vidya Devi the reversionary rights of the plaintiff got effected and he got deprived of his share in the suit land. It had also been averred that the gift deed is not valid and the plaintiff is not bound by the gift deed. The plaintiff had further averred that Vidya Devi had also constructed a house over the suit land about two years back and there was another old house existing on the suit land constructed by the forefathers of the parties. The plaintiff and the defendants have got their shares in both the house since the parties are in joint possession of both the houses. The defendant NO.1 in connivance with the revenue staff got mutation sanctioned on the basis of the alleged gift deed in his favour without notice to any of the interested parties or to deceased Vidya Devi. The defendant No.1 was asked time and again that he should not claim anything as per the alleged gift deed but in vain, hence the instant suit.

3. Defendant No.1 contested the suit and taken preliminary objections inter alia maintainability, locus standi, estoppel, cause of action. It had been averred that the plaintiff was regularly visiting to his house. It had also been averred that Vidya Devi was not a simple lady. She executed a valid gift deed in faovur of defendant No.1 out of her free will and undue influence. The gift was registered with the Sub Registrar, Jawali. Thus there was no question of fraud. Defendant NO.1 has become owner of 558 shares out of 924 shares out of which 285 shares were due on account of the gift deed. The houses constructed by defendant No.1 by raising loan from the financial institution. Thereby the plaintiff and proforma defendants have got no share over that house. The plaintiff is owner to the extent of 366 shares out of 924 shares. It had been averred that the parties are not governed by custom in the matters of alienation. Vidya Devi had every right to alienate suit land by way of gift being owner-in-possession of the suit land. The deed is valid and a legal document. Thereby the plaintiff is not entitled to any relief.

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

1. Whether the plaintiff is joint owner to the extent of 435/924 share i.e. 0-04-57 HM, out of the suit property, as alleged? OPP

2. Whether the gift deed dated 23.4.1991 executed by Vidya Devi in favour of defendant No.1, is result of fraud , as alleged? OPP

3. Whether the suit of the plaintiff is not maintainable in the present form, as alleged? OPD

4. Whether the plaintiff has no locus stnadi to file the present suit, as alleged? OPD

5. Whether the plaintiff is estopped to file the present suit, as alleged? OPD.

6. Whether the plaintiff has no enforceable cause of action, as alleged? OPD.

6-A. Whether the property is ancestral and parties are governed by customs in the matter of alienation of such property, as alleged? OPP

7. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, it dismissed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom by the plaintiff/appellant herein before the learned first Appellate Court, the latter Court while dismissing the defendant's appeal, 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 assailing therein the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 24.08.2007, this Court, admitted the appeal instituted by the plaintiff/appellant against the

judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether misreading of oral as well as documentary evidence which goes to the root of the matter has vitiated the findings of the ld. Courts below.

b) Whether the Ld. Courts below have arrived at wrong conclusion by the misreading of documents Ex.P1, Ex.DW2/A and ExPW3/F?

c) Whether the learned Courts below were right in holding that the documents Ex.DW2/A, the gift deed was not in violation of Section 122 of the |Transfer of Property Act?

d) Whether the learned Court below is wrong in holding that the suit property is not an ancestral property and could have been alienated in the matter it has been done so?

e) Whether the learned Court below erred in holding that the property is not ancestral and is not governed by local custom.

f) Whether the learned Court below is right in holding that the gift deed Ex.DW2/A dated 23.4.91 is not a result of fraud?

Substantial questions of Law No.1 to 6:

7. The plaintiff/appellant and the contesting defendant/respondent are the off springs of deceased Vidya Devi. Vidya Devi, the predecessor-in-interest of the contestants herebefore had prior to the execution qua her property of Ex.DW2/A executed a testamentary disposition whereby she devised her estate vis-a-vis the parties at contest in the manner enshrined therein. The testamentary disposition of Vidya Devi, the predecessor-in-interest of the contesting parties hereat stands comprised in Ex.P-1. It stood executed on 9.4.1991. It also stood registered by the Sub Registrar concerned. It stood scribed by one Tilak Raj, Advocate and marginal witnesses thereto are Sadhu Ram and Shiv Singh. In quick succession thereto gift deed comprised in Ex.DW2/A stood executed by the predecessor-in-interest of the contesting parties hereat vis-a-vis defendant No.1/respondent No.1 herein. The factum of valid and due execution of Will comprised in Ex.P-1 has remained uncontroverted. However, an acerbic contest has erupted qua the valid and due execution of gift deed comprised in Ex.DW2/A. With execution of gift deed by the predecessor-in-interest of the parties at contest occurring in a short span vis-a-vis execution of a testamentary disposition comprised in Ex.P-1 by her, obviously the factum aforesaid stands highlighted by the learned counsel appearing for the appellant/plaintiff to constitute a suspicious circumstance impinging upon its volitional execution by the donor vis-a-vis the contesting defendant No.1. The validity of gift deed comprised in Ex.DW2/A stands pronounced by the testimony of its scribe also by the witnesses thereto. Apart therefrom, the factum of gift deed embodied in Ex.DW2/A standing presented for registration by the predecessor-in-interest of the contesting parties hereat before the registering authority concerned whereupon it stood accepted for registration also with occurrence of an endorsement qua its contents standing readover and explained to the donor, does strip the vigour of the contention of the learned counsel for the plaintiff/appellant of the donor since deceased standing beguiled by the donee to execute it in his favour. Contrarily, a tentative inference is erectable of it constituting a volitional disposition of her estate vis-a-vis the contesting defendant/respondent herein.

8. Be that as it may, even if, the recitals embodied in Ex.DW2/A do unveil the factum of its execution by the donor being bereft of any consideration passing from the donee to the donor whereupon it dons the mantle of a validly executed instrument of gift yet the order of mutation comprised in Ex.PW3/F attested by the revenue officer concerned on its presentation before him by the donor, who thereat stood accompanied by Shri Tilak Raj, Advocate, brings to the fore the factum of the donor on therebefore recording her appearance acquiescing tot he factum of hers receiving a sum of Rs.5000/- in lieu of her transferring possession of the corpus of the property enunciated in Ex.DW2/A vis-a-vis contesting defendant No.1/respondent No.1.

Both the learned Courts below had overlooked the occurrence of the aforesaid recitals in the order of the mutation recorded by the revenue officer on presentation of Ex.DW2/A before him, whereat Shri Tilak Raj, Advocate, identified the donor, who therebefore obviously had recorded her appearance on the score of it being unreadable whereas only the recitals existing in Ex.DW2/A being readable for forming a construction of it constituting a gratuitous transfer of property alienated by the donor to the donee wherewithin with no recitals occurring in display of passing of consideration from the donee to the donor constituting a conclusive pointer of it being construable to be a gratuitous alienation of the suit property by the donor to the donee. The slighting, by both the Courts below of the germane recitals embodied in Ex.PW3/F wherewithin portrayals are held of monetary consideration passing from the donee to the donor in lieu of the donor passing possession of the suit property to the donee, on the score of theirs being unreadbale, has begotten gross mis-appraisal of there impact upon the trite factum of the gift deed comprised in Ex.DW2/A being construable to be a volitional gratuitous transfer of the property by the donor to the donee. True it is that the recitals in Ex.DW2/A omit to bespeak of passing of monetary consideration from the donee to the donor also true it is of Ex.DW2/A alone constituting the instrument whereupon title qua the suit property stood bestowed upon the donee besides true it is of the order recording attestation of mutation by the Revenue officer concerned on production of Ex.DW2/A before him by the donor not conferring title qua the suit property upon the donee yet the existence of recitals therein of the donor passing possession of the suit property to the donee in lieu of hers receiving a sum of Rs.5000/- cannot be amenable to a construction of its occurrence therein being mechanical nor the aforesaid germane recital occurring therein can stand segregated from the factum of execution of Ex.DW2/A nor it can be read in isolation therefrom, conspicuously, when in pursuance thereto possession of the suit property stood received by the donee from the donor. Since delivery of possession of the suit property from the donor to the donee is imperative for a transaction of gift being construable to stand completed, imperatively, hence with the transaction of gift standing completed with the revenue officer concerned recording an order qua possession of the suit property standing delivered to the donee by the donor in lieu of the latter receiving a sum of Rs.5000/- from the former holds a natural sequel of thereupon thereat the transaction of gift standing completed besides consummated. As a corollary, though the instrument of gift comprised in Ex.DW2/A omits to hold therewithin any recital of passing of consideration from the donee to the donor rather holds communication therewithin qua conveyance of the suit property by the donor to the donee being a volitional gratuitous disposition, the aforesaid recitals occurring in Ex.DW2/A are excludable for forming a construction whether Ex.DW2/A is a volitional gratuitous transfer of the suit property significantly when they are read in entwinement with the order of mutation recorded in Ex.PW3/F whereat, for reasons aforestated, the transaction of gift stood consummated. Contrarily when order of mutation embodied in Ex.PW3/F holds traits besides elements of passing of consideration from the donee to the donor in lieu of passing of possession from the latter to the former whereupon hence with a key characteristic feature of a gift for thereupon it standing concluded to be holding tenacity in law significantly qua its standing bereft of consideration passing from the donee to the donor obviously stands diminished. In aftermath, it is apt to conclude of Ex.DW2/A being unamenable to a construction of it being an instrument of gift within the ambit of its statutory definition held in the apposite provisions of the Transfer of Property Act.

9. Also both the learned Courts below had made short shrift of an apposite recital aforesaid occurring in Ex.PW3/F on score of no suggestion in tandem thereto standing put by the learned counsel for the plaintiff to the defendant's witnesses while holding them to cross-examination. The assigning of the aforesaid reason by both the learned Courts below for theirs omitting to rid off the impact of the apposite recitals embodied in Ex.PW3/F upon Ex.DW2/A for the latter being thereupon not being construable a to be validly executed instrument of gift, has emanated on theirs holding a view of the plaintiff standing enjoined to discharge the onus of proving the factum of Ex.DW2/A standing gripped with a vice of falsity or with a vice of its execution emanating from the contesting defendant/respondent practicing deception upon his predecessor-in-interest. The aforesaid view as taken by both the learned Courts below appears to

germinate from theirs fallaciously holding a view of unlike a testamentary disposition, propounder whereof stands enjoined to dispel the suspicious circumstances surrounding its execution, the plaintiff while impeaching the validity of Ex.DW2/A standing obliged to prove the factum of its execution emanating from the contesting defendant No.1 practicing deception upon the donor, onus whereof standing undischarged by the plaintiff/appellant, theirs on anvil of the testimonies of the scribe of Ex.DW2/A besides on anchor of the testification of the witness thereto also on anchor of it being a registered instrument of gift whereupon a presumption of truth is fastened, presumption whereof remaining uneroded by adduction of convincing evidence, concluded of Ex.DW2/A being free from any stain of its execution ensuing from the contesting defendant practicing deception upon the donor. However, the aforesaid view as taken by the learned Courts below is in gross transgression of the mandate of the Hon'ble Apex Court propounded in ***Krishna Mohan Kul alias Nani Charan Kul and another versus Pratima Maity and others (2004)9 SCC 468,*** the relevant paragraph 14 whereof stand extracted hereinafter:-

> "14. It is now well established that a Court of Equity, when a person obtains any benefit from another imposes upon the grantee the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it. The proposition is very clearly stated in Ashburner's Principles of Equity, 2nd Edn. p.229, thus:
>
> "When the relation between the donor and donee at or shortly before the execution of the gift has been such as to raise a presumption that the donee had influence over the donor, the Court sets aside the gift unless the donee can prove that the gift was the result of a free exercise of the donor's will.""
>
> (P....475)

Wherewithin a mandate stands propounded of a grantee or a donee concerting to maintain a contract or a gift each standing obliged to prove qua his in obtaining it not exerting any influence upon the granter or the donor significantly when the donee holds a fiduciary relationship with the donor also when the donor at the time contemporaneous to its execution was under the care of the donee, whereupon a presumption is erectable of his exerting influence qua its execution vis-a-vis him upon the donor, presumption whereof is enjoined to be dispelled by the donee. The essential nuance of the mandate of the Hon'ble Apex Court besets the donee with an onerous obligation to satisfy the conscience of the Court qua execution of gift deed qua him by the donor being free from his dominating the will of the donor. The concomitant effect of the rendition of the Hon'ble Apex Court is of alike a testamentary disposition whereupon its propunders standing enjoined to by cogent evidence explicate the suspicious circumstance(s) surrounding its execution for theirs thereupon satisfying the judicial conscience of the Court qua its execution being free from any suspicious circumstance(s), a donee also likewise standing enjoined to explicate the suspicious circumstance(s) surrounding its execution. Now herebefore, it is imperative to under score qua whether the donee had the opportunity to dominate the will of the donor, opportunity whereof would arise on proof emanating of his staying in her company at the stage contemporaneous to its execution. Only on the aforesaid upsurgings emanating herebefore would this Court be inclined to enjoin the donee to prove the factum of its execution being free from his dominating her will besides this Court would stand coaxed to make it incumbent upon the donee to dispel suspicious circumstance(s) surrounding its execution. In the endeavour aforesaid, an incisive perusal of the relevant record makes vivid upsurgings qua the donor staying in the company of the donee at the stage contemporaneous to the execution of Ex.DW2/A, whereupon he stood obliged, dehors his not assailing it also dehors onus standing not cast upon him to prove the factum of its execution emanating from his practicing deception upon the donor also dehors no suggestion standing put to the defendants witnesses by the learned counsel for the plaintiff hinged upon the order of mutation in succession to its execution standing attested by the revenue officer concerned holding recitals qua consideration passing from the donee to the donor in lieu of the former transferring possession of the suit land to him, whereupon for reasons aforestated the transaction of gift stood consummated also when it

adversely impinged upon the trite factum of it thereupon lacking the statutorily trait of it being a volitional gratuitous transfer of the suit property by the donor to the donee, for it hence being construable to be a validly executed instrument of gift qua the suit property, to adduce evidence dispelling the factum of its execution not ensuing from his in any manner dominating the will of the donor. Reiteratedly, he was enjoined to make apposite pronouncements in dispelling the aura of suspicion surrounding the factum of purported volitional gratuitous disposition of the suit property under Ex.DW2/A by the donor to the donee. However, the aforesaid apposite bespeakings remain uncommunicated by the contesting defendant's witnesses. Since, the citation aforesaid of the Hon'ble Apex Court propagates a view qua akin to a propounder of a testamentary disposition standing enjoined to dispel the suspicious circumstance surrounding the valid and due execution of a testamentary disposition of a deceased testator, the donee likewise standing obliged to dispel the aforesaid suspicious circumstance surrounding the valid and due execution of Ex.DW2/A conspicuously when they are impinging upon the factum of its execution being not a volitional gratuitous transfer of the suit property by the donor to the donee. Since for removing the aura of suspicion ingraining the instrument of gift comprised in Ex.DW2/A, no apposite bespeakings occur in the testifications of the defendants witnesses, omissions whereof when read in coagulation with the apposite order of attestation of mutation comprised in Ex.PW3/F candidly convey qua the alienation of the suit land under Ex.DW2/A being a coloured transaction or a sham transaction also are loudly communicative under its guise the donor receiving consideration from the donee for handing over possession of the suit property to the donee whereupon the act of gift stood completed besides consummated, rendering Ex.DW2/A to be hence not construable to be a gift of the suit property. Furthermore, with a short gap occurring inter se the execution of a testamentary disposition by the predecessor-in-interest of the contesting parties hereat vis-a-vis the execution of gift deed comprised in Ex. DW2/A, is also a significant suspicious circumstance which too has remained inexplicated nor any reason stands purveyed by the donee qua the predominant prevailing reason besetting the donor to since the execution by her of a valid testamentary disposition of her estate, execute gift deed comprised in Ex.DW2/A besides with one Shri Tilak Raj scribing both the will and the gift deed besides with witnesses in both the aforesaid documents being common is connotative of the contesting defendant No.1 in tandem with the aforesaid contriving its execution.

10. Be that as it may, the commonality of scribe of both the aforestated instruments also given the commonality of the witnesses thereto begets an inference of theirs in tandem with the scribe of Ex.DW2/A besides with intra se complicity, theirs dominating the Will of the donor also theirs beguiling her to present it for registration before the Sub Registrar concerned. The shroud of the beguile practiced upon the donor by the donee in tandem with the aforesaid gets unveiled by revelations occurring in the order of mutation attested thereupon by the Revenue Officer concerned. The effect of the aforesaid conclusion is of validity imputed to a registered instrument of gift getting waned, more so, when the Sub Registrar concerned, who made an endorsement(s) therein has remained unexamined qua his in the presence of the donor making the relevant endorsement(s) thereon. In sequel, his non-examination begets an inference of the endorsement(s) occurring therein qua its contents standing readover and explained to the donor being construable to be mechanically besides perfunctorily made by the ministerial staff of his office, whereupon, no sanctity is imputable to them. Predominantly when the aforesaid inference, for reasons aforestated, stands enjoined to be explained besides to be dispelled by the donee, whereas, his omitting to examine the Sub Registrar concerned for enhancing the vigour of the relevant endorsement occurring therein bolsters a derivative of the entire act of registration of Ex.DW2/A by him, emanating on its scribe besides witnesses thereto acting in tandem with the donee bereft of the volition of the donor.

11. The concurrently recorded findings recorded by both the learned Court below qua the suit property being the self acquired property of deceased Vidya Devi are well founded especially when the predecessor-in-interest of the contesting parties received the suit land under a testamentary disposition executed in her favour by her father-in-law. Since, the suit land stood received by the predecessor-in-interest of the contesting parties under an testamentary

disposition executed in her favour by her father-in-law, it obviously becomes her self acquired property, whereupon she held an indefeasible right to alienate it in the manner she chose.

12. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are not based upon a proper and mature appreciation of the evidence on record. While rendering the apposite findings, the learned first Appellate Court as also the learned trial Court have excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the plaintiff/appellant and against the defendant No.1/respondent.

13. In view of above discussion, the present Regular Second Appeal is allowed and the judgements and decrees rendered by both learned Courts below are set aside. Consequently, the suit of the plaintiff is decreed and in sequel, gift deed of 23.4.1991 comprised in Ex.DW2/A is quashed and set aside and the plaintiff/appellant is held joint owner to the extent of 435/924 shares i.e. 0-04-57 HMS in the land bearing Khata NO.235, Khatauni No.719, Khasra Nos. 2132, 2133 and Khata No.236, Khatauni No.711, Khasra Nos. 2134, 2135, Plots-4, measur4ing 0-10-34 HMs situated in village Kehrian, PO AND Tehsil Jawali, District Knagra, H.P. along with the construction existing on the said lands consisting of one old house constructed by the forefathers of the parties and the new house constructed about two years back by the deceased Smt. Vidya Devi and the defendant No.1 has got 336/924 share,measuring 0-03-58 HMS in the said land and the proforma defendants No.2 to 4 have 51/924 share each (0-00-73 HMS in the said land on the basis of the Will dated 9.4.1991 comprised in Ex.P-1. The parties are left to bear their own costs. Decree sheet be drawn accordingly. All pending applications also stand disposed of.

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

Sita Devi and others ..Appellants/defendants
Versus
Lekh Ram and others. ..Respondents/plaintiffs.

RSA No. 412 of 2009.
Reserved on : 18/10/2016
Date of decision: 25/10/2016

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit in representative capacity – the judgment and decree dated 9.12.1959 were obtained by playing a fraud in connivance with Ex-Sarpanch of the village – the suit was decreed by the trial Court- an appeal was preferred, which was allowed- held in second appeal that the suit land had vested in the gram Panchayat – previous suit was filed seeking declaration regarding the possession – Pardhan was authorized to defend the suit but he compromised the suit without any authorization to do so- Gram Panchayat filed a civil suit to set aside the decree but the suit was withdrawn by Pardhan – customary right was established by the plaintiffs- land had vested in Gram Panchayat- mere fact that some of the plaintiffs had died during the pendency of the suit will not result in the dismissal of the same, but the abatement shall be partial – the suit was rightly decreed by the trial Court- appeal dismissed.
(Para-9 to 13)

For the appellants: Mr. G.D.Verma, Sr. Advocate with Mr. Ashok Tyagi, Advocate.
For the respondents: Mr. A.K.Pathania,, Mr. R.K.Gautam and Mr. Pawan Gautam, Advocates for respondentsNo. 1, 2, and 4 to 41 and LRs of respondents No. 3, 34 and 38.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned Additional District Judge, Una, H.P., whereby he affirmed the rendition of the learned Sub Judge 1st Class, Court No.I, Amb, District Una. The defendants standing aggrieved by the concurrently recorded renditions of both the learned Courts below concert, through the instant appeal constituted before this Court, to reverse the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiffs filed a suit in representative capacity seeking a declaration to the effect that the judgement and decree of 9.12.1959 had been obtained by the defendants by playing a fraud on the Court and the residents of village Tiai, Tehsil Amb, District Una, having been obtained collusively and in connivance with Sant Ram the Ex-Sarpanch of the village and as such was a nullity in the eyes of law. The premises on which the suit was laid was Shamlat deh and the same stood vested in the Gram Panchayat Tiai by operation of law under the provisions of Section 3 of the Punjab Act No.1 of 1954 and mutation No. 113 had come to be sanctioned in this behalf on 18.6.1955 and since then the Shamlat was being managed by the Panchayat. The defendants had instituted a suit being Civil Suit No. 293/1959 against the Gram Panchayat Tiai seeking a declaration that land measuring 2860 Kanals and 17-1/2 marlas was owned and possessed by them. On 12.8.1959 the Gram Panchayat vide its resolution had resolved to contest the case and authorized Sant Ram to defend the case on behalf of the Panchayat. On 9.12.1959 Sant Ram Pardhan had made a statement in Court that the suit of the plaintiffs be decreed. In 1968 the defendants got the mutation in their name in pursuance to the judgement vide mutation No. 136 of 1968 and thereafter a civil suit No. 484 of 1969 titled as Gram Panchayat vs. Khoshala was filed challenging the aforesaid mutation. In the year 1972 Sarpanch Sant Ram again won the election and became the Sarpanch and again got a resolution passed on 9.3.1973 seeking to withdraw the Civil Suit No. 484 of 1969. The said suit was also dismissed as withdrawn on 23.3.1973. The present plaintiffs again in representative capacity filed suit alleging themselves to be beneficiary in the suit being Shamlat challenging the withdrawal of the suit. The matter went upto the Hon'ble High Court and in Regular Second Appeal No. 161 of 1987 Hon'ble High Court observed that as long as judgement and decree of 9.12.1959 is not challenged the plaintiffs could not succeed in getting any relief in the said suit out of which aforesaid RSA arose. The plaintiffs therein again filed review petition wherein the Hon'ble High Court had given liberty to avail the remedy of challenging the judgement and decree Ext.D-2 and Ext.D-3. The plaintiffs herein, therefore, challenging the judgement and decree of 9.12.1959 have filed the present suit.

3. The defendants No.1 to 18 preferred a common written statement. They interalia raised the preliminary objections of locus standi, limitation, cause of action, maintainability, the suit being barred under the provisions of Order 2, Rule 2 CPC and the plaintiffs being estopped from bringing the suit in view of the earlier suit having been filed by them.

4. On merits, the defendants denied that any fraud was played or any mis statement of fact was ever made in the Court. It was denied that the defendants had colluded with Sant Ram the then Sarpanch. The plaintiffs were stated to be in full knowledge of the decision rendered in 1959. The suit land was stated to have never been vested either in the Gram Panchayat or in the State. As per the defendants the Gram Panchayat and the State did not claim any interest or title to the suit land. The plaintiffs were thus estopped from agitating the matter which is in the competence of Gram Panchayat or the State. The State of H.P. being defendant No.21 had preferred a separate written statement. As per the State the Shamlat lands vested in the Panchayat under the Act of 1961 and had come to be vested in the State of H.P. by virtue of H.P. Village Common Lands (Vesting and Utilisation) Act and as such the earlier decree of the Court has no effect in operation of the H.P.Village Common Land (Vesting and Utilisation) Act, 1976. On merits it was the case of the State that the decree passed in Civil Suit No. 293/59

had become a nullity in view of the Section 3 of the H.P.Act and the suit land had in fact been vested in the State of H.P.

5. Replication to the written statement stood filed wherein the averments made in the written statement were controverted and those made in the plaint were re-asserted.

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

1. Whether judgement and decree dated 9.12.1959 in Civil Suit No. 293 of 1959 is collusive, result of fraud and misrepresentation, as alleged? OPP.

2. If issue No.1 is proved in affirmative, whether suit land is Shamlat Deh in use of inhabitants of the village, Tiai? OPP.

3. If issue No. 1 and 2 are proved in affirmative whether the plaintiffs are entitled to the relief of injunction, as prayed, OPP.

4. Whether the suit is not within time? OPD.

5. Whether plaintiffs have no cause of action? OPD.

6. Whether suit is barred by limitation? OPD.

7. Whether suit is bad for non mentioning of particulars of fraud as required under Order 6 Rule 2 CPC? OPD.

8. Whether suit is barred by principle of res judicata under Order 2 Rule 2 CPC.

9. Whether the plaintiffs have no title either proprietary or possessory in suit land? OPD.

10. Relief.

7. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs besides the learned Additional District Judge, affirmed the findings of the learned trial Court.

8. Now the defendants/appellants herein have instituted before this Court the instant Regular Second Appeal wherein they assail the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 30.11.2011, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

> "1. Whether plaintiffs/ respondents have failed to discharge the legal onus with regard to alleged fraud and mis representation of facts in the present case as they have not pleaded the same as per order 6 Rule 2 and 3 of CPC nor have proved the same according to law?
>
> 2. Whether the suit of the plaintiffs was not abated as plaintiffs at Sr. No. 7, 8, 14, 16, 22 in the trial stage before the First Trial Court had been expired during the pendency of the suit itself and as no legal heirs had been brought on record by the plaintiffs/respondents within the time period as prescribed under law and matter as a whole had abated and suit was liable to be dismissed as a whole?
>
> 3. Whether the finding by both the Courts below are palpably illegal and erroneous on account of concurrent misappreciation and misconstruction of the pleadings of the parties, as well as oral and documentary evidence on record and the legal proposition of law as applicable to the facts of the case?
>
> 4. Whether the documents Ext.P-3, Ext.P-4, Ext.P-5, Ext.P-6, Ext.P-7, Ext.PW-1/A and Ext.PW-1/B have wrongly been ignored by the learned court below, though legally proved on record?

5. Whether the learned lower Courts below have not committed illegality in returning the findings without considering pleadings and evidence of the parties that the suit is within period of limitation on the basis of clear oral and documentary evidence on record, though it is proved on record that the suit is hopelessly barred by limitation?

6. Whether the suit of the plaintiffs/respondents has not become infructuous in view of the fact that the State Government has vide its notification No. Rev.B.A.(3)-8/2001 dated 10/09/2004 has reverted back the ownership to the legal heirs of the original owners as per their shares and as even thereafter the land has been revested in the names of the appellants and the mutation in this regard has also not been challenged by the respondents/plaintiffs till date. The notification is also placed on record of the learned Courts below but the same has not been considered hence this pure question of law is yet to be decided in the appeal."

Substantial questions of law.

9. The parties at lis are not at contest qua the factum of the suit land standing under Punjab Act No. 1 of 1954 vested in the Gram Panchayat concerned, in pursuance whereof mutation No. 113 comprised in Ext.PW-2/A stood attested/sanctioned on 18.06.1955. One Khoshala since diseased now represented by his LRs besides others instituted suit No. 293/59 against Gram Panchayat Tiai, Tehsil Amb, in 1959 wherein they staked a declaratory right qua theirs holding possession of the suit land as its owners. On the suit aforesaid standing instituted before the Civil Court concerned, notice stood issued to the Gram Panchayat concerned, whereupon it under Ext.PW-4/A resolved to defend the suit also thereunder its the then Sarpanch Sant Ram was bestowed with an authorization to defend the interests of the Gram Panchayat concerned in the suit aforesaid instituted against it, in the Civil Court concerned. A perusal of the apposite resolution, unveils of Sant Ram the then Sarpanch of Gram Panchayat Tiai, Tehsil Amb, holding thereunder an authorization to defend before the Civil Court concerned the interests of the Gram Panchayat concerned vis.a.vis the suit land qua which a suit stood instituted by the aforesaid Khoshala and others for whittling the effect of the statutory vestment of the suit land in the Gram Panchayat concerned. However, Sant Ram, the then Sarpanch of Gram Panchayat, Tiai, who held an authorization to defend the interests in litigation of Gram Panchayat Tiai also who did not hold any specific authorization, to, in derogation of the interests in the suit land of the Gram Panchayat concerned, compromise the suit significantly when qua the suit land ownership stood vested qua it under a legislative enactment whereas he despite his not holding any specific authorization to compromise the interests in litigation of Gram Panchayat, Tiai, besides obviously in transgression of Ext.PW-4/A proceeded to record a statement on 9.12.1959 before the Civil Court concerned whereupon he accepted the claim in the suit of the plaintiffs therein, statement whereof stands couched in the hereinafter extracted phraseology :-

> "Bian Kiya Ke Dawa Mudai se Iqwal Hai. Decree Bahak Mudian di jawe. Kharcha Frikan Rakha Jawe. Sun Kar Darust Taslim Kiya."

10. In sequel thereto the Civil Court decreed the suit of the plaintiffs i.e Khosala and others instituted against Gram Panchayat Tiai, Tehsil Amb. The decree rendered by the Civil Court concerned vis.a.vis Khoshala and others sequelled attestation of mutation No.136 in the year 1968 qua the suit land vis.a.vis them. The aforesaid mutation stood resolved by the Gram Panchayat Tiai to face the ordeal of it standing subjected to a challenge before the Civil Court concerned whereupon Civil Suit No. 484 of 1969 stood instituted before the Civil Court concerned. However, Sant Ram, the then Sarpanch of Gram Panchayat concerned who obviously abused besides infringed the authorization previously bestowed upon him by Gram Panchayat Tiai, authorization whereof stands comprised in Ext.PW-4/A, inference of infringement thereof by him stands spurred from his transgressing the specific mandate held therewithin whereupon he stood authorized to defend the interests in the suit instituted against it by Khoshala and others

besides stands pointedly communicated in his recording a statement before the Civil Court concerned holding therein articulations of the suit of Khoshala and others instituted against Gram Panchayat, Tiai, being ordered to be decreed whereupon an apposite decree stood rendered vis.a.vis Khoshala and others, on standing re-elected in 1972 as Sarpanch of Gram Panchayat Tiai, Tehsil Amb, ensured passing of a resolution on 9.3.1973 by the Gram Panchayat concerned wherewithin echoings are held qua Civil Suit No. 484 of 1969 being withdrawn. In pursuance thereto Civil Suit No. 484 of 1969 nominclatured as Gram Panchayat Tiai vs. Khosala and others stood withdrawn on 23.3.1973 by the Gram Panchayat Tiai wherein mutation No. 136 of 1968 as stood sanctioned qua the suit land vis.a.vis plaintiffs Khoshala and others was subjected to an assault standing constituted thereupon. As a corollary thereto the apposite decree in consonance therewith stood rendered by the Civil Court concerned. The plaintiffs instituted a suit on 3.4.1973 before the Sub Judge Ist class, Una whereby they claimed a declaratory decree for setting aside mutation number 136 sanctioned on 25.3.1968 also claimed a declaratory relief qua the apposite decree dismissing as withdrawn the suit of the Gram Panchayat Tiai, Tehsil Amb, being declared to be illegal and void, it standing sequelled by collusion and fraud.

11. The aforesaid civil suit stood instituted on 3.4.1973 by the plaintiffs before the Sub Judge Ist Class, Una whereby they assailed the attestation of mutation bearing No. 136 sanctioned on 25.3.1968 mutation whereof stood attested in pursuance to the rendition of the Civil Court concerned recorded in 1959 whereupon the plaintiffs therein stood declared to be owners in possession of the suit land besides therein they assailed the decree rendered on 17.3.1982 by the Civil Court concerned. The suit aforesaid suffered the fate of dismissal. In an appeal carried therefrom before the learned Addl. District Judge it suffered an alike fate. The plaintiffs therein assailed the decision recorded by the Addl. District Judge, Una by preferring an appeal therefrom before this Court whereupon this Court dismissed their Regular Second Appeal bearing No. 161 of 1987. This Court while pronouncing an adjudication upon RSA No. 161 of 1987 dismissed the appeal preferred herebefore by the plaintiffs. The reason which prevailed upon this Court to dismiss the aforesaid Regular Second Appeal preferred herebefore by the plaintiffs stood embedded in (a) the factum of the apposite decree of the Civil Court concerned rendered on 9.12.1959 acquiring finality arising from the factum of it remaining un-assailed. (b) Also for want of an onslaught standing constituted against it in the suit of the plaintiffs, their suit of 1973 for setting aside the relevant mutation recorded in the year 1968, mutation whereof stood anvilled thereupon, warranting dismissal. Significantly since no challenge stood constituted by the plaintiffs against the rendition of the Civil Court concerned pronounced on 9.12.1959 constrained this Court to dismiss the Regular Second Appeal preferred herebefore by the plaintiffs against the concurrently recorded renditions of the learned Courts below whereby they declined to interfere with the mutation recorded in the year 1968 also declined to afford a declaratory relief qua the decree of dismissal as withdrawn, pronounced qua Civil Suit No. 484 of 1969 being declared to be null and void, it standing procured by collusion and fraud. The plaintiffs therefrom preferred Civil Review No. 47 of 1997 before this Court whereupon they sought review of the judgement of this Court recorded in RSA No. 161 of 1987. This Court dismissed the aforesaid review petition yet it reserved liberty to the plaintiffs to by availing the appropriate mechanism prescribed by law constitute a challenge to the judgement and decree pronounced in 1959 by the Civil Court concerned rendition(s) whereof stand comprised in Ext.D-2 and Ext.D-3. Also it ordered qua the question of limitation being sympathetically considered by the Civil Court concerned whereat the plaintiffs constitute a challenge to the judgement and decree comprised in Ext.D-2 and Ext.D-3. In sequel, thereto the plaintiffs instituted Civil Suit No. 12-1 of 1998 before the Civil Judge, Jr. Division, Court No.1, Amb whereupon the latter Court decreed the suit of the plaintiffs. The learned First Appellate Court on standing seized with an appeal preferred therebefore by the aggrieved defendants dismissed it. The defendants stand aggrieved by the renditions of the learned Courts below hence for reversing them they have herebefore instituted the instant Regular Second Appeal.

12. The suit of the plaintiffs initially instituted in the year 1973 besides their successive suit instituted in the year 1998 stood instituted in a representative capacity, in latter

suit whereof they obtained success by adducing cogent evidence in display qua theirs in consonance with prescriptions held in the relevant apposite records holding customary rights qua user of the suit land whereupon they canvassed qua theirs holding a concomitant leverage to unsettle the mutation recorded qua the suit land in the year 1968, mutation whereof stood anchored upon a decree of the Civil Court concerned pronounced in 1959, rendition whereof of the Civil Court is palpably in gross transgression of a legislative enactment nomenclatured as Punjab Act No. 1 of 1954 whereupon the suit land came to be vested in Gram Panchayat Tiai besides in sequel whereto mutation comprised in 113 came to be sanctioned vis.a.vis. the Gram Panchayat concerned. With the suit of the plaintiffs standing instituted in a representative capacity besides with right of customary user of the suit land by the plaintiffs standing clinchingly sustained by emphatic evidence, resultantly though on occurrence of demise of co-plaintiffs No. 7, 8, 14, 16 and 22 during the pendency of the suit before the learned trial Court, no apposite motion was made before the Civil Court concerned for theirs standing substituted by their LRs nor an order emanated therefrom qua theirs being ordered to be substituted by their LRs yet the omission on the part of the plaintiffs to beget their substitution by their LRs, would not entail a consequence of the suit of the plaintiffs abating as a whole, contrarily the suit of the plaintiffs would abate only qua deceased co-plaintiffs who died during the pendency of the trial of the suit before the learned trial Court and on occurrence of whose demise they remained unsubstituted by theirs LRs in the apposite array of co-plaintiffs. Since an order of abatement of the extant suit vis.a.vis. co-plaintiffs whose demise occurred before the learned trial Court may ipso facto bar their legal representatives to claim the benefit of an apposite decree, if any, pronounced by this Court vis.a.vis. other co-plaintiffs also when a suit stands instituted in a representative capacity whereunder the collective interest of the village proprietary body qua user by them of the suit land stands staked, hence occurrence of names of the deceased in the apposite array of litigants in the renditions of the learned Courts below would not beget a sequel qua the apposite renditions hence standing ingrained with a vice of nullity, as any pronouncement by this Court qua hence the renditions of the Court concerned standing afflicted with a vice of nullity would defeat the collective interests qua the suit land of the village proprietary body, collective interests whereof stand propagated by the plaintiffs for themselves besides for the entire village proprietary body, by theirs instituting a representative suit whereunder they claim assertion of customary rights upon the suit land, rights whereof stand espoused to ensue in their favour in pursuance of the suit land vesting in the Gram Panchayat concerned under a legislative Enactment aforesaid also predominantly when the nature of the rights asserted by the plaintiffs are res communis besides when for lack of impleadment at the apposite stage of the LRs of deceased co-plaintiffs has begotten the sequel of the suit standing ordered to abate vis.a.vis. them, concomitantly it would be in sagacious to conclude qua the renditions of the Courts below standing stained with a vice of nullity arising from occurrence of their names in the apposite array of litigants in the pronouncements made by the Courts concerned. The aforesaid view is warranted to obviate perpetuation of any mishap to the collective interests of the village proprietary body in the suit land, collective interests whereof stand concerted to be protected through the plaintiffs instituting the instant suit in a representative capacity whereon the trite assault for assailing the relevant pronouncements occurring in the relevant exhibits stand anchored upon bestowment upon them by a legislative Enactment customary rights of user of the suit land. Since the collective interests of the village proprietary body stand canvassed through a suit filed by the plaintiffs in a representative capacity before the Civil Court concerned, as a corollary when obviously the interests in the suit land canvassed by the plaintiffs are not individual interests qua property held individually as owners by them rather when the suit property was owned by the Gram Panchayat concerned whereon in consonance with prescriptions held in the relevant records they hold only customary rights qua its user, exercise of rights whereon by them stand clinchingly proven, in sequel thereto when insistence with inflexible rigidity is enjoined to be made when plaintiffs sue in an individual capacity qua suit property whereon they assert rights as owner in their individual capacity qua on demise of co-plaintiffs on an apposite motion at the apposite stage before the Court concerned theirs imperatively standing ordered to be substituted in the apposite array of litigants by theirs

LRs, want whereof rendering the apposite pronouncement of the Court concerned to stand ingrained with a vice of nullity. Contrarily for reasons aforestated when the extant suit stands contra distinctively instituted in a representative capacity qua suit property whereon they do not stake any individual right of ownership rather only espouse rights qua its customary user, the rigour of the aforesaid inflexible dictate warrants its standing relaxed significantly for protecting the collective interests in the suit land of the village proprietary body also when the pronouncement of this Court qua the suit of the plaintiffs abating in part qua deceased co-plaintiffs who at the apposite stage remained unsubstituted by their LRS would hence suffice to mete a formal deference thereto, deference aforesaid obviously wanes the effect of the aforesaid omission. Consequently, in the peculiar facts and circumstances of the case prevailing hereat it is deemed fit to order qua the suit of the plaintiffs standing abated vis.a.vis. co-plaintiffs whose demise occurred during the pendency of the trial of the suit before the learned trial Court whereat they remained unsubstituted by their LRs, without ordering for the renditions of the Courts below being declared to be nonest.

13. The factual matrix of the case as aforestated underscores the factum of the rendition of the Civil Court concerned pronounced in 1959 standing pronounced vis.a.vis. the suit land also it unveils of it standing pronounced inter partes holding no congruity vis.a.vis. inter partes herebefore. Consequently, for lack of distinctivity in the litigating parties before the Civil Court concerned which pronounced a decree in the year 1959 vis.a.vis. the defendants herebefore the principle of res judicata may not stand attracted vis.a.vis. the extant suit of the plaintiffs herebefore. Tritely put the principle of res judicata encapsulated in Section 11 of the CPC is hinged upon estoppel arising from conclusivity of judicial pronouncement whereas the principle of estoppel embodied in Order 2 Rule 2 CPC is anchored upon pro active waiver besides abandonments by plaintiffs to incorporate in their previous suit, all reliefs besides causes of action which arose thereat. Significantly when the pronouncement qua the suit land occurring in the year 1959 holds analogity vis.a.vis the suit land hereat yet with the plaintiffs herebefore not being contestants therebefore whereupon hence the principle of resjudicata may not stand attracted vis.a.vis the instant suit yet it is enjoined to cross the hurdle of limitation besides the hurdle of the mandate of Order 2 Rule 2 CPC. The plaintiffs would succeed in crossing the hurdle of limitation only on theirs emphatically by sustainable relevant evidence proving the factum of theirs acquiring knowledge only in the year 1998 qua the pronouncement of the Civil Court which occurred in the year 1959 erupting on deception standing practiced upon it by the plaintiffs therein in collusion with Sant Ram the then Sarpanch of the Gram Panchayat Tiai whereupon it would concomitantly acquire a stain of nullity also would hence pave way for facilitating the plaintiffs, to, on theirs thereupon acquiring knowledge qua the pronouncement of the Civil Court concerned standing procured by collusion or fraud practiced upon the Court concerned by the plaintiffs in collusion with Sant Ram the then Sarpanch of Gram Pranchayat concerned, institute an apposite suit for assailing the decree and judgement rendered in the year 1959. The aforesaid conclusion stands erected given there being no wrangle qua the proposition qua a decree obtained by fraud being nonest also there being no quarrel with the proposition of law of it being assailable within the statutorily prescribed period of time computable from the date of acquisition of knowledge by the aggrieved qua it standing procured by fraud or collusion. However, before applying the aforesaid principle of law it is imperative to determine whether the plaintiffs acquired knowledge earlier than 1998 qua the pronouncement of the Civil Court concerned which occurred in the year 1959 standing obtained by fraud. In case this Court holds of the plaintiffs prior to 1998 holding active knowledge qua the fraud practiced upon the Civil Court concerned by the plaintiffs therein in collusion with Sant Ram the then Sarpanch of Gram Panchayat Tiai, Tehsil Amb, the inevitable sequel thereto would be of with hence the plaintiffs abandoning to in their previous suit instituted in the year 1973 incorporate therein the trite factum of the pronouncement of the Civil Court concerned rendered in the year 1959 standing obtained by fraud whereas it stood enjoined by the mandate of Order 2 Rule 2 CPC to stand embodied therein, transgression whereof would attract qua their instant suit the statutory principle of theirs standing estopped to incorporate in the extant suit a declaratory relief qua the rendition of the Civil Court concerned pronounced in 1959 emanating on fraud in the manner

aforesaid standing practiced upon it. The learned counsel for the defendants/appellants contends with vigour qua with the plaintiffs' in their instant suit infracting the embargo of Order 2 Rule 2 CPC arising from the factum of theirs holding knowledge, qua the factum of rendition of the Civil Court concerned pronounced in 1959 purportedly standing vitiated with a vice of nullity it standing procured by them by theirs purportedly practicing fraud upon it in collusion with Sant Ram the then Sarpanch of Gram Panchayat concerned, at the stage contemporaneous to the trial of Civil Suit No. 484 of 1969 by the Court concerned, knowledge whereof held thereat by them is garnerable from the factum of the plaintiffs constituting apposite pleadings in the instant suit qua theirs acquiring knowledge qua the rendition of the Civil Court concerned pronounced in 1959, on the apposite judgement and decree embodied in Ext.D-2 and Ext.D-3 standing adduced therebefore in evidence, pleading whereof portrays their acquiescing qua the trite factum whereupon they held leverage to with the leave of the Court make apposite amendments in the plaint for hence thereat theirs assailing the aforesaid renditions comprised in the aforesaid exhibits whereas theirs omitting to do so, rendered invokable vis.a.vis the extant suit, the mandate of order 2 rule 2 CPC whereupon they stand statutorily ousted to canvas therein qua the judgement and decree of the Civil Court concerned pronounced in 1959 being declared to be null and void, it standing engineered by fraud practiced upon the Civil Court concerned by them in collusion with Sant Ram the then Sarpanch. However, the aforesaid submission holds no vigour significantly when the plaintiffs herebefore were not contestants in the Civil Suit which stood instituted before the Civil Court concerned in the year 1959 hence concomitantly when the renditions comprised in Ext.D-2 and Ext.D-3 stood not rendered inter partes litigants in the instant Civil Suit, as a corollary, it would be an over exacting expectation from them qua theirs thereat holding knowledge qua the pronouncement of the Civil Court concerned which occurred in the year 1959. Also the effect of the aforesaid inference is of the mere factum of adduction into evidence of the judgement and decree of the Civil Court concerned comprised in Ext.D-2 and Ext.D-3 not holding the effect of theirs thereupon also acquiring knowledge qua the resolution passed by the Gram Panchayat concerned, resolution whereof stands pronounced in Ext.PW-4/A whereupon its the then Sarpanch Sant Ram was authorized to defend the apposite civil suit whereas in transgression of the mandate held therewithin qua his standing enjoined to defend its interests in the Civil Suit preferred against it by the apposite plaintiffs therein, his causing mishap to the interests in the suit land of Gram Panchayat Tiai, by making a statement before it, holding echoings therein qua his concedeing to the claim staked by the apposite plaintiffs in their apposite suit, proclamation whereof held therewithin is a loud vivid display qua his for securing vis.a.vis them the decree as prayed for in their suit instituted in the year 1959 his hence colluding with the plaintiffs therein whereupon it obviously acquired a stain qua its rendition emanating from fraud standing practiced upon it by the plaintiffs in collusion with Sant Ram the then Sarpanch of the Gram Panchayat concerned. Predominantly also the judgement and decrees of the Civil Court concerned rendered in 1959 stand unaccompanied by the resolution of the Gram Panchayat concerned reflected in Ext.PW-4/A, mandate whereof stood transgressed by its the then Sarpanch Sant Ram also when no efficacious evidence stands adduced by the defendant in display of the plaintiffs earlier than 1998 acquiring knowledge qua its making by the Panchayat concerned evidence whereof stood denoted in the relevant register portraying qua theirs applying for its copies whereas it constituted the foundation for the plaintiffs efficaciously propagating qua the rendition of the Civil Court concerned comprised in Ext.D-2 and Ext.D-3 standing procured by collusion occurring interse the apposite plaintiffs therein and Sant Ram the then Sarpanch of Gram Panchayat Tiai. In aftermath the mere adduction into evidence of Ext.D-2 and Ext.D-3 during the course of trial of the civil suit instituted by the plaintiffs in the year 1973 would not ipso facto beget a conclusion of theirs thereat also acquiring knowledge qua the making of a resolution comprised in Ext.PW-4/A by the Gram Panchayat concerned nor also hence it can be concluded qua their omission, to in the extant suit assail Ext.D-2 and Ext.D-3 by making a motion under Order 6 Rule 17 CPC before the court concerned whereby they sought its leave to incorporate in their apposite pleadings an apposite relief qua Ext.D-2 and Ext.D-3 standing pronounced to suffer invalidation given theirs standing stained with a vice of nullity arising from theirs standing procured for them by Sant Ram, the then Sarpanch of Gram

Panchayat Tiai by the latter transgressing the mandate of Ext.PW-4/A besides its rendition erupting on his holding active complicity with them, conspicuously when he committed breach of resolution comprised in Ext.PW-4/A by making therebefore a statement abandoning the interests in the suit land of the Panchayat concerned whereupon the apposite judgement and decree stood pronounced, inviting qua them the bar of estoppel constituted in the provisions of Order 2 Rule 2 CPC. In other words, when Ext.D-2 and Ext.D-3 stood founded upon Ext.PW-4/A knowledge whereof stood for reasons aforestated unacquired by the plaintiffs till 1998 it was neither imperative for the plaintiffs to introduce in their earlier plaint the aforesaid factum of Ext.D-2 and Ext.D-3 standing ingrained with any vice of nullity it standing procured by fraud nor also they stood enjoined to in their earlier plaint by making a motion before the appropriate Court concerned seek its leave for incorporating an apposite relief therein qua it hence suffering invalidation nor also any omission of the plaintiffs qua the facet aforesaid would attract qua them the rigour of the bar of estoppel constituted in Order 2 Rule 2 CPC significantly when for its attraction, proven acquisition of knowledge by the plaintiffs qua the relevant germane facet, at the relevant stage qua its imperative incorporation in the plaint, is essential. However, when the aforesaid trite factum is amiss hereat, reiteratedly the bar of estoppel constituted under Order 2 Rule 2 CPC whereupon the plaintiffs stand interdicted to qua the relevant facet seek relief from the Civil Court remains unattracted qua them, thereupon the inevitable sequel is of suit of the plaintiffs for setting aside the pronouncement of the Civil Court concerned rendered in 1959 being construable to be within limitation. For reasons aforesaid this Court concludes with aplomb of the judgements and decrees of the Courts below standing sequelled by theirs appraising the entire evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of material on record by the learned Courts below not suffering from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. I find no merit in this appeal, which is accordingly dismissed and the judgments and decrees of both the Courts below are maintained and affirmed. Substantial questions of law are answered accordingly. No costs. However, the defendants are directed to within two weeks comply with the orders of this Court of 18.10.2014 rendered in CMP No. 11109 of 2014. The pending application(s), if any, also stand disposed of. Records of the Courts below be sent back forthwith.

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

Chaman Lal and others ....Appellants.

Versus

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

Cr. Appeal No. 135 of 2008.
Date of Decision: 26th October, 2016.

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to the accused- she committed suicide by consuming poison- her father lodged a report with the police stating that the accused were harassing her without any reason, which led to her suicide – the accused were tried and convicted by the trial Court- held in appeal that father of the deceased has not narrated about the nature of ill-treatment – PW-2 improved upon her version – the deceased had visited her parental home with her husband and had not stated anything about the ill-treatment – the Trial Court had not properly appreciated the evidence – appeal allowed and accused acquitted. (Para-10 to 15)

For the Appellants: Mr. Dinesh Sharma and Mr. Y.Paul, Advocates.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the judgment rendered by the learned Addl. Sessions Judge, Fast Track Court, Solan, District Solan, H.P. on 7.3.2008 in Case No. 5 FTC/7 of 2007, whereby, the latter Court recorded findings of conviction against the accused/respondents qua theirs committing offences punishable under Sections 498-A and 306 read with Section 34 of the IPC besides in consequence thereto imposed sentence of imprisonment upon them in the hereinafter extracted manner:-

> "1. to undergo rigorous imprisonment for a period of three years each and to pay a fine of Rs.5000/- each for the commission of offence punishable under Section 306 read with Section 34 of the IPC and in case of default of payment of fine to further undergo rigorous imprisonment for a period of two months each.
>
> 2. to undergo rigorous imprisonment for a period of one year each and to pay a fine of Rs.2000/- each for the commission of offence punishable under Section 498-A read with Section 34 IPC and in case of default of payment of fine to further undergo rigorous imprisonment for one month each."

2. Brief facts of the case which are necessary to determine the appeal are that Ranjubala, deceased, daughter of Khushi Ram, was married to accused Chaman Lal in November, 2005. On 23.10.2006 Ranjubala allegedly consumed poison in the matrimonial house and committed suicide. On 24.10.2006,Kushi Ram, father of deceased Ranjubala lodged report with the police wherein he alleged that about four months after the marriage, his daughter Ranjubala had told him that her husband Chaman Lal, mother-in-law Jai Devi and sister-in-law Sunita had been harassing her in the matrimonial house without any cause, but he made her daughter to understand and sent her to her matrimonial house. On 20.10.2006, Ranjubala had told him on telephone about the maltreatment given to her by the accused in the matrimonial house and she also told that she was fed up with that, but he had assured his daughter to send some relatives to her matrimonial house and after that he had told about it to Om Dutt Pradhan, who advised him to settle the matter through relatives. Thereafter, on 23.10.2006, he had sent his relatives Ashok Kumar, Prem Chand, Kuldeep, Anil, Kulwinder, Sandhya, Suresh and Rekha to the matrimonial house of his daughter Ranjubala, but on 23.10.2006 at about 9.30 p.m., he received a phone call from police station Nalagarh and was told that Ranjubala had consumed poison and died. Khushi Ram also stated in his statement that his daughter Arti, who had gone to the matrimonial house of Ranjubala on 22.10.2006, told him that while she was in kitchen on 23.10.2006, accused Chaman Lal had slapped her sister Ranjubala and thereafter Ranjubala had gone towards cow shed whereat she was found lying unconscious. He also stated in his statement that his daughter Ranjubala was subjected to cruelty by the accused in the matrimonial house and their conduct forced her to commit suicide. On the basis of statement of Khushi Ram, FIR was recorded at Police Station Nalagarh. Thereafter the police completed all the codel formalities.

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

4. The accused were charged by the learned trial Court for theirs committing offences punishable under Sections 498-A, 306 read with Section 34 of the IPC to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 14 witnesses. On closure of prosecution evidence, the statements of accused, under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence. However, they did not lead any defence evidence.

6. On an appraisal of evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant for theirs committing offences punishable under Sections 498-A and 306 read with Section 34 of the IPC.

7. The accused/appellants herein are aggrieved by the judgment of conviction recorded by the learned trial Court. The learned defence counsel for the appellants has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction recorded by the learned trial Court being reversed by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of acquittal.

8. On the other hand, the learned Deputy Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

9. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

10. Deceased Ranjubala was married to accused/appellant No.1 Chaman Lal in the month of November, 2005. She within less than one year elapsing therefrom committed suicide by consumption of poison, factum whereof stands unraveled in the apposite postmortem report comprised in Ex.PW8/B. Accused/respondent No.1 Chaman Lal, her husband besides accused No.2 and accused No.3, her mother-in-law and sister-in-law respectively are alleged to abet the commission of suicide by deceased Ranjubala. The prosecution had depended upon the testimonies of the relatives of deceased Ranju Bala as also upon the deposition of the Pradhan of the Gram Panchayat concerned for propagating qua the accused/appellants herein during the currency of her stay at her matrimonial home, meteing ill-treatment besides maltreatment to the deceased hence actuating besides instigating her to commit suicide. The deposition of PW-1, Khushi Ram, the father of the deceased unveils of within 2-3 months of marriage standing solemnized inter se his deceased daughter with accused Chaman Lal, the accused perpetrating ill-treatment upon her. However, he has omitted to communicate therein the nature of the ill-treatment perpetrated by the accused upon the deceased nor also he has communicated its enormity. Resultantly, he has obviously in his testification made a nebulous attribution qua perpetration of ill-treatment upon the deceased by the accused during former's stay at her matrimonial home. Given lack of enunciations with specificity qua the nature of ill-treatment besides its potency, it is hazardous to invincibly conclude therefrom qua its nature besides its gravity, in sequel wherefrom it is unbefitting to conclude qua the alleged ill-treatment perpetrated upon the deceased by the accused during the former's stay at her matrimonial home hence goading besides instigating her to commit suicide.

11. The deposition of PW-1, Khushi Ram stands corroborated by PW-2, Arti, his daughter besides by the deposition of PW-7 Anil Kumar. However, PW-2, the sister of the deceased and PW-7, the cousin brother of PW-1, both in their respective testifications comprised in their respective examinations-in-chief echoed qua after solemnization of marriage inter se the deceased and accused Chaman Lal, both once and twice visiting the parental home of the deceased. Both also deposed qua on completion of stay, of the deceased in the company of her husband, at her parental home, her husband taking her along with him to her matrimonial home. However, when PW-1 has omitted to testify the aforesaid fact as stands conjointly deposed by PW-2 and PW-7, wherefrom an inevitable conclusion is qua PW-1 inventing the factum of the deceased on hers visiting her parental home hers unraveling the factum of hers standing ill-treated by the accused at her matrimonial home. Apart therefrom, with both PW-2 and PW-7 unanimously disclosing in their respective testimonies qua on the deceased visiting her parental home hers thereat standing accompanied by her husband, who after their stay thereat retrieved her therefrom to her matrimonial home wherefrom it is befitting to conclude of hence amity prevailing inter se both besides qua when at the relevant time she stood accompanied by accused

Chaman Lal to her parental home, she obviously hence not making any disclosure either to PW-1, PW-2 or PW-7 qua hers at her matrimonial home standing subjected to ill-treatment by the accused/appellants herein. Resultantly, it appears qua the close relatives of the deceased Ranjubala contriving the factum qua hers on hers visiting her parental home hers making disclosures thereat qua hers at her matrimonial home standing subjected to ill-treatment by the accused, more so, given the lack of specification in their respective testifications qua the nature of ill-treatment which stood perpetrated by the accused upon the deceased or its gravity, it is inapt to secure a conclusion of thereupon the psyche of the deceased suffering torment nor it is apt to conclude of the accused actuating or instigating the deceased to commit suicide. Moreover, the principle of proximity inter se the alleged penal misdemeanors ascribed to the accused by the prosecution witnesses vis-a-vis the ill-fated occurrence stands unsatiated significantly when each of the prosecution witnesses omit to with specificity pronounce in their respective testifications qua the time whereat deceased Ranjubala visited her parental home whereat penal ascriptions vis-a-vis the accused/appellants stood ascribed vis-a-vis them by the deceased by the latter making the apposite purported communications to them. In sequel, it is hazardous to record any firm conclusion therefrom qua at the time of the ill-fated occurrence it holding apposite proximity in time vis-a-vis the relevant purported penal misdemeanors ascribed to the accused by the prosecution witnesses. In aftermath, for lack of proximity inter se the alleged ascription of penal misdemeanors by the prosecution witnesses to the accused/respondents vis-a-vis the ill fated occurrence, the prosecution ought to be concluded to not succeed in proving the trite factum of the alleged penal misdemeanors ascribed by the prosecution witnesses to the accused/respondent goading deceased Ranjubala to commit suicide.

12. Be that as it may, a perusal of the record discloses of PW-1 making disclosures to the Pradhan of the Gram Panchayat concerned, who has deposed as PW-3 qua the trauma which befell upon the deceased at her matrimonial home. However, the factum of PW-1 making disclosures to PW-3 qua the trauma gripping the deceased Ranjubala at her matrimonial home appears to be engineered also it is visible of PW-3 in collusion with PW-1 contriving the factum of the deceased making a disclosure to PW-1 qua the woes or sufferings befalling upon her at her matrimonial home significantly when PW-2, the daughter of PW-1 in her cross-examination has voiced therein qua the alleged penal misdemeanors perpetrated at her matrimonial home by the accused upon the deceased, not standing reported either to the panchayat or to the police. In sequel, thereto, it is also apt to conclude qua hence PW-1 engineering the factum qua penal misdemeanors standing perpetrated by the accused upon the deceased at the latter's matrimonial home.

13. Though PW-2, a purported eye witness to the incident of cruelty which purportedly occurred in immediate proximity to the ill-fated occurrence wherefrom the prosecution assays of its proving the charge against the accused, testifies qua the accused in immediate proximity to the ill-fated occurrence in her presence slapping the deceased wherefrom it is befitting to conclude qua the findings of conviction recorded against the accused by the learned trial Court warranting no interference. However, the testimony of PW-2 is to construed conjointly with the testimony of PW-7 for ascertaining qua hence PW-2 deposing a truthful version qua the factum of the accused in immediate proximity to the ill fated occurrence slapping deceased Ranjubala in her presence. Though, PW-2 deposes qua at the relevant time the deceased serving tea to her besides to PW-7 yet PW-7 has not voiced in his testification qua thereat accused Chaman Lal slapping deceased Ranjubala. Also PW-7 has omitted to testify qua the eruption of an altercation inter se the deceased Ranjubala and accused Chaman Lal at the site besides at the venue whereat PW-2 was also present. However, contrarily besides contradistinctively vis-a-vis PW-7, PW-2 deposes qua an altercation occurring inter se deceased Ranjubala and accused Chaman Lal. She in contradiction to PW-7 also deposes, qua accused Chaman Lal slapping deceased Ranjubala in his presence. Obviously, when both were conjointly present at the relevant time at the site of occurrence, the omission by PW-7 to depose the trite factum aforesaid renders the testimony of PW-2 qua it being construable to be wholly engineered besides contrived, whereupon, no credence can be fastened. In aftermath, the aforesaid

testification of PW-2 holds no vigour wherefrom the ensuing conclusion is of the relevant act of cruelty imputed to accused Chaman Lal by PW-2 being discardable.

14. Furthermore, PW-2 deposes qua an altercation over telephone taking place inter se the deceased and accused Chaman Lal yet the factum aforesaid appears to be contrived significantly when precedingly thereto she falsely deposes of accused Chaman Lal slapping deceased Ranjubala, whereupon an inference spurs qua hence when accused Chaman Lal at the relevant time being available in his house, whereupon it is difficult to conclude of both holding any opportunity to hold a telephonic communication, especially when an inference qua possibility of a telephonic conversation occurring inter se both Chaman Lal and deceased Ranjubala would stem only when they were at the relevant time present at different locations, whereas, theirs being available together at the site of occurrence there was no opportunity for both to hold a telephonic conversation or also the testification of PW-2 qua theirs thereon holding an altercation vis-a-vis each other is bereft of credence. Tritely put the purported incident of cruelty which purportedly occurred in close proximity to the ill-fated occurrence does not hold any formidability nor hence it can be concluded of the prosecution succeeding in proving its charge against the accused.

15. The learned Deputy Advocate General has contended with force of with the ill-fated occurrence taking place within less than one year elapsing since the solemnization of a marriage inter se deceased Ranjubala and accused Chaman Lal, the presumption embodied in Section 113 of the Indian Evidence Act standing attracted, wherefrom, it would be befitting for this Court to sustain the findings of conviction recorded against the accused. However, the anchor for drawing succor from the aforesaid presumption embodied in Section 113 of the Indian Evidence Act is of proven cruelty standing perpetrated upon the deceased by the accused. Since, for reasons aforestated, there is no proven evident cruelty perpetrated upon the deceased by the accused, the benefit of the statutory presumption is unavailable for it standing attracted qua the accused.

16. The summom bonum of the aforesaid discussion is that the learned trial Court below 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 the evidence on record.

17. Consequently, the instant appeal is allowed and the accused are acquitted for the commission of offences punishable under Section 498-A and 306 read with Section 34 of the IPC. In sequel, the judgment impugned before this Court is set aside. Fine amount, if deposited, be refunded to the accused/appellants. Records be sent back forthwith.

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

Kewal Krishan and others .....Appellants.

Vs.

Surjeet Singh and another .....Respondents.

RSA No.: 120 of 2007
Date of Decision: 26.10.2016

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land – defendants threatened to interfere in the suit land and to demolish the Chhapar situated over the same without any right to do so – defendants pleaded that they were licencees and had constructed a chhapar under the licence – suit was decreed by the trial Court – an appeal was preferred, which was allowed- held in second appeal that findings were recorded by Appellate Court on the basis of conjectures and not on the basis of the facts- the Court can record the findings on the basis of the facts and not on the basis of presumption- it was obligatory for the

Appellate Court to take into consideration the reasoning of the trial Court and thereafter to record its own findings- appeal allowed – case remanded to the Appellate Court for a fresh decision.

(Para- 10 to 15)

For the appellants: Mr. N.K. Thakur, Sr. Advocate with Ms. Jamuna Pathik, Advocate.
For the respondents: Mr. R.P. Singh, Advocate.

The following judgment of the Court was delivered:

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

By way of this appeal, the appellants/plaintiffs have challenged the judgment and decree passed by the Court of learned Additional District Judge, Fast Track Court, Una in Civil Appeal No. 133/98 RBT No. 123/04/98 dated 21.12.2006, vide which, learned appellate Court while allowing the appeal filed by the present respondents, has set aside the judgment and decree passed by the Court of learned Senior Sub Judge, Una, in Civil Suit No. 119/1986 dated 29.06.1998, whereby the learned trial Court had decreed the suit for permanent injunction filed by the present appellants.

2. This appeal was admitted on 29.12.2007 on the following substantial questions of law:

> *"1. Whether the licence can be legally proved to have been created without there being any writing or non-producing the licensor/owner?*
>
> *2. Whether the entry of possession reflected after deleting the name of the earlier possessor without serving any notice or without affording any opportunity to such owner, can raise the presumption of truth to him and contrary approach of the learned lower appellate Court is not legally sustainable"*

3. Brief facts necessary for the adjudication of the present case are that predecessor in interest of present appellants/plaintiffs (hereinafter referred to as 'the plaintiffs') filed a suit praying for a decree of permanent injunction restraining the defendants from interfering in any manner and from taking forcible possession of land measuring 1KL.-5MLs. being $25/37^{th}$ share, out of land measuring 1KL.-17MLs. bearing Khewat No. 92, Khatauni No. 130, Khasra No. 1123, as per jamabandi for the year 1981-82, situated in village Jankaur, Tehsil and District Una (hereinafter referred to as 'suit land') and further restraining the respondents/defendants from demolishing the 'Chhapar' in the suit land. The case of the plaintiff (since expired) was that he was owner in possession of the suit land and defendants had no right, title or interest over the same. As per the plaintiff, defendants who were headstrong persons threatened the plaintiff to interfere and to take forcible possession of the suit land and further to demolish the 'Chhapar' which was situated over the same. It was further the case of the plaintiff that he had requested the defendants many a times not to interfere, not to take forcible possession of the suit land and not to demolish the 'Chhapar' existing on the suit land but defendants refused to accede to the requests of plaintiff and accordingly, on these bases, suit was filed by the plaintiff.

4. Defendants contested the claim of the plaintiff and stated in the written statement that the plaintiff was not the owner in possession of the suit land. According to the defendants, they were coming in possession of the suit land as licensee under the owners/pre-empter (not the plaintiff) and had constructed a 'Chhapar' over the suit land which was being used by them only, to the exclusion of the plaintiff. It was further the case of the defendants that earlier plaintiff alongwith his sons had made an attempt to take forcible possession over the suit land for which criminal proceedings were also initiated. On these bases, claim of the plaintiff was denied by the defendants

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

"1. Whether the defendants are licensees over the suit land as alleged? OPD
2. Whether the suit is not maintainable in the present form? OPD
3. Whether the plaintiff has no locus-standi to file the suit? OPD.
4. Whether the suit is time barred? OPD
5. Whether the suit is not properly valued? OPD
6. Relief."

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

"Issue No. 1: No.
Issue No. 2: No.
Issue No. 3: No.
Issue No. 4: No.
Issue No. 5: No.
Relief: Suit decreed for permanent injunction against the defendants as per operative part of judgment."

7. It was held by the learned trial Court that plaintiff who entered the witness box as PW1 stated that he had purchased the suit land from Roshan Lal and had constructed a shed thereupon. Learned trial Court further held that PW1 Brahma Nand had deposed in the Court that Roshan Lal had filed a suit for preemption which was decided in favour of plaintiff and he remained in possession of the suit land and Roshan Lal had filed an execution petition for possession of the suit land which was dismissed. In his cross examination, he stated that he had paid the sale price to daughter of Roshan Lal and the factum of any case having been registered against him was also denied. Learned trial Court also took note of the fact that this witness deposed that after the preemption suit, Roshan Lal had obtained the money from Surjeet Singh and given possession of the suit land to Surjeet Singh. Learned trial Court further held that in rebuttal , defendant Surjeet Singh had examined himself as DW-1 and also examined Kishan Singh, Ravinder Kumar, Mohabat Rai and Bishan Dass. Learned trial Court took note of the fact that DW1 Surjeet Singh stated that suit land was owned by Roshan Lal which was sold by him to Brahma Nand but Smt. Rakesh Kumari, daughter of Roshan Lal had filed a suit for preemption in the year 1968 which was decided in her favour and preemption amount was received by Brahma Nand. As per defendants, thereafter Roshan Lal gave this land to them who constructed a house over the same and also paid the amount of said land to Roshan Lal. Learned trial Court also took note of the fact that defendants were never dispossessed by Roshan Lal from the suit land and the plaintiff never came in possession of the suit land. It was taken note of by the learned trial Court that defendants stated that when plaintiff and his sons came to dispossess defendants from the suit land forcibly by demolishing the house, a case under Section 325 of IPC was registered against them. Learned trial Court also took note of the fact that DW2 Kishan Singh had stated that defendant was in possession of the suit land and plaintiff never came in possession of the same. It was also taken note of by the learned trial Court that in cross examination this witness admitted that there was civil litigation between him and Brahma Nand. Learned trial Court also took note of the fact that plaintiff had produced copy of jamabandi for the year 1981-82 Ext. P-1, as per which, suit land was shown to be in joint ownership and possession of Rattan Chand s/o Pratap Singh and Brahma Nand s/o Salig Ram and Ext. P-2 was the copy of khasra girdawari for the years 1982 to 1986, contents of which were almost similar. It was also taken note of by the learned trial Court that defendants had filed copy of Khatauni Ext. D-1, in which the suit land was shown in the joint ownership of Rattan Chand and Brahma Nand and in the possession of Surjeet Singh and Ram Parkash. Learned trial Court also took note of the fact that Ext. D-2 was the copy of judgment of Sub Judge 2nd Class, Una. In the said suit, Smt. Rakesh

Kumari, daughter of Roshan Lal had filed suit for possession through preemption which was decreed and plaintiff was directed to deposit Rs. 400/- on or before 28.02.1967, failing which suit of the plaintiff shall stand dismissed. Learned trial Court also took note of Ext. D-3, copy of khasra girdawari for the years 1982 to 1986 and Ext. D-4, copy of MIsal Hakiat Bandobast Jadid for the year 1987-88 in which suit land was shown in joint ownership of plaintiff Rattana and in possession of defendant. It was held by learned trial Court that oral and documentary evidence on record proved that the suit land was owned and possessed by Sh. Roshan Lal and the same was purchased from him by plaintiff Brahma Nand and a suit was filed by Kumari Rakesh d/o Roshan Lal for possession by way of preemption which was decreed subject to depositing preemption amount of Rs. 400/- on or before 28.02.1967, but there was nothing on record to show that this amount had ever been paid or deposited on or before 28.02.1967 by the plaintiff Brahma Nand nor there was any order of dismissal of suit. Learned trial Court further held that execution petition filed by Rakesh Kumari was dismissed in default on 17.11.1984. It was held by the learned trial Court that Kumari Rakesh had not obtained the possession of the suit land from the plaintiff through preemption, which established that plaintiff was in possession of the suit land and the same was never delivered to Rakesh Kumari. It was held by the learned trial Court that the plea of defendants that they are licensees of the suit land was not proved on record. Learned trial Court further held that the defendants did not examine Roshan Lal or his daughter Rakesh Kumari nor there was any record to prove as to how and when possession of the suit land was given to the defendants. Learned trial Court further held that though plaintiff in his statement had mentioned that the suit for preemption was decided in his favour but a perusal of statement of plaintiff revealed that he was an illiterate person and on these bases, it was held by the learned trial Court that it could not be said that plaintiff was aware of legal complications of the decision. It was further held by the learned trial Court that the plaintiff in fact was in possession of the suit land since possession thereof had not been taken from him by the true owner i.e. Smt. Rakesh Kumari nor the true owner stepped into witness box to deny this fact that possession of the suit land was not with the plaintiff. Accordingly, on these bases, the suit so filed by the plaintiff was decreed by the learned trial Court.

8. Feeling aggrieved by the said judgment passed by the learned trial Court, defendants filed an appeal. Learned Appellate Court vide its judgment and decree dated 21.12.2006 set aside the judgment and decree passed by the learned trial Court and allowed the appeal by dismissing the suit so filed by the plaintiff. A perusal of the judgment passed by the learned Appellate Court demonstrates that while coming to the conclusion that the suit land was not in possession of the plaintiff but rather was in possession of the defendant, it took note of the fact that the plaintiff had not disclosed in his pleadings as to how he had become owner of the suit land and had not come to the Court with clean hands as the factum of Roshan Lal being the owner of the suit land and the factum of suit for preemption having been filed by the daughter of Roshan Lal, which was decided on 19.12.1986, was not disclosed in the plaint. Learned Appellate Court took note of the fact that rather in his statement plaintiff (PW1) was claiming that the said suit was decided in his favour. On these bases, it was held by the learned Appellate Court that such like conduct of the plaintiff created a doubt in the mind of the Court as to whether plaintiff was entitled to be granted the relief of injunction. It was further held by the learned Appellate Court that in the plaint, plaintiff had not explained his source of ownership but while appearing as PW1 he had deposed about his source of ownership and previous litigation between the parties. Learned Appellate Court observed that it was strange that he had not deposed even a single word qua accruing of cause of action against the defendants. It was further held by the learned Appellate Court that it was nowhere mentioned in the plaint that defendants were threatening to take forcible possession of the suit land or were threatening to interfere with his possession. It was further held that there was no other evidence on record to prove the cause of action as plaintiff had not examined any other witness except himself. It was further held by the learned Appellate Court that nowhere execution petition filed by daughter of Roshan Lal for possession was dismissed in default but simply because of this it could not be said that possession was still with the plaintiff. Learned trial Court observed that there was always a possibility of out of Court settlement. It further held that plaintiff in his examination in chief had

stated that he had received money and if he had received the preemption money, the possibility of handing over possession by him to the daughter of owner may also be there. On these bases it was held by learned Appellate Court that that was why the entry came in favour of defendants in the latest revenue record as discussed above. It further held that there was nothing on record to show that plaintiff ever challenged the entries mentioned in Ext. D-X and, therefore, it was difficult to say that plaintiff was still in possession of the suit land. On these bases, it was concluded by the learned Appellate Court that learned trial Court had not properly appreciated the evidence on record and accordingly learned Appellate Court while settling aside the judgment and decree passed by the learned trial Court allowed the appeal and dismissed the suit so filed by the plaintiff.

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

10. It is clearly borne out from the findings which have been returned by the learned Appellate Court while concluding that the suit land was in possession of the defendants and not the plaintiff that the same are based on conjectures and not based on material on record. The relevant extract of the findings so returned by the learned Appellate Court are reproduced below:-

- *No doubt the execution petition filed by the daughter of Roshan Lal for possession was dismissed in default but simply because of it, it cannot be said that the possession is still with the plaintiff. There is always a possibility of out of the Court settlement and it is not necessary to take possession through Court.*
- *He as stated in his chief examination even that he had received the preemption money. If he had received the money then possibility of handing over possession by him to the daughter to owner may also be there.*
- *It is pertinent to note that there is nothing on the record to show that the plaintiff ever challenged these entries in Ext. DX. So it is very difficult to say that the plaintiff is still in possession of the suit land.*

11. I am afraid that the findings so arrived at by learned appellate Court are not sustainable. The findings of fact by a Court of law cannot be based on presumptions. On the basis of material adduced on record by both the parties, the Court has to give a definite finding.

12. Learned trial Court after appreciating material on record held that the plaintiff had proved that he was in exclusive possession of the suit land and on these bases, learned trial Court decreed the suit in favour of the plaintiff. This Court is not making any observation as to whether the finding so returned by learned trial Court was correct or not. However, in my considered view, in case the finding arrived at by learned trial Court was to be set aside or distinguished by learned appellate Court, then it was obvious that after taking into consideration the reasonings behind the findings so arrived at by learned trial Court, learned appellate Court should have had returned its independent findings which were to be arrived at on the basis of material on record and not on the basis of conjectures, surmises or presumptions. However, this has not been done by the learned appellate Court in the judgment under challenge.

13. It is well settled law that the first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage and anything less than this is unjust to him. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court and first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on question of fact and law. It is settled law that while reversing a finding of fact, the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate court had discharged the duty expected of it. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons on all the issues involved in the case alongwith the contentions put forth and pressed by the parties for decision by the appellate Court.

14. In view of the above salutary principles, I am of the considered view that the learned appellate Court has failed to discharge the obligation placed on it as first appellate Court by deciding the appeal on presumptions rather than returning its findings by coming close quarters with the reasoning assigned by the learned trial Court and thereafter assigning its own reasons for arriving at a different finding.

15. In view of the discussion held above, the appeal is allowed and judgment and decree dated 21.12.2006 passed by the Court of learned Additional District Judge, Fast Track Court, Una, in Civil Appeal No. 133/98 RBT No. 123/04/98 are set aside. The case is remanded back to learned appellate Court i.e. Fast Track Court, Una with a direction to decide the appeal afresh on merits. Parties through their counsel are directed to put in appearance before the learned appellate Court on 12.12.2016. Keeping in view the fact that case pertains to the year 1986, this Court hopes and trusts that learned appellate Court shall adjudicate upon the appeal as expeditiously as possible. No order as to costs. Miscellaneous application(s), if any, also stands disposed of. Registry is directed to return back the records of the case to learned appellate Court forthwith.

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

Shri Pratap Singh and others .....Appellants.

Vs.

Shri Ram Rattan, son of Shri Lachhmi Singh
(since deceased) through his legal representatives and others .....Respondents.

RSA No.: 336 of 2007
Reserved on: 01.09.2016
Date of Decision: 26.10.2016

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit pleading that they were co-owners in possession of the suit land – D had executed sale of his share but mutation could not be attested- the sale deed was mistakenly executed regarding the whole land, which was not permissible- revenue entries were not correctly recorded- defendants started digging the suit land to raise structure over the same- suit was decreed by the trial Court- an appeal was filed, which was allowed- held in second appeal that copy of jamabandi shows that D was co-sharer to the extent of 1/4th share – revenue record does not substantiate the fact that entire land was exclusively owned and possessed by D- therefore, he could not have parted with more land than was owned by him- the plea that defendants had become owners by way of adverse possession was not proved as no evidence was led that D was in possession of the entire land to the exclusion of the other co-owners - it was also not proved that D had denied the title of the other co-owners – appeal allowed- judgment and decree passed by District Judge set aside.

(Para-12 to 27)

Cases referred:

P. Lakshmi Reddy Vs. L. Lakshmi Reddy AIR 1957 SC 314

MD. Mohammad Ali (dead) by LRs. Vs. Jagadish Kalita and others, 2004 (1) SCC 271

Mohammad Baqar and others Vs. Naim-un-Nisa Bibi and others, AIR 1956 SC 548

For the appellants: Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.

For the respondents: Mr. K.D. Sood, Sr. Advocate, with Mr. Rajnish K. Lal, Advocate, for respondents No. 1 to 3.
None for respondents No. 4 to 10.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this appeal, the appellants/plaintiffs have challenged judgment passed by the Court of learned District Judge, Solan, H.P. in Civil Appeal No. 60-S/13 of 2006 dated 01.06.2007 vide which, learned appellate Court has allowed the appeal filed by the present respondents/defendants against the judgment passed by the Court of learned Civil Judge (Senior Division), Kandaghat, District Solan, H.P. in Civil Suit No. 5-K/1 of 2002 dated 03.05.2006.

2. Brief facts necessary for the adjudication of the present case are that the appellants/plaintiffs (hereinafter referred to as 'the plaintiffs') filed a suit for declaration and injunction against the defendants on the grounds that plaintiffs and proforma defendant No. 4 were co-owners in joint possession of half share in 8 plots of land measuring 13 bighas and 5 biswas, comprised in Khasra Nos. 15, 23, 55, 57, 73, 81, 95 and 109, Kitas 8, entered at Khewat No. 4, Khatoni No. 5, situated in village Mahog, Pargna Chail, Tehsil Kandaghat, District Solan, H.P. as per Jamabandi for the year 1996-97 alongwith the defendants. As per the plaintiffs, the suit land was in joint possession and ownership of Shri Dhingia to the extent of 1/4th share, Shri Mehar Singh to the extent of 1/4th share and Shri Motia, who was owner to the extent of ½ share in the year 1966-67 Bikrami. Shri Dhingia, who was co-owner of the suit land to the extent of 1/4th share sold his share by way of a registered sale deed dated 18 Kartika, 1967 Bikrami in favour of Shri Biru, son of Shri Haria. Shri Dhingia expired after the execution of the sale deed and the factum of the sale could not be incorporated in the revenue records during the life time of Shri Dhingia. Mutation No. 6 on the basis of the said sale deed was attested on 11th Maghar, Samvat 1967 Bikrami. Further, as per the plaintiffs, Dhingia died issueless and his estate was inherited by Shri Mehar Singh, son of Shri Shonku vide mutation No. 9 attested on 16th Jaisth, 1969 Bikrami. It was further the case of the plaintiffs that it appeared from the records that Dhingia, who was owner only of 1/4th share in the land measuring 13 bighas and 5 biswas, i.e. the suit land appeared to have executed the deed of sale by mistake with respect to the entire suit land. According to the plaintiffs, Dhingia could not have sold the land in its entirety as he had no right, title or interest of any kind over the entire suit land save and except his share. It was further the case put up by the plaintiffs that from the records it appeared that Mehar Singh, who was to inherit the estate of Shri Dhingia objected to the attestation of mutation, but revenue officer attested the same by exceeding his jurisdiction. As per the plaintiffs, Biru could not have purchased the land through sale deed dated 11th Maghar, Samvat 1967 Bikrami in excess of 1/4th share in the suit land. It was further the case of the plaintiffs that Motia who was co-owner in joint possession to the extent of ½ share died in the year 1968 Bikrami and his estate devolved upon his son Shri Jash Ram through mutation No. 8 attested on 16th Jaisht, 1969 Bikrami. As per the plaintiffs, though after the death of Shri Dhingia and Motia the suit land should have been shown to be owned and possessed by Shri Biru to the extent of 1/4th share, Shri Mehar Singh to the extent of 1/4th share and Shri Jash Ram to the extent of ½ share, but the revenue entries did not depict the correct position. According to the plaintiffs, on the basis of the said wrong revenue entries, the defendants were trying to derive undue advantage. It was further the case of the plaintiffs that after the death of Shri Biru, his estate devolved upon Smt. Niharikhi his wife, who died issueless and her estate devolved upon Shri Jonki, who was brother of Biru. After the death of Shri Jonki, his estate devolved upon his son Jhamtu. According to the plaintiffs, though the revenue entries should have reflected Jhamtu to be owner to the extent of 1/4th share, Shri Mehar Singh to the extent of 1/4th share and Jash Ram to the extent of ½ share, yet the revenue record rather than depicting the factual position, reflected wrong position and the entries so recorded which were factually incorrect did not affect the right, title or interest of the plaintiffs or proforma respondent No. 4 and their predecessors adversely. According to the plaintiffs, during his life time, Mehar Singh adopted Jagat Ram as his son and after the death of Mehar Singh, Jagat Ram acquired right, title and interest to the extent of 1/4th share qua the estate of Mehar Singh. Jagat Ram was succeeded by his widow Subda, who executed a registered sale deed dated 21st May, 1954 in favour of Shri Bijnu, son of Shri Totu and after the execution of

gift deed, revenue records should have depicted Jagat Ram as owner to the extent of 1/4th share, Shri Bijnu to the extent of 1/4th share and Shri Jash Ram to the extent of ½ share, but the entries continued to be recorded contrary to the factual position. Further as per the plaintiffs, Bijnu sold his share to the defendants through a registered sale deed dated 1st October, 1962 and after the death of Jagat Ram, his estate devolved upon his widow Smt. Gauri, his son Shri Siri Ram and daughters Smt. Kaushalya, Smt. Satya and Smt. Bimla. Siri Ram was succeeded by his son Shri Joginder Singh and Shri Sat Pal and daughters Smt. Sumitra and Smt. Indira Devi. After the death of Jash Ram, his estate was succeeded by Smt. Chainu, Smt. Kaushalya and his sons Dada Nand, Brij Lal, Partap Singh and Ishwar Chand. According to the plaintiffs, mutation of sale which was made by Shri Dhingia in favour of Shri Biru was incorrectly attested and the same led to wrong entries in the revenue record which were contrary to the factual position. Thus, as per the plaintiffs, transfer of interest by Shri Dhingia in excess of his share was illegal, null and void. It was further contended by the plaintiffs that defendants had started digging the suit land with an intention to raise structure over the property. The plaintiffs objected and made requests to defendants to desist from the same, but they did not accede to their request, hence the suit was filed by the plaintiffs.

3. The suit was contested by defendants No. 1 to 3, who in their written statement denied the claim as was set forth by the plaintiffs. According to the defendants, the revenue entries showing plaintiffs and proforma defendants as co-owners were wrong and illegal and were not binding on the rights of defendants No. 1 to 3. As per them, since they had purchased the suit land from Shri Bijnu Ram, s/o Totu through registered sale deed dated 01.10.1962, the revenue entries to the contrary were not binding upon them. According to the defendants, even the mutation of inheritance of Smt. Kasaulaya, widow of Shri Jash Ram in favour of her son Sh. Kuldeep was wrong. It was further the case of the defendants that they exclusively possessed the suit land as owners. It was further mentioned in the written statement that Bijnu acquired ownership and possession of land on the basis of registered gift deed from Smt. Subdha, wife of Shri Jhamtu and Jhamtu acquired ownership from his father Shri Chungi, who had become owner by succession from Smt. Thagi. According to the defendants, Thagi acquired ownership and exclusive possession from Shri Biru and Biru had purchased the suit land from Dhangia, predecessor-in-interest of Shri Mehar Singh, son of Shankru @ Shangu. On these bases, it was stated by the defendants that Dhangia was in exclusive possession of the entire suit land. It was further the case of the defendants that defendants No. 1 to 3 after purchase of the suit land by way of registered sale deed dated 01.10.1962 treated themselves to be exclusive owners in possession of the suit land and their possession over the suit land was peaceful, continuous and hostile to the knowledge of the plaintiffs and their family members and defendants No. 1 to 3 never admitted the plaintiffs and their brother Shri Ishwar Chand to be owners nor they were allowed to participate in the profits of the property. According to the defendants, there was complete ouster of plaintiffs and Ishwar Chand from the suit land and defendants No. 1 to 3 had otherwise also become owners of the suit land by way of adverse possession, which started from 01.10.1962. On these bases, it was contended by defendants No. 1 to 3 that they were absolute owners in possession of the suit property from 01.10.1962 and were enjoying exclusive possession of the suit land to the exclusion of the plaintiffs and proforma defendants. On these bases, the defendants No. 1 to 3 denied the claim of the plaintiffs.

4. Learned trial Court on the basis of the pleadings of the parties, framed the following issues:

> *"1. Whether the plaintiffs and proforma defendants No. 4 to 11 are joint owners in possession of suit land to the extent of ¾ share as alleged? OPP*
>
> *2. Whether the sale deed Sh. Dingia in favour of Sh. Biru beyond his share is illegal and not binding, as alleged? OPP.*
>
> *3. If Issue No. 2 is proved in favour of the plaintiff, whether the plaintiff is entitled for declaration regarding correction of revenue entries? OPP.*

4. Whether the subsequent transfers by Sh. Biru are not binding, as alleged? OPP

5. Whether the possession of defendants No. 1 to 3 over the suit land has ripened into ownership by way of adverse possession, as alleged? OPD.

6. Whether the present suit is liable to be stayed in view of Section 10 C.P.C.? OPD.

7. Whether the suit is barred by limitation, as alleged? OPD.

8. Relief."

5. On the basis of the evidence led by the respective parties, learned trial Court returned the following findings against the issues so framed:

"Issue No. 1:	Yes.
Issue No 2:	Yes.
Issue No. 3:	Yes.
Issue No. 4:	Yes.
Issue No. 5:	No.
Issue No. 6:	No.
Issue No. 7:	No.
Relief:	Suit of plaintiffs decreed as per operative part of judgment.

6. Learned trial Court held that from the evidence led by the parties both ocular as well as documentary, it was evident that Dhingia was owner to the extent of 1/4th share, Sh. Mehar Singh to the extent of 1/4th share and Motia was owner to the extent of ½ share. It further held that there was no jamabandi placed on record by the defendants which could prove that Dhingia was owner to the extent of 13 ½ bighas of land. Learned trial Court further held that the sale deed which was executed by Dhingia in Samvat 1967 Bikrami, as per the revenue record available pertaining to the relevant time also reflected that Dhngia was owner of 1/4th share only. It further held that there was admission on the part of the defendants that plaintiffs were residing at village Mahog and further on the issue of complete ouster of co-sharers, the defendants themselves were not sure about the ouster of co-sharer from the suit land. Learned trial Court held that co-owner had no duty cast upon him to watch the conduct of other co-owners and to be on the look out to find out the extent of share purported to be transferred by the other co-sharer. It further held that co-sharer was entitled to assume that the permissive nature of possession had passed on to his co-owners transferee, who now became the co-owners in place of original owner. It further held that if subsequent purchaser asserts his title over the entire land and brings it to the knowledge of other co-owners, only then the issue of adverse possession can be raised. Learned trial Court further held that mere fact that co-owners were seeking partition of joint property would not amount to adverse possession. It further held that it was basic law that no vendor can pass a better title than what he possesses and on these bases, it was held by the learned trial Court that as Dhingia was having title qua 1/4th share in the suit land and was not having any right to execute sale deed qua entire 13 ½ bighas of land in favour of Biru, therefore, the sale pertaining to 3/4th share of the entire property was meaningless. It further held that ouster has to be expressly proved and possession of one party over the joint property cannot be treated as adverse possession until and unless there was clear cut disclaiming on the part of co-sharer in possession of right, title and interest of other co-sharer. It further held that there has to be an intention of excluding other co-sharer from possession and such intention has to be expressed by assertion or otherwise. On these bases, it was held by the learned trial Court that in the case in hand, defendants had purchased the suit land from Bijnu but there was no evidence on record to show that either Dhingia or Biru ever claimed ouster of other co-sharer and it was no where pleaded by defendants No. 1 to 3 that right from their purchase date, i.e. 01.10.1962, they asserted their title hostile as to the other co-owners whose names appeared in the revenue

records. On these bases, it was held by the learned trial Court that in absence of such assertion and overt act, it could not be said that defendants No. 1 to 3 had become owners of the suit land by way of adverse possession by ouster of other co-sharers. Learned trial Court declared the plaintiffs and proforma defendant No. 4 as co-owners in joint possession qua ½ share and defendants No.1 to 3 as co-owners in joint possession to the extent of 1/4th share and proforma defendants No. 5 to 11 to the extent of rest 1/4th share in the land measuring 13 bighas and 5 biswas in village Mahog. It further held that transaction of sale and gift showing the devolution of interest in excess of the share of Sh. Dhingia over the suit land to be illegal, null, void and in operative over the right, title or interest over the suit property. Learned trial Court further restrained the defendants No. 1 to 3 from changing the nature of the suit land in any manner whatsoever till the same was partitioned by metes and bounds according to the shares mentioned above.

7. Feeling aggrieved by the judgment and decree so passed by the learned trial Court, defendants No. 1 to 3 filed an appeal. Learned appellate Court while accepting the appeal so filed by defendants No. 1 to 3, set aside the judgment and decree passed by the learned trial Court and dismissed the suit of the plaintiffs. It was held by the learned appellate Court that in the jamabandi of 1963-64, Dhingia had been shown in possession through mortgagee which was redeemed in 1967 B.K. and sold in the same year to Biru and there was no Jamabandi on record showing name of Biru, but upon his death, his wife's name appeared in subsequent jamabandi Ex. PW2/B and thereafter possession had passed in succession from one hand to another. Learned appellate Court further held that these long entries of over 100 years had shown the vendee through his successor in exclusive possession under the successors in interest of original owners. Though evidence had been led by the plaintiffs to show that they were cultivating the land jointly, but this appeared to be far from satisfactory as it was unlikely that the land was jointly possessed physically by the parties. Learned appellate Court further held that the suit land comprised of different khasra numbers and there was no evidence as to which khasra number was in possession of which party. It further held that it cannot be possible that both the parties were in joint possession of all the Khasra numbers. It further held that it was common sense that one co-sharer could mortgage the joint land only when others consented to it or when one was in exclusive possession. It further held that similarly no person would become mortgagee or purchaser of land which is in joint possession. Learned appellate Court held that the very fact that neither Biru nor his successors had applied for partition went to show that possession of the suit land was with them. It further held that had Dhingia not been in exclusive possession, there was no reason for the authorities to record his separate possession way back 100 years ago through a mortgagee and thereafter through a vendee. Learned appellate Court thus held that had the said three co-owners been in joint possession, their possession would have been recorded, which went to show that Dhingia was in exclusive possession of the suit land and this was the reason for him to sell whole of the suit land to Biru, predecessor-in-interest of the present appellants. Learned appellate Court further held that there was reference of partition in the remarks column of jamabandi for the year 1966-67 Bikrmi and may be the predecessor-in-interest of the parties had effected partition of joint land and suit land having come to the share of Dhingia. It further held that otherwise Dhingia could not have had sold whole the suit land to Biru when he had only 1/4th share in it. It further held that Mehar Singh, one of the co-owners with Dhingia after succeeding to his trial had never challenged during his life time the sale and had also not sought partition of the suit land. As per the learned appellate Court other co-owner Jash Ram had also not done so, which meant that they had accepted Dhingia to be exclusive owner of the suit land. Learned appellate Court further held that other co-sharers and their successors could be assumed to be having knowledge of the exclusive possession of Biru and his successors in view of entries in the revenue records on account of various mutations of inheritance etc. attested from time to time. Learned appellate Court further held that possession of land was not a secret affair and every one is aware of it especially the persons who have any interest in it. It was thus held by the learned appellate Court that long and uninterrupted possession of Dhingia and his successors due to an invalid sale deed was certainly adverse to the true owners and they being in possession for more than 12 years continuously to the knowledge

of the true owners, had become its owners by way of adverse possession. On these bases, it was held by the learned appellate Court that even if Dhingia had only 1/4th share in the suit land, the predecessor of defendants No. 1 to 3 and defendants No. 1 to 3 had become owners of the suit land by way of adverse possession being in exclusive and hostile possession of the suit land to the knowledge of other co-owners and the findings recorded by the learned trial Court were thus not sustainable in law and on facts. On these basis, learned appellate Court while accepting the appeal filed by defendants No. 1 to 3 dismissed the suit so filed by the plaintiffs by setting aside the judgment and decree passed by the learned trial Court.

8. Mr. Bhupender Gupta, learned Senior Counsel appearing for the appellants has argued that the findings returned by the learned appellate Court, whereby learned appellate Court set aside the well reasoned judgment and decree passed by the learned trial Court were not sustainable either on facts or law. It was argued by Mr. Gupta that it stood proved on record that share of Dhingia over the suit land was only to the extent of 1/4th and this fact was duly borne out from the records of the case. Mr. Gupta argued that the learned trial Court after carefully appreciating the evidence on record had come to the conclusion that because Dhingia was having only 1/4th share in the entire suit land, he could not have had passed title better than what he himself possessed. In other words, according to Mr. Gupta, Dhingia could not have had alienated more than what his share was in the suit land. On these bases, it was urged by Mr. Gupta that while learned trial Court had rightly come to the conclusion that the sale deed in favour of the defendants pertaining to 13 ½ bighas of land was of no consequence, however, learned appellate Court committed an illegality by setting aside the said findings and that too by completely misreading and mis-construing the evidence on record. It was further argued by Mr. Gupta that keeping in view the fact that the appellants/plaintiffs were co-sharers over the suit land and their ouster from the same was not proved in accordance with law, it could be contended by defendants No. 1 to 3 in the alternative that from the date the suit land was purchased by them, they had become owners in possession over the same by way of adverse possession. Mr. Gupta argued that the learned appellate Court failed to appreciate that in case a party exerts its rights over the suit land by way of adverse possession, then the said party besides proving its possession over the land in issue has to demonstrate by leading cogent evidence that said possession is; (a) open; (b) peaceful; and (c) hostile to the knowledge of real owner. According to Mr. Gupta, it cannot be that defendants No. 1 to 3 on one hand contend that they are owners in possession over the suit land by virtue of a sale deed and at the same time they say that alternatively they have become owners over the suit land by way of adverse possession. On these bases, it was urged by Mr. Gupta that the judgment passed by the learned appellate Court vide which it dismissed the suit of the plaintiffs was perverse and was liable to be set aside.

9. Mr. K.D. Sood, learned Senior Counsel appearing for respondents No. 1 to 3 argued that there was no merit in the present appeal and the findings returned by the learned appellate Court were correct both on facts and on law and learned appellate Court had rightly set aside the judgment and decree passed by the learned trial Court and had dismissed the suit of the plaintiffs. Mr. Sood argued that it stood proved on record that Dhingia had in fact parted 13 ½ bighas of suit land and said suit land ultimately vested in defendants No. 1 to 3 by virtue of a duly registered sale deed executed on 01.10.1962 and since then defendants No. 1 to 3 were in exclusive possession over the suit land in their capacity as owners to the knowledge of everyone including the plaintiffs and proforma defendants. Mr. Sood further argued that since 01.10.1962, the plaintiff and proforma defendants even otherwise stood ousted from the suit land and there was no merit in the contention of the plaintiffs that Dhingia could not have sold more than his share over the suit land as Dhingia had alienated 13 ½ bighas of land long time back and the same was not objected to by the predecessor-in-interest of the plaintiffs and it was on these bases that defendants No. 1 to 3 had urged that even if it is proved that Dhingia alienated land in excess of his share, even then, keeping in view the fact that defendants No. 1 to 3 were in possession over the suit land w.e.f. 01.10.1962 and their possession over the same was open, peaceful and hostile as to the plaintiffs and proforma defendants, they had accordingly become owners of the same by way of adverse possession. It was further argued by Mr. Sood that the

conclusions arrived at by the learned trial Court that as per the revenue entries, the plaintiffs and proforma defendants continued to be reflected as owners of the suit land and were co-owners in possession of the suit land were totally contrary to the spot and revenue records in which exclusive possession of vendees had been recorded. According to Mr. Sood, learned appellate Court had after correct appreciation of the material on record rightly set aside the judgment and decree passed by the learned trial Court and the same did not warrant any interference. On these bases, it was argued by Mr. Sood that there was no merit in the appeal and the same be dismissed.

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

11. This appeal was admitted on 10.03.2008 on the following substantial questions of law:

> *"1. When the defendants-respondents did not produce the Sale Deed allegedly executed by Shri Dhingia in favour of Shri Biru, the predecessor-in-interest of defendants-respondents, are not the findings of Lower Appellate Court that defendants-respondents have become owners of the suit land by adverse possession on the basis of such invalid sale?*
>
> *2. When Shri Dhingia was admittedly owner of ¼ share in the land in dispute, has not the Lower Appelate Court acted in erroneous and perverse manner in raising inferences of consent by other co-owners acknowledging such sale of their shares, when no registered document evidencing such fact was produced in evidence by defendants?*
>
> *3. Has not the Lower Appellate Court committed grave error of law and jurisdiction in ignoring settled proposition of law that possession of one co-owner is possession of all and unless specific plea of ouster is made and substantiated by specific and cogent evidence, the co-owners in exclusive possession cannot acquire title by prescription merely by afflux of time?"*

12. Records demonstrate that the case which was set up by the plaintiffs was that Dhingia being owner in possession of 1/4th share qua the suit land could not have passed on more land to his successors-in-interest in excess of what his share in the suit land was. The factum of his being owner in possession of 1/4th share in the suit land and his being capable of passing of 1/4th share over the suit land in favour of his successors-in-interest is not disputed even by the plaintiffs. Defendants No. 1 to 3 had come in possession of the suit property having purchased the same by way of sale deed dated 01.10.1962 from Bijnu. The sale deed is on record as Ex.-P-Z (12). As per this sale deed, Bijnu sold the land vide sale deed dated 01.10.1962 in favour of Ram Ratan, Rikhi Ram and Balak Ram. As per the said sale deed, Bijnu sold 13.5 bighas of land in favour of defendants No. 1 to 3. As per the plaintiffs, as Bijnu is one of the successors-in-interest of Dhingia, therefore, it has to be seen as to how and how much property actually devolved upon Bijnu. However, according to defendants No. 1 to 3, Mehar Singh did not succeed the interest of Dhingia qua suit land and the same was transferred by Dhingia during life time to Biru and it appeared that Dhingia owned some other land in village Mahog and village Damdar in addition to what he sold to Biru, which might be in possession of other co-owners and in fact Dhingia sold entire Khata qua suit land to Biru, which thereafter was exclusively possessed by him. According to them, as Dhingia was in exclusive possession of suit land being owner, he could sell the entire Khata to Biru and exclusive possession thereof was given to Biru.

13. In Ex. PW2/A, which is Hindi translation of Ex.-PA, i.e. copy of jamabandi for the year 1966-67 Bikrami, Mauza Mahog, Tehsil and District Sirmaur, Dhingia is reflected in the column of ownership as co-owner alongwith Mehar Singh and Motia. Whereas the share of Dhingia and Mehar Singh is reflected therein as "*Charam*" i.e. 1/4th, the share of Motia in the same is reflected as *"Nisaf"*, i.e. ½. One thing which is evident from the said jamabandi is that Dhingia was co-sharer with regard to the suit land measuring 13 ½ bighas and his share in the

same was to the extent of 1/4th. As per the case set up by defendants No. 1 to 3 in the written statement, Dhingia sold the land to Biru, Biru was succeeded by Smt. Thagi, Smt. Thagi was succeeded by Shri Chunghi, Shri Chunghi was succeeded by Jhamtu and Jhamtu was succeeded by his wife Subdha. Subdha by way of registered gift deed bequeathed the land to Bijnu and Bijnu sold the suit land to defendants No. 1 to 3.

14. The plea of adverse possession taken in the written statement as it finds mention in para-1 of the same is in the following words:

> *"1……….In fact Shri Dhangia son of Shri Kapuria was in exclusive possession of the entire land detailed in the para. Even in the year Samvat 1965 and right from the time of Shri Dhangia the property in question remained in exclusive possession of aforesaid person. The other co-owners, illegally shown in the revenue record never remained in possession of the land right from the time of Shri Motia, predecessor in interest of plaintiffs and their brothers, mother and Shri Ishwar Chand defendant No. 4 and replying defendants after purchase of the land through registered sale deed dated 01.10.1962 treated themselves to be exclusive owner in possession and their possession is peaceful, continuous and hostile to the knowledge of the plaintiffs and their family members and replying defendant never admitted the plaintiffs, their brother Shri Ishwar Chand to be owner nor they were allowed to participate in the profits of the property and there is complete ouster of the plaintiffs, Shri Ishwar Chand and their family members from the time of Shri Dhangia aforesaid and the adverse possession of the defendants which started on 01.10.1962 from the purchase of the land and possession, which is continuous, have ripened into ownership and thus the replying defendants are owner in possession of the suit land."*

15. No revenue record has been produced by defendants No. 1 to 3 to substantiate their contention that the entire suit land measuring 13.5 bighas was either exclusively owned and possessed by Dhinga or was exclusively possessed by him to the exclusion of other co-sharers. Keeping in view this fact that there is no material on record to demonstrate that the suit land was exclusively owned and possessed by Dhingia, the findings returned by the learned trial Court to the extent that Dhingia could not have parted with more land than what he owned were correct findings. A perusal of the judgment passed by the learned appellate Court in general and para-8 in particular of the same demonstrates that the line of arguments of defendants No. 1 to 3 who were appellants before the learned appellate Court was that though Dhingia had 1/4th share in the suit land, however, Biru, the vendee was put in possession of whole of the land of Dhingia and the possession of Biru in respect of ¾ share became adverse to other co-sharers the moment he came to possess it. Incidentally, the finding to this effect returned by learned trial Court that Dhingia had 1/4th share in the suit land has not been interfered with by the learned appellate Court and in its conclusions even the learned appellate Court has held that even if Dhingia had only 1/4th share in the suit land, the predecessors of defendants No. 1 to 3 have become owners of the suit land by way of adverse possession. Therefore, the factum of Dhingia being owner of only 1/4th share in the suit land has attained finality. The findings returned to this effect by the learned first appellate Court have not been assailed by defendants No. 1 to 3. In other words, they have accepted the findings returned by the learned appellate Court that though Dhingia was owner of the suit land only to the extent of 1/4th share, however, the predecessors-in-interest of defendants No. 1 to 3 had become owners of 3/4th share of the suit land by way of adverse possession.

16. In this background, the issue which now remains to be adjudicated is whether the findings returned by learned appellate Court to the effect that the predecessors-in-interest of defendants No. 1 to 3 had become owners-in-possession of the entire suit land by way of adverse possession are sustainable on the basis of material produced on record by the parties or not?

17. The Hon'ble Supreme Court in **P. Lakshmi Reddy** Vs. **L. Lakshmi Reddy** AIR 1957 SC 314 has held that in order to establish adverse possession of one co-heir as against

another, it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. The Hon'ble Supreme Court has held that ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse should be made out. It further held that possession of one co-heir is considered in law as possession of all the co-heirs. It further held that when one co-heir is found to be in possession of the properties, it is presumed to be on the basis of joint title. A co-heir in possession cannot render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus on his own part in derogation of the other co-heir' title. The Hon'ble Supreme Court further held that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. It further held that burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession. Therefore, it is evident that assertion of hostile title amongst co-owners must be to the knowledge of the plaintiffs and this is exactly the distinction between the case of adverse possession between co-owners and adverse possession between strangers.

18. In **MD. Mohammad Ali (dead) by LRs.** Vs. **Jagadish Kalita and others**, 2004 (1) SCC 271, the Hon'ble Supreme Court while dealing with a case where a co-sharer in exclusive possession set up the plea of adverse possession held that long and continuous possession by itself, would not constitute adverse possession and even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription. It further held that a co-sharer becomes a constructive trustee of other co-sharer and the right of the appellant and/or his predecessors-in-interest would thus be deemed to be protected by the trustees.

19. A three Judges Bench of the Hon'ble Supreme Court in **Mohammad Baqar and others** Vs. **Naim-un-Nisa Bibi and others**, AIR 1956 SC 548 has held that as under the law, possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession and exclusion and ouster following thereon for the statutory period.

20. Learned appellate Court while returning the findings that the successors-in-interest of Dhingia had become owners in possession of the entire suit land to the exclusion of other co-owners held that there were long entries over 100 years showing vendee through his successor in exclusive possession under the successors-in-interest of the original owners and that it was unlikely that the land was jointly possessed physically by the parties. It further held that the suit land comprised of different khasra numbers and there was no evidence which of khasra numbers were in possession of which particular party. On these bases, it held that it could be possible that both the parties were in joint possession of all Khasra numbers and if this be so, then how were they cultivating the land and appropriating the produce. Learned appellate Court further held that had Dhingia not been in exclusive possession, there was no reason for the authorities to record his separate possession for over 100 years and had three of the co-owners been in joint possession, then their possession would have been recorded as such. On these bases, it was held by the learned appellate Court that Dhingia was in exclusive possession of the suit land and for this reason, he sold the entire suit land to Biru, predecessor-in-interest of present appellants. It was further held by learned appellate Court that Mehar Singh, one of the co-owners with Dhingia never challenged during his life time the sale and also did not try to seek partition of suit land. It further held that other co-owner Jash Ram also had not done so, meaning thereby he accepted Dhingia to be exclusive owner of the suit land. It further held that other co-sharers and their successors can also be assumed having knowledge of exclusive possession of Biru and his successors in view of such entries in the revenue record. On these bases, it concluded that long and uninterrupted possession of Dhingia and his successors due to an invalid sale deed was certainly adverse to the true owners and they being in possession for more than 12 years continuously to the knowledge of true owners had become its owners by way of adverse possession.

21. In my considered view, the findings so returned by the learned appellate Court are not sustainable either on facts or on law. While coming to the conclusions that defendants No. 1 to 3 have become owners of the entire suit land by way of adverse possession, learned appellate Court concluded that Dhingia had gained possession of the entire suit land to the exclusion of other co-sharers and his possession as such qua other co-sharers had ripened into adverse possession. I am afraid the findings so returned by the learned appellate Court are not based on records but are based on mere conjectures and surmises. There is no evidence to substantiate the findings returned by the learned appellate Court to the effect that other co-sharers had accepted the exclusive possession of Dhingia to their express ouster qua the entire suit land. There is no material to decipher that Dhingia denied the right of other co-sharers to their knowledge. There is no evidence that Dhingia asserted his hostile title coupled with exclusive possession and enjoyment vis-à-vis the other co-sharers to their express knowledge. The findings so returned by learned appellate Court are based on assumptions.

22. It is well settled law that the first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage and anything less than this is unjust to him. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court and first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on question of fact and law. It is settled law that while reversing a finding of fact, the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate court had discharged the duty expected of it. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons on all the issues involved in the case alongwith the contentions put forth and pressed by the parties for decision by the appellate Court. In the present case, while setting aside the findings returned by the learned trial Court, the appellate Court has not based its findings on evidence on record, but has justified its findings on assumptions.

23. Incidentally, a perusal of the cross-examination of DW-1 Rikhi Ram demonstrates that he has admitted therein that the plaintiffs were residing where suit property was situated. He has also admitted that no partition of the suit land has taken place. In fact a minute perusal of the written statement filed by defendants No. 1 to 3 and the affidavit filed by DW-1 Rikhi Ram which is on record as Ex. D-1 also demonstrates that it is not in so many words that it has been stated by the defendants that Dhingia was owner of the entire suit land. According to them, the entire suit land was in fact in possession of Dhingia, but this contention of their's is belied from the documents.

24. There is one more important fact which learned appellate Court did not appreciate while relying upon entries in favour of the successors-in-interest of Dhingia to the effect that the entire suit land was in their possession, which fact is that how these entries were initially recorded in the revenue records. As I have already mentioned above, there is no evidence on record to substantiate that Dhingia was either owner of the entire suit property or was in possession of the entire property. Therefore, subsequent entries to this effect in favour of his successors-in-interest are *non est* as defendants No. 1 to 3 have not been able to substantiate from records as to how the entire suit land came to be recorded in ownership and possession or in possession of the successors-in-interest of Dhingia when Dhingia was neither owner-in-possession of the entire property nor was he in possession of the entire property.

25. The contention of the learned counsel for the respondents that presumption of truth is attached with the latter revenue entries is a rebuttable presumption because if the genesis of the entries so made in the revenue records is not substantiated and is doubtful, then the presumptions so attached with the revenue records stands rebutted.

26. The version of defendants No. 1 to 3 of complete ouster of other co-sharers of Dhingia is not substantiated from the records. It is settled law that he who acquires title from a co-owner or a co-sharer enters into the foot steps of co-owner does not acquires a title better than

that of co-owner/co-sharer. The factum of one of the co-sharer selling a portion of joint property would not amount to adverse possession and as Dhingia was having no right, title or interest over 3/4th portion of the suit land, he had no right in law to alienate the same in any manner whatsoever. Once the successors-in-interest of Dhingia entered into his foot steps, then they acquired the status of co-sharer and their possession over the suit property was on behalf of all the co-sharers. As far as defendants No. 1 to 3 are concerned they had purchased the suit land vide sale deed dated 01.10.1962. There is no material on record from which it can be inferred that from 01.10.1962, they asserted their title hostile to the other co-owners, whose names admittedly were existing in the revenue records. There is no material on record to substantiate that defendants No. 1 to 3 after they came in possession of the suit land became owners of the same by way of adverse possession by ouster of other co-sharers. In these circumstances, learned trial Court had rightly held plaintiffs and proforma defendant No. 4 as co-owners in joint possession qua ½ share and defendants No. 1 to 3 as co-owners in joint possession to the extent of 1/4th share and proforma defendants No. 5 to 11 to the extent of rest 1/4th share in the suit land measuring 13 bighas and 5 biswas in village Mahog and learned appellate Court erred in setting aside the findings so returned by the learned trial Court. Substantial questions of law are answered accordingly.

27. In view of the discussion held above, the present appeal is allowed with costs and the judgment and decree passed by the Court of learned District Judge, Solan in Civil Appeal No. 60-S/13 of 2006 dated 01.06.2007 is set aside, whereas the judgment and decree passed by the Court of learned Civil Judge (Senior Division), Kandaghat, District Solan in Civil Suit No. 5-K/1 of 2002 dated 03.05.2006 is upheld. Miscellaneous applications, if any, also stands disposed of.

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

Revti Devi ... Appellant

Versus

Hari Singh & Anr. ... Respondents

RSA No. 257 of 2008
Reserved on: 14.09.2016
Date of decision:26.10.2016

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit claiming that he is the owner in possession on the basis of the Will executed by G – the Will propounded by defendant No. 1 is the result of mis-representation, deception, undue influence and fraud – the revenue entries on the basis of the same are illegal, null and void- the suit was dismissed by the trial Court- an appeal was preferred, which was dismissed – held in second appeal that the Will propounded by the plaintiff was held to be shrouded in suspicious circumstances – plaintiff was not able to dispel those circumstances – the defendant No. 1 was able to prove the execution of the Will by the deceased- no fault can be found with the judgment of Appellate Court- appeal dismissed.

(Para-15 to 19)

Cases referred:

H. Venkatachala Iyengar Vs. B.N. Thimmajamma, AIR 1959 SC 443

Adivekka and others Vs. Hanamavva Kom Venkatesh (Dead) by LRS. and another, (2007) 7 Supreme Court Cases 91

For the appellant: Mr. Vijay Chaudhary, Advocate.
For the respondents: Mr. Praneet Gupta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

This appeal has been filed by the appellant/ plaintiff against the judgment and decree passed by the Court of learned Presiding Officer Fast Track Court, Mandi, in Civil Appeal Nos. 58/2004, 135/2005 dated 31.03.2008, vide which, learned Appellate Court dismissed the appeal filed by the present appellant against the judgment and decree passed by the Court of learned Civil Judge (Jr. Division), Sundernagar, in Old Civil Suit No. 144/1990, New Civil Suit No. 99/2002, dated 15.06.2004 and allowed the cross objections filed on behalf of the respondents/defendants under Order 41 Rule 22 C.P.C. against findings returned by learned trial Court on Issues No. 1(a) and 2.

2. This appeal was admitted on 02.06.2008 on the following substantial questions of law:-

> *"1. Whether any prudent and reasonable man would create tenancy after coming into force the HP Tenancy & Land Reforms Act, 1974 knowing fully well that the said tenant would acquire proprietary rights by operation of law?*
>
> *2. Whether the learned courts below have erred in recording the findings to the effect that there was minor contradictions in the statements of plaintiff's witnesses without taking into consideration the fact that their statements were being recorded after a gap of 8-10 years and such minor contradictions were necessary outcome of passage of time?*
>
> *3. Whether the learned courts below erred in concluding that the appellant/plaintiff has failed to prove the Will dated 14/5/86 (Ex. PW.2/A) and 4/11/86 (Ex.PW.2/B)?"*

3. Brief facts necessary for the adjudication of the present case are that the appellant/plaintiff (hereinafter referred to as the 'plaintiff') filed a suit for declaration to the effect that land comprised under khewat No. 43, Khatauni No. 61, Khasra No. 1898/1454 old and present Khasra No. 1151 measuring 3-1-15 bighas, situated at village Bhour, Tehsil Sundernagar, District Mandi, HP (hereinafter referred to as 'suit land') was owned and possessed by the plaintiff as per Will dated 04.11.1986 which was the last Will of deceased Ganga Ram made by him in her favour and entries qua the same in favour of defendant No. 1 as owner thereof and in favour of defendant No. 2 as non occupancy tenant thereupon were wrong, illegal, null and void. It was further prayed that as the defendants had taken over the forcible possession over the suit land on the basis of said wrong and illegal revenue entries, possession of suit land be also delivered to the plaintiff as a consequential relief. According to the plaintiff, suit land was owned and possessed by one Shri Ganga Ram who during his lifetime was looked after and maintained by the plaintiff and out of love and affection and in lieu of services rendered to him by the plaintiff, Ganga Ram bequeathed the suit land in her favour by way of a registered Will dated 14.05.1985, which Will was later on revived and confirmed by him vide his last and final Will dated 04.11.1986, which Will was also executed by Ganga Ram in her favour. As per the plaintiff, Ganga Ram died on 07.11.1986 and after his death, she inherited and succeeded to the suit land on the basis of said Will and was in possession of the suit land in her capacity as owner. Further as per the plaintiff, Ganga Ram had not executed any other Will except the abovementioned two Wills in her favour, however, defendant No. 1 managed to obtain one Will in his favour from the deceased which was result of misrepresentation, deception, undue influence and fraud etc.. As per the plaintiff, the forged Will had no weight in the eyes of law. It was her case that in November, 1988, when she had sown wheat crop in the suit land, defendants in connivance with each other re-ploughed the suit land forcibly and changed the crop sown by her and instead had sown their own wheat seeds. As per plaintiff, she requested them not to do so and not to take law in their hands, however, defendant No. 1 disclosed to her that he was recorded as owner of the suit land while defendant No. 2 was non-occupancy tenant in possession under defendant No. 1. It was further the case put up by the plaintiff that thereafter she approached the Patwari Halqa

and obtained the copies of revenue record from him and after getting them 'visualized' from her counsel, the disclosure of defendant came to light. It was further stated by the plaintiff that mutation, if any, concerning the suit land in favour of defendant No. 1 and on the basis of same, subsequent entries in revenue record were wrong, illegal, null and void and inducting defendant No. 2 as non-occupancy tenant over the suit land was also wrong and illegal and without any authority. It was on these bases, the suit was filed by the plaintiff seeking the relief as mentioned above.

4. The suit filed by the plaintiff as contested by the defendants. As per defendants, suit land was recorded in the ownership of defendant No. 1 and was in possession of defendant No. 2 as non occupancy tenant and thereafter defendant No. 2 had become owner of the suit land by virtue of operation of law. Though, it was admitted by the defendants that the suit land was previously owned and possessed by Ganga Ram, however, it was denied that Ganga Ram was looked after and maintained by the plaintiff during his lifetime. It was further denied that Ganga Ram executed Will in favour of plaintiff out of love and affection. According to the defendants, Will dated 04.11.1986 was not genuine but was a fake and fictitious Will obtained by the plaintiff. According to the defendants though Will dated 14.5.1985 was executed by Ganga Ram in favour of plaintiff, however, the same was subsequently cancelled and in fact Ganga Ram, who was a close relative of defendant No. 1, during his lifetime had executed a registered Will dated 18.5.1985 in favour of defendant No. 1, out of love and affection in lieu of services rendered by defendant No. 1 to Ganga Ram, with regard to his entire moveable and immoveable property. It was further the case of the defendants that Ganga Ram had already inducted defendant No. 2 in possession of the suit land who was in actual possession of the suit land and defendant No. 2 had become owner of the same by operation of law and thereafter the suit land was in ownership and possession of defendant No. 2. It was denied by the defendants that Ganga Ram had not executed Will in favour of defendant No. 1 and as per defendants Will dated 18.05.1985 was the last valid Will executed by Ganga Ram in favour of defendant No. 1. As per the defendants, Will dated 18.05.1985 which was executed by Ganga Ram in favour of defendant No. 1 was his last valid Will and in fact the plaintiff after she came to know about said last Will of Ganga Ram having been executed in favour of defendant had managed to manufacture and obtain a fictitious Will allegedly executed in her favour by Ganga Ram in order to grab the suit property. It was denied that any revenue entries have been wrongly entered into in favour of defendant No. 1 in connivance of revenue officials or mutation sanctioned in favour of defendants was bad. According to the defendants, mutation proceedings were in full knowledge of the plaintiff and in fact plaintiff had not remained in possession of the suit land at any point of time. It was denied that plaintiff had ever sown any wheat crop over the suit land or she was forcibly dispossessed from the suit land in November, 1988, as alleged. According to the defendants, it was defendant No. 2 who had been cultivating the suit land during the lifetime of deceased Ganga Ram in his capacity as tenant and thereafter he had become owner in possession of the same by operation of law. On these bases, the case of the plaintiff was denied by the defendants.

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

> *"1. Whether Ganga Ram executed valid wills dated 14-5-1985 and 4-11-1986 in favour of the plaintiff, if so its effect? … OPP*
>
> *1(a) Whether the defendant No. 1/2 was tenant over the suit land and has become owner by operation of law and if so its effect? … OPD 2*
>
> *1(b) Whether the plaintiff has been forcibly dispossessed from the suit land by defendants in November, 1988 as alleged and plaintiff is entitled for relief of possession as claimed? … OPP*
>
> *2. Whether Ganga Ram executed a valid will dt. 18-5-1985 in favour of defendant No. 1? … OPD*
>
> *3. Whether the plaint is liable to be rejected for non-furnishing of particulars of fraud as alleged? … OPD*

4. Relief.”

6. On the basis of material placed on record both ocular as well as documentary by the respective parties, learned trial Court dismissed the suit filed by the plaintiff after holding that perusal of record demonstrated that plaintiff has failed to prove that deceased Ganga Ram had executed ‘Will’ in favour of plaintiff. It was held by learned trial Court that the case of the plaintiff was that initially Ganga Ram executed a Will PW2/A in her favour which was later on revived and confirmed vide Will Ext. PW2/B dated 04.11.1986. Learned trial Court held that the first suspicious circumstance regarding the execution of Will Ext. PW2/B was the sitting arrangement of scribe, attesting witnesses and the testator. It further held that statements of plaintiff (PW1) and the attesting witnesses were contrary to each other which rendered the presence of all of them at one place to be doubtful. It was further held by the learned trial Court that the second suspicious circumstance was the contention of the plaintiff that the later Will in fact revived the earlier Will executed by Ganga Ram in her favour and also confirmed the same. Learned trial Court held that PW2 Shiv Lal, who was one of the attesting witnesses of the later Will, deposed that Will Ext. PW2/A was read over and thereafter Will Ext. PW2/B was scribed whereas PW3 Nek Ram other attesting witness deposed that no reference of the earlier Will i.e. Ext. PW2/A was made at the time of execution of second Will i.e. Ext. PW2/B. Learned trial Court also took note of the fact that the third suspicious circumstance surrounding the purportedly Will executed by Ganga Ram in favour of plaintiff was that a school boy was engaged to scribe the Will who had no knowledge about scribing the same. Learned trial Court further held that this witness also admitted that neither earlier Will was shown to him nor any reference was made of the same at the time of execution of Will Ext. PW2/B. Learned trial Court took note of the fact that as per admission of PW5 Lekh Ram, scribe of the Will Ext. PW2/B, he was himself not aware about the meaning of word ‘Sanad Patra’ which was mentioned on the top of the Will Ext. PW2/B and he also admitted that he had not scribed such words on the top of Will Ext. PW2/B. Learned trial Court further held that the fourth suspicious circumstance which shrouded the Will Ext. PW2/B being propounded by deceased Ganga Ram was thumb impression of deceased Ganga Ram. Learned trial Court held that the thumb impression of testator of Will Ganga Ram was not on the documents of Will Ext. PW2/B but was completely on the revenue stamp which was appended on the Will Ext. PW2/B. Said thumb impression nowhere touched paper Ext. PW2/B. In other words, affixation of thumb impression on revenue stamp at the bottom of the document and mentioning of ‘Sanad Patra’ on the top of the same made the existence of genuineness of such Will doubtful as per the learned trial Court. On these bases, it was held by the learned trial Court that the execution of Will Ext. PW2/B was not proved by the plaintiff.

7. As far as issue pertaining to defendant No. 2 having become owner by operation of law by virtue of defendant No. 2 earlier being tenant over the suit land is concerned, the same was answered against the defendants by the learned trial Court.

8. It was further held by the learned trial Court that plaintiff had failed to prove that she was in possession of the suit land and had been dispossessed from the same.

9. Issue to the effect that Ganga Ram had executed Will DW1/A in favour of defendant was answered against the defendants by the learned trial Court.

10. The issue whether the plaint was liable to be rejected on account of non-furnishing of particulars of fraud was decided against the plaintiff and in favour of defendants.

11. The judgment and decree so passed by the learned trial Court was challenged by the plaintiff by way of appeal. Cross-objections were filed by the defendants against the findings returned against the defendant on issues No. 1(a) and Issue No. 2.

12. Learned Appellate Court while dismissing the appeal filed by the plaintiff allowed the cross-objections which were filed by the defendants.

13. Learned Appellate Court confirmed the findings returned by the learned trial Court that deceased Ganga Ram had not executed any valid Will in favour of plaintiff, however, it

set aside the findings returned by the learned trial Court that Ganga Ram had not executed valid Will dated 18.05.1985 in favour of defendant No. 1. Learned Appellate Court also set aside the findings of the learned trial Court that defendant No. 2 was not tenant over the suit land and had not become owner by operation of law over the same. On the basis of material on record, the learned Appellate Court came to the conclusion that execution of Will purportedly executed by Ganga Ram in favour of plaintiff, Ext. PW2/B, dated 04.11.1986 was not proved by the plaintiff in accordance with law. It was held by the learned Appellate Court that said Will was shrouded with grave and suspicious circumstances and execution thereof had not been duly prove and hence the findings returned by the learned trial Court on issue No. 1 were correct and it could be safely held that the said findings given by the learned trial Court were not liable to be set aside. Learned Appellate Court further held that it was a matter of record that after 3-4 days of the purported execution of alleged Will Ext. PW2/B, Ganga Ram died. It further held that said Will Ext. PW2/B was no Will in the eyes of law whereas Will Ext. DW1/A dated 18.05.1985, which was executed by deceased in favour of defendant No. 1, fulfilled all the necessary requirements as provided under Section 63 of the Indian Succession Act and it was a valid Will as both the attesting witnesses had seen the testator putting thumb impression on the Will Ext. DW1/A. The scribe of the Will Asif Khan appeared as DW1 and Govind Ram (DW5), one of the attesting witnesses of the said Will, had clearly proved the execution of said Will and these witnesses were not interested witnesses and their statements remained unshattered. Learned Appellate Court also took note of the fact that the other attesting witness of Will Ext. DW1/A was stated to be dead and DW 5 Shri Nirmal Singh, Additional District Magistrate, Hamirpur, who at the relevant time was posted as Sub Registrar at Sundernagar categorically stated that Will in question was read over and explained to Ganga Ram who admitted its correctness. Learned Appellate Court further held that he also proved endorsement qua the registration of the documents Ext. PW5/A to Ext. PW5/C on the Will in question. It was further held by the learned Appellate Court that the statement of Nirmal Singh further proved that deceased Ganga Ram was in his senses and was in sound state of mind when he had executed Will Ext. DW1/A and on these bases, it could be safely held that said Will was not shrouded with suspicious circumstances as defendant No. 1 was real nephew of deceased Ganga Ram and he was looking after deceased Ganga Ram and his last rites were also performed by him (defendant No. 1). It was further held by learned trial Court that Rewati Devi who belonged to a different caste was not even adopted by deceased Ganga Ram as alleged. Learned Appellate Court further held that the findings returned by the learned trial Court to the effect that thumb impression of testator on the Will Ext. DW1/A was not identified by the defendants, was not based on the material on record as the defendants had proved the valid execution of Will Ext. DW1/A in favour of Hari Singh, on the basis of which, he had become owner of the suit land. Learned Appellate Court set aside the findings of learned trial Court to this effect. It further held that the factum of defendant No. 2 being a non-occupancy tenant earlier under Ganga Ram and thereafter under defendant No. 1 had been categorically stated by defendant No. 1 Hari Singh and his statement had not been shattered by plaintiff and moreover, the factum of said defendant being in possession of the suit land also proved prima facie that he was inducted as tenant over the suit land during the lifetime of deceased Ganga Ram. On these bases, the findings returned to the contrary by the learned trial Court were set aside. It was on these bases that the appeal filed by the plaintiff against the judgment and decree passed by the learned trial Court was dismissed by the learned Appellate Court whereas cross-objections filed by the defendants against the same were allowed.

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

15. The factum of Will Ext. PW2/B having been executed by Ganga Ram in favour of plaintiff stands concurrently decided against the plaintiff by both the learned Courts below. After taking into consideration the entire evidence on record it was held by the learned trial Court that the purported Will Ext. PW2/B was shrouded with suspicious circumstances. The findings so returned by the learned trial Court have been affirmed by the learned Appellate Court. Findings so returned by both the learned Courts below are duly borne out from the records of the case.

Therefore, it cannot be said that on the basis of statements of plaintiff witnesses plaintiff had proved the execution of Will Ext. PW2/B by Ganga Ram in her favour.

16. Section 63 of the Indian Succession Act clearly lays down that every testator shall execute his Will according to the following rules:-

> *"(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.*
>
> *(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.*
>
> *(c) The will shall he attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."*

17. It has been held by the Hon'ble Supreme Court in ***H. Venkatachala Iyengar Vs. B.N. Thimmajamma***, ***AIR 1959 SC 443***, that in the cases in which execution of the Will is surrounded by suspicious circumstances, it may raise a doubt as to whether the testator was acting of his own free will. The Hon'ble Supreme Court has further held that in such circumstances, the initial onus is on the propounder to remove all reasonable doubts in the matter. The presence of suspicious circumstances makes initial onus heavier. Such suspicion cannot be removed by the mere assertion of the propounder that the will bears signature of the testator or that the testator was in a sound and disposing state of mind at the time when the will was made.

18. The Hon'ble Supreme Court has held in ***Adivekka and others Vs. Hanamavva Kom Venkatesh (Dead) by LRS. and another***, ***(2007) 7 Supreme Court Cases 91***, that where there are suspicious circumstances, the onus would be on the propounder to remove suspicion by leading appropriate evidence. Section 63 of the Succession Act lays down the mode and manner in which an unprivileged Will is to be executed. Section 68 of the Evidence Act postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the Court and capable of giving evidence. The proof of Will is not required as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be. In the present case, propounder of Will Ext. PW2/B i.e. the appellant was not able to dispel the suspicious circumstances shrouding the execution of Will Ext. PW2/B. She was not able to discharge this initial onus which is on the propounder of the Will. It could not be proved by her that the Will was executed in the mode and manner as is laid down under Section 63 of the Succession Act. Besides this, as has been taken note by the learned trial Court and in appeal by the learned Appellate Court, the said will was shrouded with suspicious circumstances which were not satisfactorily explained by the plaintiff.

19. Similarly, the findings which have been returned by the learned Appellate Court to the effect that Will Ext. DW1/A was proved to have been validly executed by deceased Ganga Ram in favour of defendant No. 1 cannot be faulted with. In my considered view, the findings returned by the learned trial Court that execution of Will Ext. DW1/A which was executed by Ganga Ram in favour of defendant No. 1 stood duly proved as per law are the correct findings. The execution of said Will by Ganga Ram in favour of defendant No. 1 has been duly substantiated by the statements of DW1 Arif Khan, the scribe of the Will and DW5 Govind Ram, one of the attesting witness. It has come in the statement of DW1 that Will Ext. DW1/A was

scribed at the instance of Ganga Ram and was read over to him and that at the relevant time he was in a sound disposing state of mind. He also stated that the other attesting witnesses of the said Will were Dila Ram and Govind Ram. In his cross examination, he categorically stated that after the Will Ext. DW1/A was scribed, firstly thumb impression on the same was put by Ganga Ram and thereafter signatures of the attesting witnesses were obtained on the same. He also stated in his cross examination that on the day when the Will Ext. DW1/A was scribed, Ganga Ram was in a sound state of mind and the Will was executed at his instance. Similarly, Govind Ram, one of the attesting witness of Will Ext. DW1/A, who entered the witness box as DW5, has clearly stated that Will Ext. DW1/A was written at the instance of Ganga Ram and when said Will was written, Ganga Ram was in sound state of mind and he (Govind Ram) and Dila Ram were present when said Will was executed. He further deposed that after the Will was executed it was read over to Ganga Ram who admitted it to be correct and thereafter he (Ganga Ram) appended his thumb impression over the same and thereafter attesting witness signed the same. He also stated that Will Ext. DW1/A was taken before the Tehsildar for the purpose of registration and he was also present there at that time. He further stated that Ganga Ram had stated even before the Tehsildar that the Will was correct. Nirmal Singh who entered the witness box as DW6 proved the factum of registration of Will Ext. DW1/A and he also stated that the will was read over to Ganga Ram who admitted the contents of same to be correct. Therefore, on the basis of said evidence produced on record by the defendants, the findings returned by the learned Appellate Court to the effect that execution of Will Ext. DW1/A was duly proved by defendant No. 1 as per the provisions of Indian Succession Act are the correct findings and findings to the contrary recorded by the learned trial Court were rightly set aside by the learned Appellate Court. Similarly, the factum of defendant No. 2 having been initially inducted as a tenant over the suit land by late Shri Ganga Ram and thereafter his continuing to be as such under defendant No. 1 and the factum of defendant No. 2 becoming owner of the suit land by operation of law and thereafter his being in possession of the suit land in his capacity as owner of the same has been duly proved by defendant No. 1. The statement of defendant No. 1 could not be shattered by the plaintiff and there is no reason as to why the same should be disbelieved. The findings returned in this regard by the learned Appellate Court in favour of defendants are also duly borne out from the records of the case and the conclusion arrived at by the learned trial Court was contrary to the material on record. Therefore, learned Appellate Court correctly returned said findings in favour of defendants by allowing the cross objections. During the course of arguments, learned counsel for the appellant could not point out as to how the findings returned by the learned Appellate Court to this effect were perverse and not borne out from the records of the case.

Therefore, in my considered view, no fault can be found with the judgment and decree passed by the learned appellate Court whereby it dismissed the appeal filed by the appellant/plaintiff against the judgment and decree passed by the learned trial Court and simultaneously allowed the cross objections filed by the defendants against the said judgment and decree. The substantial questions of law are answered accordingly and the appeal being devoid of any merit is dismissed. No order as to costs. Pending application(s), if any, also stands disposed of.

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

State of H.P. …..Appellant.

Versus

Chaman Lal and another …..Respondents.

Cr. Appeal No. 113 of 2007
Decided on : 26.10.2016

Prevention of Food Adulteration Act, 1954- Section 16(1)(a)(i)- Samples of glucose biscuits were taken, which were found to be misbranded- accused were tried and acquitted by the trial Court – held in appeal that Food Inspector deposed about the taking of the sample and completion of codal formalities – his testimony was not shaken in cross-examination- respondent No. 1 had purchased the food item from respondent No. 3, who had died during the pendency of the appeal- respondent No. 1 and 2 were convicted of the commission of offence punishable under Section 16(1)(a)(i) read with Section 7(ii) of Prevention of Food Adulteration Act. (Para-10 to 14)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Virender Kanwar, with Mr. Raman Prashar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge, Oral

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 26.9.2006 by the learned Sub Divisional Judicial Magistrate, Arki, District Solan, H.P. in Criminal Case No. 32/3 of 2001, whereby the learned trial Court acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 16.12.2000, Food Inspector, S.C. Joshi inspected the premises of Chaman Lal Malhotra, proprietor of General Merchant and Confectionary Works at Kunihar at about 1.20 p.m. where he was found conducting the business of the shop and at the time of inspection he was having 170 sealed packets of Glucose-V-Biscuits of 250 grams each in his possession meant for sale to the general public for human consumption, which were manufactured by 'Surya Food and Agro Limited, Noida, Priya Gold Industries (India) Ltd, Noida'. After disclosing his identity being Food Inspector, he served notice to accused No. 1 declaring his intention to take the sample of sealed Glucose-V-Biscuits out of these sealed packets and purchased six sealed packets of Glucose-V Biscuits of 250 grams each against the payment of Rs. 48/- as a sample for analysis. At the time of taking sample, accused No. 1 disclosed to the Food Inspector that he has purchased the said biscuits from M/s Shashank Enterprises, The Mall, Solan vide Bill No. 3521, dated 25.11.2000 under Section 14-A. So, a subsequent notice under Section 14-A was sent to accused No. 2 under the registered cover. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for theirs committing offences punishable under Sections 16(1)(a)(i) read with Section 7(ii) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act) to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 3 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record by the learned trial Court and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The accused respondent No.3 Purshotam Julka died during the pendency of the appeal before this Court. Hence, the prosecution case against him stands abated.

10. The Food Inspector concerned during the course of his inspecting the commercial premises of accused/respondent No.1 purchased from him six packets of biscuits weighing 250 grams each, purchase whereof stands displayed in Ext.P-2. The aforesaid food item was dispatched to the public analyst concerned whereupon he recorded an opinion of the batch number borne thereon being illegible besides the month and year of the manufacture or its packing remaining un-recited therein. Consequently, under the apposite report prepared by the public analyst concerned recorded in sequel to his subjecting the aforesaid food item to examination, he concluded qua it being misbranded, in sequel thereto the accused respondent No.1 besides respondents No.2 and 3 respectively the retailer besides forwarding agent and the manufacturer of the relevant food item stood arrayed as accused. A notice of accusation stood put to them qua theirs infringing the provisions of Section 16(1)(a)(i) read with Section 7(ii) of the Act. A thorough examination of the entire cross-examination to which the prosecution witnesses stood subjected to by the learned defence counsel unveils of theirs not standing put any apposite suggestion nor obviously any response upsurging in personification of the Food Inspector concerned on inspecting the commercial premises of respondent No.1 his not under Ext.P-2 purchasing from respondent No.1 the relevant food product/food item in sequel whereto it is inevitable to conclude qua the defence neither concerting to repudiate nor it concerting to controvert the trite factum of the Food Inspector visiting the relevant commercial premises nor also it concerting to belie the factum of purchase of the relevant food item by the Food Inspector concerned from accused/respondent No.1. Also the evidentiary material as exists herebefore makes a loud pronouncement qua accused No. 2 and 3 respectively the forwarding agent and manufacturer of the misbranded food item not concerting to repudiate the factum of theirs being respectively the manufacturer or the forwarding agent qua the relevant food item vis.a.vis. accused respondent No.1. Consequently, the derivative therefrom is of theirs acquiescing to the factum of theirs respectively manufacturing besides being the forwarding agent qua the relevant food item vis.a.vis. respondent No.1. The learned trial Court on visiting the entire record had concluded qua with availability of independent witnesses in proximity to the relevant commercial establishment of accused respondent No.1 yet their association in the relevant proceedings remaining unsolicited by the Food Inspector concerned staining the purchase by the Food Inspector concerned of the relevant food item from accused/respondent No.1. In sequel, thereto he concluded of the prosecution not succeeding in proving the charge against the accused. However, the aforesaid reason as purveyed by the learned trial Magistrate in his impugned order is ridden with gross perversity arising from his mis-appreciating the impact of purchase of the relevant food item by the Food Inspector concerned from the relevant Commercial premises occurring under Ext.P-2 also its overlooking the trite factum of the defence not adducing any evidence in denial of the aforesaid purchase standing ridden with a vice of compulsion or duress standing exercised upon accused No.1 by the Food Inspector concerned. For unavailability of the aforesaid evidence on record it was wholly inapt for the learned trial Magistrate to conclude qua with evident availability of independent witnesses in proximity of the relevant site of occurrence whereas theirs remaining unjoined at the time contemporaneous to his purchasing the relevant food item from accused respondent No.1, ingraining the entire prosecution version with a blemish of untruthfulness qua the relevant facet predominantly when the probative sinew for reasons aforestated of Ext.P-2 remained unshattered. In sequel, thereof, the aforesaid reason as assigned by the learned trial Magistrate for recording an order of acquittal vis.a.vis the accused warrants interference.

11. Be that as it may, the learned trial Magistrate had while recording an order of acquittal vis.a.vis. the accused had postulated a reason qua the prosecution standing enjoined by the mandate of Section 17(1)(a)(i) and Section 17(1-a)(ii) to display with specificity in the apposite complaint the factum of commission of offences by the Company itself and/or any nominated person or any other person who was incharge and was responsible to the Company for conducting its business wherefrom it concluded of with accused respondent No.1 standing neither averred in the apposite complaint nor evidence standing adduced qua his at the relevant time holding any authorization as a nominee of the manufacturer of the relevant food item who stood arrayed as accused No.3 or his being incharge of its business besides responsible to the Company for conducting its business, recorded a conclusion of thereupon the charge against the accused respondent warranting its being construable to stand jettisoned. However, the aforesaid reason as stands assigned by the learned trial Magistrate is also extremely legally frail as it emanates on a gross mis appreciation by him of the relevant provisions engrafted in Section 17 of the Act, provisions whereof are applicable where the relevant purported misbranded or adulterated food item stands purchased or stands seized from the premises of Company (M/s Surya Food and Agro Limited, Sector-2, Noida) besides only in the event of the aforesaid display there would be an onerous obligation cast upon the Food Inspector concerned to while concerting to prove charges framed vis.a.vis. the accused under Section 17 of the Act, to aver in the apposite complaint the relevant ingredients encapsulated in Section 17 of the Act whereas with contra distinctivity herebefore qua the relevant purchase/seizure of the mis branded food product or food item occurring on the Food Inspector concerned visiting/inspecting the retail commercial outlet of accused respondent No.1 who uncontrovertedly made its purchase/received it from accused No.2 latter whereof had received it from its manufacturer arrayed as respondent No.3, concomitantly did not entail upon the Food Inspector concerned to mete compliance to the provisions of Section 17 of the Act nor obviously he was enjoined to embody therein the ingredients thereof nor obviously any evidence in display of satiation thereof standing begotten was enjoined to be adduced by the prosecution. In sequel thereto the aforesaid reason as stands assigned by the learned trial Court to record an order of acquittal vis.a.vis. the accused suffers from a vice of infirmity arising from its misappraising the provisions of Section 17 of the Act.

12. The learned trial Magistrate on the anvil of a verdict of the Hon'ble Apex Court reported in Dwarka Nath and another vs. Municipal Corporation of Delhi, *1971 AIR 1844* wherein the Hon'ble Apex Court had declared ultra vires Rule 32(b) of the Prevention of Food Adulteration Rules, relevant portion whereof stands extracted hereinafter,

> "23. We are not inclined to accept the contention of Mr. Manchanda that Clause (b) of Rule 32 is beyond the rule making power of the Central Government under Section 23(1)(d) of the Act. It is well known that in many cases in business the name and address of a manufacturer or importer or vendor or packer has become associated with the character, quality or quantity of the article and as such we are of the opinion that Clause (b) of Rule 32 is a valid rule."

On anvil of its enactment being beyond the ambit of the rule making power of the relevant authority vice whereof ingraining it emanating on emergence of transgression of the mandate of Section 23 of the Act whereupon the trial Magistrate recorded a conclusion of the report of the public analyst concerned holding therewithin portrayals of the relevant food item/food product holding a vice of misbranding, not warranting acceptance, wherefrom it concluded of the accused standing entitled to an order of acquittal. The reliance as placed by the learned Magistrate upon the aforesaid verdict of the Hon'ble Apex Court emanates on his grossly misappreciating its subtle nuance tritely the one qua the relevant Rule 32(b) (e) of the 'Rules' enjoining upon the relevant manufacturer to on the label of the relevant food product item disclose therein the name and business address of the importer or packer also enunciate therein the batch number either in English or in Hindi or in combination, not carrying forward the salutary spirit of the Act qua its informing the consumer qua the purity or the freshness of the product, qua factum whereof the relevant customer would become enlightened only when the label of the relevant food product

holds portrayals qua the date and year of its manufacture besides holds reflections therein qua the date of expiry of the food product wherefrom reiteratedly the relevant consumer would stand apprised qua the freshness of the product besides would be baulked to purchase it for precluding injury to his health. Consequently, with contra distintivity occurring in the relevant Food Adulteration Rules vis. a vis. the nature of misbranding indulged by accused respondent No.3 wherefrom respondent No.1 purchased the misbranded food item/food product without his concerting to discover the factum of misbranding renders, all the accused from whom the relevant food item stood transmitted in an unbroken chain upto accused respondent No.1 wherefrom the Food Inspector purchased the relevant food product, to be vicariously liable for infringement of the relevant penal provisions.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Magistrate 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 Magistrate suffers from perversity or absurdity of mis-appreciation and non appreciation of evidence on record. In sequel thereto, I find merit in this appeal, which is accordingly allowed and the judgement of acquittal rendered by the learned trial Magistrate is quashed and set-aside. Accordingly, the accused No. 1 and 2 are held guilty for theirs committing offences punishable under Sections 16(1)(a)(i) read with Section 7(ii) of the Prevention of Food Adulteration Act, 1954.

14. Let the accused/respondents No. 1 and 2 be produced before this Court on 16/11/2016 for theirs being heard on the quantum of sentence.

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

State of H.P. .....Appellant.

Versus

Tej Ram & others ....Respondents.

Cr. Appeal No. 602 of 2008.
Date of Decision: 27th October, 2016.

Indian Penal Code, 1860- Section 341, 325, 323 and 506 read with Section 34- Accused restrained the informant and caused simple and grievous hurt to her and simple hurt to her daughter- the accused were tried and acquitted by the trial Court- held in appeal that informant admitted the pendency of the Civil litigation - PW-2confined the incriminatory role to accused T only –PW-3 improved upon his version – the prosecution version was not proved beyond reasonable doubt - appeal dismissed.(Para-9 to 12)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Chief Judicial Magistrate, Sirmaur District at Nahan rendered on 31.0.3.2008 in Cr. Case No. 62/2 of 2006, whereby, he acquitted the accused/respondents herein for theirs allegedly committing offences punishable under Sections 341, 325, 323 and 506(1) read with Section 34 of the Indian Penal Code.

2. The facts relevant to decide the instant case are that on 16.06.2006 at about 7.00 p.m. at village Meerpur Kotla, the accused in furtherance of common intention wrongfully restrained the complainant Smt. Debo Devi from proceeding to the direction, to which she has

right to move and the accused in furtherance of common intention, caused simple hurt to complainant Smt. Debo Devi and her daughter while Smt. Debo Devi also sustained grievous injuries due to the blows of danda given by the accused and the accused also criminally intimidated the complainant and her family members with dire consequences, with a view to raise alarm on their persons. Smt. Devi Devi was rescued by her husband Anup Singh from the clutches of the accused and the accused also gave beatings to him. The complainant lodged FIR Ex.PW1/A at P.S.Nahan and during the investigation, the police visited the spot and the accused produced three dandas, which were taken into possession vide recovery memos Ex.PW1/B, Ex.PW1/C and Ex.PW1/D. The police also took into possession blood stained shirt of injured vide memo Ex.PW2/A. The complainant Smt. Debo Devi was medically examined at R.H., Nahan and her MLC is Ex.PW9/A and Kumari Pinki was also medically examined and her MLC Ex.PW10/A was obtained by the IO and the IO during the investigation prepared site plan Ex.PW12/A and recorded the statements of the witnesses. He also arrested the accused and later on released them on bail.

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

4. The accused were charged by the learned trial Court for theirs committing offences punishable under Sections 341, 323, 325 and 506(1)read with Section 34 of the IPC. In proof of the prosecution case, the prosecution examined 12 witnesses. On conclusion of recording of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the trial Court, in which they claimed innocence. However, they did not lead any defence evidence.

5. On an appraisal of evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondents herein.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. With the user of dandas, Ex.P-1, P-2 and P-3, recovered under memos Ex.PW1/B to Ex.PW1/D, the accused/respondents are alleged to commit offences constituted in the relevant FIR comprised in Ex.PW1/A. The reflections in the apposite MLCs respectively comprised in Ex. PW9/A besides in Ex.PW10/A also the factum of the blood stained shirt of Debo Devi taken into possession under memo Ex.PW 2/A, stand contended by the learned Deputy Advocate General to make a vivid display qua hence the prosecution succeeding in proving its case against them. He contends qua the discarding by the learned trial Court of the aforesaid evidentiary material has sequeled gross perversity seeping qua its verdict arising from the factum of its not appraising their probative worth vis-a-vis the prosecution case.

10. The anvil of the prosecution version is in its entirety hinged upon the deposition of PW-1, who lodged FIR Ex.PW1/A. She in her testification comprised in her examination-in-chief has therein unveiled a version in corroboration to the embodiments occurring in Ex.PW1/A,

yet her testification comprised in her cross-examination belittles the credibility of her testification occurring in her examination-in-chief, conspicuously, when she therewithin testifies qua a civil litigation inter se her and accused/respondent Tej Ram pending before the Civil Court concerned. Also with hers making a communication therein qua after the institution of the aforesaid suit against her by accused/respondent Tej Ram, her family members also she vowing to teach a lesson to the accused. She has also pronounced therein of the instant complaint standing reared by a vendetta nursed by her vis-a-vis the accused, vendetta whereof arising from the factum aforesaid. The aforesaid communications existing in the cross-examination of the complainant graphically display of the FIR comprised in Ex.PW 1/A being contrived for falsely implicating the accused. Even otherwise, the testification of PW-1 qua the ill-fated occurrence as held in her examination-in-chief is bereft of probative worth in the face of an injured child witness PW-2 in her testification contradicting the testification of her mother, the complainant herein, who deposed as PW-1, wherein PW-2 has ascribed an incriminatory role vis-a-vis accused Tej Ram, whereas, obviously she has excluded the participation of Mito Devi and Tarsem Singh in the occurrence wherefrom the ensuing sequel is qua the entire genesis of the prosecution version testified by PW-1, wherein she has ascribed an incriminatory role also to accused No.2 and 3 in the alleged occurrence losing its credibility.

11. Be that as it may, PW-3 in his testification qua the occurrence comprised in his examination-in-chief has deposed in corroboration to the deposition of PW-1, his wife, nonetheless his deposition occurring therein is rid of sanctity in the evident face of his in his cross-examination to which he stood subjected to by the learned defence counsel unveiling the factum of his making immense improvements vis-a-vis his previous statement recorded in writing, improvements whereof stand comprised in the factum of his testifying of the accused chasing him with dandas whereupon he ingressed his house to obviate the assault assayed to be perpetrated on his person by the accused also stands constituted in his testifying qua blood oozing from the leg of his wife besides hers sustaining fracture on her arm, testifications whereof remained unembodied in his previous statement recorded in writing. Resultantly, when the aforesaid testifications rendered by PW-1 visibly stand stained with a vice of embellishments besides improvements vis-a-vis his previous statement recorded in writing, his testification in purported corroboration to the testification of his wife, PW-1, loses credibility. In aftermath, the recovery of weapons of offence Exts. P-1, P-2 and P-3 under memos Ext.PW-1/B to Ext.PW-1/D hold no efficacy nor also the reflections in the apposite MLCs comprised in Ext.PW-9/A and Ext.PW-10/A hold no probative sinew. Consequently, on anvil thereof, the accused cannot be concluded to stand connected with the offences for which they stood charged.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

13. Consequently, I find no merit in the instant appeal which is accordingly dismissed and the judgment of acquittal recorded by the learned trial Court is affirmed in favour of the accused/respondents herein. Records be sent back forthwith.

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

Dr. Dev Raj ….Petitioner.

Versus

Smt. Sandhya Sharma ….Respondent.

Cr. Revision No. 373 of 2014.
Reserved on: 24th October, 2016.
Date of Decision: 28th October, 2016.

Indian Penal Code, 1860- Section 500- A criminal case was instituted against the petitioner, which resulted in his acquittal – an appeal was preferred, which was dismissed- the petitioner filed a complaint for defamation on the basis of news items – Magistrate ordered the summoning of the accused- a revision was preferred, which was allowed and the summoning order was set aside – held in revision that a period of three years has been prescribed for filing the complaint for the commission of offence punishable under Section 500- present complaint was filed after more than three years – defamation is not a continuing wrong – the petitioner has also instituted a suit for malicious prosecution – the complaint to the police is privileged and no action lies on the same – the Magistrate had wrongly summoned the accused and the order was rightly set aside by the Additional Sessions Judge- revision dismissed.(Para- 5 to 10)

Cases referred:
Dambarudhar Panda vs. Mahendranath Saran, 1992 CriLJ 2213
Uadi Shankar Awasthi versus State of U.P. & another, 2013(2) RCR (Criminal) 503
V. Narayana Bhat v. E. Subbanna Bhat, AIR 1975 Karnataka 162

For the Petitioner: Mr. Ajay Sharma, Advocate.
For the Respondent: Mr. Anirudh Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge .

The respondent herein had instituted a complaint against the complainant/petitioner herein before the State Vigilance and Anti-Corruption Bureau, Solan qua the complainant/petitioner herein demanding illegal gratification for meteing transport expenses for visiting various places for verifying the position, status and tagging of cows purchased by the members of Self Help Group, Badhal, headed by the respondent herein. Consequently, FIR No. 11 of 2010 of 21.06.2010 stood registered against the complainant/petitioner herein constituting therein commission of offences by him under Sections 7 and 13 of the Prevention of Corruption Act. In sequel to the registration of the FIR, the complainant/petitioner herein faced prosecution before the learned Special Judge, Solan. The Charge for which he came to be tried stood concluded by the learned Special Judge, Solan to remain unsubstantiated whereupon it pronounced an order acquitting the accused/complainant/ petitioner herein. In an appeal carried therefrom by the State of Himachal Pradesh before this Court, this Court pronounced a judgment in affirmation to the judgment recorded by the learned Special Judge, Solan.

2. The pronouncement of the learned Special Judge, Solan in Corruption Case No.10-S/7 of 2010 occurred on 29.07.2011 whereas the pronouncement of this Court in Criminal Appeal No. 445 of 2011 as arouse therefrom whereupon this Court rendered findings in concurrence to the findings rendered by the learned Special Judge, Solan, stood rendered on 13.07.2012. The complainant/petitioner herein, accused in Corruption Case No.10-S/7 of 2011, embedded upon a complaint instituted by the respondent herein before the Police Station SV &ACB, Solan, whereupon he by concurrent verdicts stood pronounced to be not guilty, instituted a complaint against the respondent herein on 6.11.2013 before the learned trial Court. In the aforesaid complaint instituted by the petitioner herein before the learned trial Court he alleged therein of publications in daily newspaper "Divya Himachal", occurring in its edition of 22.06.2010, relevant portion whereof stands extracted hereinafter besides a publication occurring in Hindi newspaper "Punjab Kesari", in its edition of 22.06.2010, relevant portion whereof also stands extracted hereinafter also publications occurring in "Amar Ujala", "The Tribune" and "The Hindustan Times" wherewithin echoings stand encapsulated qua in pursuance to a complaint instituted against him by the respondent herein before the SV & ACB, Solan, his standing caught red handed while receiving illegal gratification besides theirs holding revelations of his coming to be arrested constituted libelous material whereupon his reputation in society stood lowered.

The relevant portion of a news item published in "the Divya Himachal" edition of 22.06.2010 reads as under:-

> ".....Pashu Chikatshak ko 5000/- Rupay ki rishpat letey rangey hathon giraftarr kar liya. Giraftaar kiyey gai Doctor ka naam Dr. Dev Raj Sharma hai, Solan Vigilance Viobhag main ek mahila Sandhya Sharma ney rapat daraz karwai thi ki Darlaghat Pashu Chikatsalya main Karyarat Ek Chikatsak ney kisi kaam ke badley 5000/- ki mang kar raha hai..... Taig lagwaney key liye karyarat veterinary Dr. Dev Raj Sharma ney ussey 5000/- ki mang ki hai"

The relevant portion of a news item published in daily newspaper Punjab Kesari reads as under:

> "....Pashu Chikatshak Dr. Dev Raj ki Rs.5000/- ki Rishpat Letey Rangey Hathon Giraftar Kar Liba Hai .....Pashuo Ko Tag Laganey ke awaiz kai dino sey pasey ki maang kar raha tha ....Sandhya Sharmaney iski Shikayat....."

The relevant portion of a news item published in daily newspaper Amar Ujala reads as under:-

> "Sandhya ka aarop hai ki Pashu Chikatsak Dev Raj Sharma Gai key kkan par tag laganey ke badley 10,000/- maang rahey they, baad me baat 5000/- per razi ho gai"

3. On consideration of preliminary evidence adduced before the learned trial Court, it proceeded to order for the summoning of accused/respondent herein. Against the summoning orders pronounced by the learned Magistrate, she preferred a revision petition before the revisional Court, revision petition whereof came to be accepted whereupon the summoning orders impugned therebefore stood quashed and set aside. The complainant/petitioner herein stands aggrieved by the rendition of the revisional Court whereupon he stands constrained to institute the instant petition before this Court, wherein he concerts to reverse the findings recorded by the Additional Sessions Judge-II, Solan in Revision Petition No. 3-ASJ-II/10 of 2014. The learned Additional Sessions Judge, Solan had meted deference to the provisions of Section 468 of the Cr.P.C. holding therewithin a dictat of the apposite period of limitation for an aggrieved setting in motion the criminal machinery qua offences punishable with imprisonment for a term exceeding one year but not exceeding three years, being a period of three years, in conjunction therewith it concluded qua with the maximum term of imprisonment prescribed qua proven commission of an offence under Section 500 of the IPC, being a period of three years besides in tandem thereof with evidently the apposite complaint standing instituted before the trial Court after three years elapsing since the publication of purported libelous matter(s), he concluded of the complaint being barred by limitation besides it being not maintainable.

4. The reasoning aforesaid afforded by the learned Additional Sessions Judge for dismissing the apposite complaint not being maintainable stands espoused by the learned counsel for the petitioner to suffer from a gross infirmity arising from the fact of his omitting to revere the mandate of the non obstante clause occurring in Section 473 of the Cr.P.C., wherewithin a mandate is held qua with availability therebefore of material in evident portrayal of the apposite delay standing properly explained, the Court concerned holding leverage to hence concomitantly draw affirmative satisfaction qua the facet aforesaid, rendering hence the apposite complaint to be maintainable even if it stands instituted before the competent Court of criminal jurisdiction beyond the statutorily prescribed period of limitation conspicuously with the apposite delay standing explicated it warranting condonation besides empowering the Court concerned to take cognizance on the apposite complaint. Moreover, he contends on the anvil of a judgment of the Orissa High Court reported in ***Dambarudhar Panda vs. Mahendranath Saran, 1992 CriLJ 2213*** wherein it is mandated of no application within the ambit of the non obstante clause to Section 473 of the Code of Criminal Procedure (hereinafter referred to as the Cr.P.C.), being enjoined to be preferred by the aggrieved complainant before the trial Magistrate for constraining attraction of its provisions vis-a-vis the maintainability of the apposite complaint significantly when the delay which has occurred in its institution stands displayed by the material as exists before the Court concerned to evidently stand explained whereupon it warrants its condonation, for obtaining benefit whereof he espouses herebefore of the relevant averments recorded in the apposite complaint which stand alluded herein-after activating besides renewing the cause of

action vis-a-vis the aggrieved complainant also hence theirs evidently explicating the delay thereupon warranting the Court below to order for cognizance being taken thereon rather on anvil of the provisions of Section 468 Cr.P.C. it being ordered to be dismissed. The relevant provisions of Section 473 read as under:-

> "473. Extension of period of limitation in certain cases:- Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court make take cognisance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice."

Moreover, he in coagulation thereof vis-a-vis the mandate of the Hon'ble Apex Court occurring in its verdict reported in ***Uadi Shankar Awasthi versus State of U.P. & another, 2013(2) RCR (Criminal) 503*** wherein a pronouncement occurs qua an offence where an enduring injury from the alleged misdemeanor of the accused accrues to the aggrieved, the relevant misdemeanor being construable to be constituting a "continuing offence" whereupon he espouses qua the mandate of Section 472 of the Cr.P.C. being applicable vis-a-vis the apposite complaint recording therein commission of offences by the respondent herein under Section 500 IPC significantly when the relevant offence constituted therein begets an enduring injury to the reputation of the complainant in the society, in sequel whereof he canvasses qua the computation of the apposite period of limitation for cognizance standing taken by the Magistrate concerned upon a complaint holding therewithin commission of a continuing offence commencing or beginning or running every moment, during the continuation of the enduring injury arising from the penal misdemeanor ascribed to the accused by the aggrieved, ensuingly he proceeds to contend of the petitioner herein in tandem thereto holding a right to initiate criminal prosecution against the respondent herein not only from the date of institution of a false complaint against him by the latter, significantly when in pursuance thereto his image in society stood lowered rather also when injury to his reputation in society endured continuously throughout the pendency of the trial against him for the charge arising from the complaint instituted by the respondent herein also when damage to his reputation endured during the pendency of the appeal preferred thereagainst herebefore by the State, rendered hence the penal ascriptions held vis-a-vis him in the apposite complaint to be construable to be constituting a continuing offence besides his standing perennially aggrieved wherefrom he contends of his throughout the aforesaid period whereon harm to his reputation endured besides even when on termination of the aforesaid proceedings against the petitioner herein injury to his image in society subsists perenially, the petitioner herein holding a leverage throughout the currency of the aforesaid trial to which he stood subjected to besides during the currency of the apposite appeal before this Court to nurse a grievance vis-a-vis the respondent herein besides obviously on culmination thereof his holding an empowerment to at any moment of time institute a complaint against the respondent herein. He hence espouses qua the view formed by the learned Additional Sessions Judge qua attraction qua the complaint the principles enshrined in Section 468 of the Cr.P.C., being inappropriate.

5. The aforesaid espousal made by the learned counsel for the petitioner herein openly militates against the principle constituted in Section 468 of the Cr.P.C., wherein a mandate stands encapsulated of the apposite period of limitation for enabling the Court concerned to take cognizance upon the apposite complaint being a period of three years significantly when the period of limitation aforesaid stands statutorily prescribed qua offences qua which a prescription is held in the relevant penal provisions qua imposition upon an accused a sentence of imprisonment for a term not exceeding three years whereupon with a proven offence under Section 500 IPC enjoining upon the Magistrate concerned to impose upon the relevant accused a sentence of imprisonment not exceeding three years, obviously renders the instant complaint instituted after more than three years elapsing since the institution of an FIR against the petitioner herein on a complaint of the respondent herein to be beyond limitation hence cognizance thereon standing barred. Moreover, likewise with the institution of the apposite complaint occurring after more than three years elapsing since publication of purported libelous matter(s) also renders it to be time barred besides concomitantly it being not maintainable.

6. Be that as it may, the learned counsel appearing for the petitioner contends qua with an offence of defamation being a continuing offence hence the apposite complaint falling within the frontiers of the pronouncements of the Hon'ble Apex Court reported in 2013(2) RCR (Criminal) 503. However, the aforesaid submission is unacceptable to this Court given the injury or harm to the reputation of a person arising from publication of a purportedly libelous matter being an instantaneous harm caused to the image of the aggrieved in society whereupon he stands enjoined to with utmost promptitude prefer a complaint before the court concerned. However, with the aggrieved procrastinating the reporting of a grievance arising from publication of a purported libelous matter, especially when on its publication he has acquired immediate knowledge thereof, he is to be construed to condone the damage or harm as purportedly befalls upon his reputation in society Moreover, any delay therefrom in his instituting a complaint before the Magistrate concerned would invite an inference of the purported libelous matter holding truth whereupon obviously any inculpation of the accused would be unwarranted. Necessarily when the aforesaid inferences stand invited by delay occurring on the part of the aggrieved to promptly report his grievance qua damage accruing to his reputation in society arising from publication of a purportedly libelous matter, it would be inappropriate to conclude qua his holding a leverage, to, on the anvil of the offence of defamation being a continuing one, institute a complaint beyond three years elapsing since the publication of a purportedly libelous matter. Predominantly also when damage or injury to his image or reputation in society arises from publication of a purportedly libelous matter, the apt concomitant thereof is qua with his apposite sensitivities standing instantaneously impaired his standing enjoined to with utmost promptitude therefrom galvanize the criminal machinery contrarily any procrastination on the part of the aggrieved in instituting the apposite complaint cannot be brooked. In sequel, it is held that the offence of defamation inflicts an instantaneous apposite injury upon the aggrieved whereupon it is to be construable for reasons aforestated to be not constituting a continuing offence nor it can be deduced qua the apposite injury to the reputation of the aggrieved in society perennially enduring nor also hence the counsel for the petitioner can draw benefit from the mandate of the Hon'ble Apex Court reported in 2013 RCR(Criminal) 503 to espouse herebefore qua his throughout the currency of the criminal proceedings against him standing inflicted with subsisting damage to his reputation in society besides he is baulked to canvass qua the apposite damage or injury to his esteem in society perennially continuing nor he holds any leverage to at any time prefer the apposite complaint before the Magistrate concerned. Any acceptance of the aforesaid submission of the learned counsel for the petitioner would negate the effect of the afore-referred inference drawn by this Court inferences whereof stand spurred for want of the aggrieved not galvanizing with promptitude the criminal machinery.

7. The learned counsel appearing for the petitioner has contended qua on the date of of the respondent herein arriving in the Court premises for giving evidence she outside the Court room in the presence of many persons passing sarcastic remarks qua him whereupon he contends qua a fresh cause of action standing spurred rendering hence his complaint to fall within limitation. Also thereupon, he contends on the anvil of a verdict of the Orissa High Court holding a pronouncement therein qua no application, for exercise of powers within the ambit of the non obstante clause of Section 473, Cr.P.C., by the Magistrate concerned, standing enjoined to be preferred thereat whereas the Court concerned on existence therebefore of circumstances in explanation of delay, holding an empowerment to condone the delay in the preferment of the apposite complaint therebefore. He also espouses herebefore of the aforesaid factum constituting a formidable explication within ambit of the non obstante clause of Section 473 of the Cr.P.C., whereupon the delay, if any, in the preferment of the apposite complaint before the Magistrate concerned standing explained besides renewing the cause of action rendering hence his complaint to be maintainable. However, as aptly concluded by the learned Additional Sessions Judge, the aforesaid espousal in purported explanation of the delay which has occurred in the preferment of the apposite complaint warrants its rejection significantly for omission in the complaint of the date whereon the apposite derogatory remarks stood proclaimed by the respondent herein besides given absence of an averment therein besides lack of testification by the complainant qua the persons in whose presence the purported sarcastic remarks stood

pronounced by the respondent herein. Consequently, the aforesaid submission holds no vigour and stands rejected.

8. Uncontrovertedly, the petitioner herein in sequel to a Court of law pronouncing an order of acquittal vis-a-vis the charge to which he stood subjected to besides tried, has instituted a suit for malicious prosecution vis-a-vis the respondent herein. The aforesaid institution of a suit for malicious prosecution by the petitioner herein against the respondent herein constituted the apposite remedy for redressing his grievance arising from his standing subjected to prosecution by the respondent herein, prosecution whereof he avers to arise from malice. Obviously, hence, the criminal complaint instituted under Section 500 of the IPC by the petitioner herein against the respondent herein on his standing acquitted by Courts of law is an inappropriate remedy besides its availment stands prohibited by a judgment recorded by the Karnataka High Court reported in ***V. Narayana Bhat v. E. Subbanna Bhat, AIR 1975 Karnataka 162*** wherein a mandate is held of a complaint made to the police even if it stands stained with vice of falsity, it being construable to be privileged whereupon even if the aggrieved accused therein stands subjected to unsuccessful prosecution, his holding no empowerment to prosecute the complainant therein for an offence under Section 500 IPC. The relevant paragraph No.7 of the judgment aforesaid stands extracted hereinafter:-

> "7. The reason why absolute privilege is extended to the statement of a witness made prior to the commencement of a judicial proceeding is based on public policy as stated by Lord Halsbury in 1905 AC 480. There is no reason why the principle stated in the said decision should not be extended to a party and the absolute privilege confined only to the statement of a witness under such circumstances. Of the two instances referred to by Blagden J. in ILR (1943) 1 Cal 250 the first refers to the editor of a newspaper as stated above. But it is doubtful whether the editor of the newspaper in such circumstances can claim absolute privilege on the basis of the principle laid down in 1905 AC 480. With regard to the second illustration referred to by Blagden J., if the complaint to the police results in an unsuccessful prosecution then the person defamed can only claim damages for malicious prosecution and not for defamation. In case the complaint to the police does not result in a prosecution, then also the persons defamed have no remedy in respect of defamatory statements made in such a complaint to the police. But if a false complaint is made to the police, the person who makes such a false complaint would be punishable either under Section 182 or Section 211 of the Indian Penal Code. It cannot therefore be said that a person against whom false charges are made in a complaint to the police, even if no further action is taken by the police authorities on such complaint, goes scot-free. I would, therefore, prefer to follow the earlier view of the Division Bench of the same High Court in AIR 1939 Cal 477 and the other decisions referred to above which take the view that a complaint to a police officer is absolutely privileged."

In view of the mandate held therewithin especially when the petitioner has extantly launched an inappropriate remedy against the respondent herein comprised in his instituting the instant complaint against her, it hence warrants its dismissal. Furthermore, permitting availment of the remedy canvassed herebefore by the petitioner herein would entail an unbefitting smothering of penal misdemeanors also would stifle prosecution of an accused for serious offences holding loud pronouncements of his indulging in moral turpitude. Necessarily, for obviating the aforesaid casualties to prosecuting an accused for serious offences, the remedy to him on his unsuccessful prosecution cannot be the one agitated in the extant complaint.

9. Lastly, the learned counsel appearing for the petitioner has canvassed of the impugned order rendered by the learned Additional Sessions Judge being an interlocutory order whereupon it is unamenable for interference by this Court. However, the aforesaid contention is meritless. The order summoning the respondent herein as pronounced by the learned trial

Magistrate, for reasons aforesaid, when arises from gross mis-appreciation by him of the import of the provisions of Section 468 of the Cr.P.C. also when the apposite complaint for the reasons aforestated is not maintainable, any holding of the respondent to prosecution would tantamount to a gross abuse of process of law. In aftermath the summoning order is to be construed to be substantially affecting the rights of the respondent herein to not stand subjected to a frivolous prosecution whereupon it is to be construable to be interfereable by the revisional Court.

10. For the reasons which have been recorded hereinabove, there is no merit in the instant petition, accordingly it is dismissed. The order impugned hereat 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.

Paras Ram alias Govind .....Appellant-Plaintiff.

Versus

Smt. Jasmati and others ....Respondents/defendants.

RSA No. 33 of 2007.
Reserved on : 24.10.2016.
Decided on : 28th October, 2016.

Specific Relief Act, 1963- Section 20- Defendant No.1 had agreed to sell half share of his land to the plaintiff for a sum of Rs.20,000/- - an amount of Rs.19,000/- was paid as earnest money- the balance amount was to be paid at the time of execution and registration of the sale deed – defendant assured to execute the sale deed after his return from abroad - when the plaintiff asked the defendant to execute the sale deed, defendant No.1 told him that sale deed was registered in favour of defendant No.2, which is illegal- hence, the suit was filed for seeking specific performance – the defendants denied the execution of the agreement – the suit was partly decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that no evidence was led to prove that the defendant No.2 is bonafide purchaser for consideration – no evidence was led to prove that the compromise between the plaintiff and defendant No.1 was collusive in nature – the Trial Court and Appellate Court had ignored the material evidence- hence, appeal allowed and the suit of the plaintiff decreed for specific performance. (Para-8 to 10)

For the Appellant: Mr. Dinesh Sharma and Y. Paul, counsel for the appellant.

For Respondents No.1,3 to 8 and 10: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Regular Second Appeal stands directed against the impugned judgement and decree recorded by the learned Presiding Officer, Fast Track Court, Mandi, District Mandi in Civil Appeal Nos.38/2004, 167 of 2005 whereby he in affirmation to the verdict recorded by the learned trial Court partly decreed the suit of the plaintiff qua damages to the tune of Rs.50,000/- wherein he had sought a decree for the specific performance of agreement to sell of 18.12.1991. The plaintiff/appellant herein stands aggrieved by the concurrently recorded renditions of both the learned Courts below wherefrom he has instituted the instant appeal herebefore.

2. The brief facts leading to the lis inter se the parties were that the defendant No.1 agreed to sell ½ share of the land comprised in Khasra No.1060 and 1072, khata and khatouni No.37/48, measuring 7-10-16 bighas, situated in village Bhiarta, I 11, Rajgarh Balh, Tehsil

Sadar, District Mandi, H.P. to the plaintiff through an agreement to sell on 18.12.1991 for a consideration of Rs.20,000/- in presence of independent witnesses. It is averred that on the day of execution of the aforesaid agreement to sell, defendant No.1 received a sum of Rs.19,000/- as an earnest money from the plaintiff in presence of the witnesses and duly acknowledged the receipt thereof. The balance amount of consideration was to be paid by the plaintiff to the defendant at the time of execution and registrtion of the sale deed. It is claimed that the plaintiff is in possession of the suit land for the last 20 years. The defendants have admitted the possession of the plaintiff over the suit land in the said agreement to sell and it has been written in the agreement to sell that whenever the plaintiff will ask the defendant No.1 for execution and registration of the sale deed, then the defendant No.1 will get the sle deed executed and registered. It is claimed that in the month of August, 1992, the plaintiff told defendant No.1 that he is going to Foreign country, Saudi Arabia and after returning from that country, the sale deed qua the suit land will be executed and registered to which defendant No.1 agreed. It is further averred by the plaintiff that when the plaintiff returned from the aforesaid country in the month of May, 1995, he requested defendant No.1 to perform his part of the agreement to sell and get the sale deed executed and registered in his favour but defendant No.1 avoided to do so. Thereafter when the plaintiff pressed defendant No.1 to do the needful, then it was disclosed to him that defendant No.1 has sold the aforesaid suit land to defendant No.2 though a sale deed registered and executed on 9.7.1993 which sale is illegal and void. It is also claimed that the plaintiff was always ready to perform his part of agreement to sell and was ready to bear entire expense of registration of the said sale deed. It is further averred by the plaintiff that on the basis of the aforesaid sale deed, the defendants are interfering with the possession of the plaintiff over the suit land since 10.01.1996 and are bent upon to alienate the suit land. The defendants are also trying to change the nature of the same. The plaintiff asked the defendants to admit his claim and get the aforesaid sale deed canceled but the defendants refused to do so. Hence, the present suit has been filed. It is prayed that a decree for specific performance of agreement dated 11.12.1991 be passed in favour of the plaintiff and against the defendants and a decree for permanent prohibitory injunction in favour of the plaintiff and against the defendant and other persons for restraining them from causing any interference with the suit land has also been sought.

3. Defendants No.1 and 2 contested the suit and filed joint written statement, wherein they have taken preliminary objections inter alia limitation, maintainability, and cause of action. It is claimed by the defendants that the defendant No.1 had not entered into the alleged agreement to sell of ½ share out of the suit land on 18.12.1991. The said agreement is forged, fake and void ab initio and not enforceable in the eyes of law. It is further claimed that defendants did not receive Rs.19000/- as an earnest money from the plaintiff for consideration of the agreement to sell. It is further claimed that the plaintiff is not in possession of the suit land rather the suit land is in possession of the defendants. It is further claimed that the plaintiff was fully aware of the transaction of the suit land entered into inter se defendants No.1 and 2, which sale is perfectly legal, valid and defendant No.2 is owner in possession of the suit land. It is denied by the defendants that they are interfering over the suit land.

4. Defendant No.2 has filed amended written statement wherein, preliminary objection has been taken to the effect that a compromise deed dated 16.7.1999 executed by defendant No.1 in favour of the plaintiff is collusive one and the same has been filed only with a motive to defeat his claim and the said deed does not effect the valuable rights of defendant No.2 nor defendant No.2 is bound by it and the same be declared null and void. On merits, it is claimed that defendant No.1 is a bona fide purchaser and she made necessary inquiry about the title of defendant No.1 before purchasing the suit land. Defendant No.1 was in possession of the suit land prior to execution of the sale deed dated 9.7.1993 in favour of defendant No.2. Defendant No.2 has purchased the suit land for a sum of Rs.50,000/- from defendant No.1 and since then, defendant No.2 is owner in possession of the suit land. She has prayed for the dismissal of the suit of the plaintiff.

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

1. Whether the defendant No.1 entered into an agreement to sell the suit land for consideration of Rs.20,000/- on 18.12.1991 in favour of the plaintiff, as alleged? OPP

2. Whether the plaintiff has performed and is still ready to perform his part of agreement, as alleged? OPP

3. If issue Nos. 1 and 2 are proved, whether the plaintiff is entitled for the relief of specific performance of contract, as prayed? OPP

4. Whether the sale deed executed by defendant No.1 in favour of defendant No.2 is wrong and illegal? OPP

4(a). Whether compromise deed dt. 16.7.1999 executed by defendant NO.1 in favour of the plaintiff is collusive as alleged? If so its effect? OPD-2

4(b). Whether defendant No.2 is a bonafide purchaser for consideration, as alleged, if so its effect? OPD-2

5. Whether the suit is barred by limitation? OPD

6. Whether the suit is not maintainable? OPD

7. Whether the plaintiff has no cause of action? OPD

8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, it partly decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom by the plaintiff/appellant herein before the learned first Appellate Court, the latter Court while dismissing the plaintiff's appeal, affirmed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein has instituted herebefore the instant Regular Second Appeal assailing therein the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 22.12. 2008, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the Courts below were correct in declining the relief of specific performance to the appellant herein?

Substantial question of Law No.1:

8. Defendant No.2 despite prevalence at the relevant time of an agreement to sell qua the suit land executed inter se the plaintiff and defendant No.1 acquired title thereto under a registered deed of conveyance executed in her faovur by defendant No.1. Initially, the learned trial Court omitted to on the contentious pleadings of the parties at contest strike issues No.4(a) and 4(b). Both the aforesaid issues stood added under an order recorded on 8.10.2002 by the learned trial Court. The onus to adduce evidence thereupon was cast upon defendant No.2. She was directed to lead evidence thereupon on 17.12.2002. However, on 17.12.2002, the learned counsel appearing on behalf of defendant No.2 recorded a statement before the learned trial Court holding a communication therein of his not intending to lead evidence thereupon, whereupon the learned trial Court closed opportunity to defendant No.2 to adduce evidence in support of additional issues No. 4(a)and 4(b), whereupon onus in discharge thereof stood cast upon her. Imperatively, hence, defendant No.2 who during the currency of the relevant agreement to sell qua the suit land executed inter se the plaintiff and defendant No.1 had acquired titled thereto in pursuance to a registered deed of conveyance executed vis-a-vis her by defendant No.1, was enjoined to protect the relevant sale deed by making vivid pronouncements held in cogent evidence of probative worth qua hers being an ostensible owner qua the suit land. The apposite pronouncements qua the acquisition of title by her qua the suit land under a registered deed of conveyance executed vis-a-vis her by defendant No.1 holding validation were enjoined to hold invincible display qua hers being a bonafide purchaser of the suit land for value, the imperative

necessary proven ingredients whereof by adduction of unflinching evidence were qua hers preceding hers acquiring title qua the suit land hers holding an in depth incisive inquiry vis-a-vis the suit land specifically qua the trite factum qua existence thereat of a binding contractual agreement inter se the plaintiff and defendant No.1 qua the suit land, inquiry whereof unraveling disaffirmative elicitations whereupon alone she could be construed to be a bonafide purchaser of the suit land for value also thereupon she could hold an empowerment to validate the registered deed of conveyance executed qua the suit land during the currency inter se her and defendant No.1 a binding contractual agreement qua the suit land inter se them. However, she omitted to discharge the onus cast upon her qua issues No.4(a) and 4(b) which stand extracted hereinafter:-

> "4(a) Whether compromise deed dt. 16.7.1999 executed by the defendant No.1 in favour of the plaintiff is collusive, as alleged? OPD-2
>
> 4(B) Whether the defendant No.2 is a bonafide purchaser for consideration, as alleged, if so, its effect?OPD-2.

Her omission to adduce evidence on the aforesaid issues warranted a natural conclusion from both the learned Courts below qua hence hers not proving the trite factum qua hers preceding hers acquiring title to the suit land under a registered deed of conveyance executed vis-a-vis her by defendant No.1, hers holding an incisive in depth inquiry qua the suit land specifically qua the prevalence thereat of the relevant binding agreement to sell executed inter se the plaintiff and defendant No.1, yet hers standing disabled to unearth the aforesaid factum wherefrom the concomitant derivative is qua hers being not construable to be a bonafide purchaser qua the suit land for value nor hers being an ostensible owner thereof. Contrarily, for omission aforesaid she is to be construed to acquiesce to the factum of hers holding knowledge qua the prevalence at the relevant time of the relevant binding agreement to sell qua the suit land recorded inter se the plaintiff and defendant No.1. Corollary whereof, is qua hence, the registered deed of conveyance executed qua the suit property inter se her and defendant No.1 warranting invalidation. Both the learned Courts below even without defendant No.2 discharging onus qua additional issues No.4(a) and 4(b) subsequently struck under the orders of the learned trial Court had inaptly pronounced qua hers being construable to be a bonafide purchaser of the suit land for value. The compromise deed executed inter se the plaintiff and defendant No.1(since deceased) comprised in Ex. Px, whereupon both enjoined the learned trial Court to decree the suit of the plaintiff, though apparently stands coloured with a stain of collusiveness also visibly it stands recorded to defeat the interests of defendant No.2 in the suit land, especially when she acquired title thereto under a registered deed of conveyance recorded inter se her and defendant No.1, she dehors Ext.PX was also obliged to adduce the relevant germane evidence on trite issues No.4(a) and 4(b) qua hers hence being construable to be a bonafide purchaser of the suit land for value. Reiteratedly when she omitted to do so, the effect, if any of collusiveness occurring inter se the plaintiff and deceased defendant No.1 in the drawing up Ex. Px is rendered frail, whereas the omission of defendant No.2 to discharge the onus cast upon her qua additional issues aforesaid assumes paramount relevance. Since, onus thereto stood undischarged by her, the apt sequel thereof is qua defendant No.2 being not construable to be an ostensible owner of the suit land nor the registered deed of conveyance executed inter se the deceased defendant No.1 and defendant No.2 holding any validation. Also subsequent alienations of the suit land made by defendant No.2 in favour of respondents No. 3 to 10 herein also suffer from an alike stain of invalidation. All the aforesaid subsequent sale deeds are also quashed and set aside.

9. The above discussion unfolds the fact that the conclusions as stand arrived at by the learned first Appellate Court as also by the learned trial Court standing not based upon a proper and mature appreciation of the evidence on record. While rendering the apposite findings, the learned first Appellate Court as also the learned trial Court have excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the plaintiff/appellant and against the defendants/respondents.

10. In view of above discussion, the present Regular Second Appeal is allowed and the judgements and decrees rendered by both learned Courts below are set aside. Consequently,

the suit of the plaintiff is decreed for specific performance of contract of 18.12.1991 and the legal representative of deceased defendant No.1 i.e. respondent No.2 is directed to execute sale deed qua the suit land comprised in Khata Khatuni No. 37/48, khasra Nos. 1060, 1072 measuring 7-10.16 bighas situated in village Bhiarta, Illaqua Hatgarh Balh,Tehsil Sadar, District Mandi, H.P. in favour of the plaintiff within two months from today. The sale deed executed by defendant No.1 in favour of defendant No.2 is quashed and set aside. In sequel, subsequent alienations of the suit land made by defendant No.2/respondent No.1 herein in favour of respondents No.3 to 10 herein are also quashed and set aside. Decree sheet be prepared accordingly.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh ……Appellant.
Versus
Kamlesh Kumar & others. ……Respondents.

Cr. Appeal No. 434 of 2011.
Reserved on: 29.7.2016.
Date of decision: 28.10.2016.

N.D.P.S. Act, 1985- Section 20- Accused K and M were found in possession of 2.5 k.g and 2.2. kg. charas, respectively – accused K had facilitated transportation of charas by accused M and accused S had facilitated transportation of charas by other accused - accused were tried and acquitted by the trial Court- held in appeal that acquittal was recorded on the basis of omissions, procedural irregularities and contradictions – the prosecution version was proved by the testimonies of the police officials- recovery was effected from the bag and there was no need of compliance with Section 50 of N.D.P.S. Act – I.O. should have filled NCB form separately but no such guidelines were formulated at the time of recovery and the omission to do so will not make the prosecution case doubtful- I.O. specifically stated in cross-examination that he had prepared only one NCB form- the link evidence was proved- merely, because the parcels were not marked will not lead to the acquittal of the accused – the defence version was not probable – any defect in the investigation will not result in the acquittal of the accused- no evidence was brought on record to show that accused S had facilitated the transportation of charas – appeal allowed- accused K and M convicted for the commission of offence punishable under Section 20 of N.D.P.S. Act.(Para-12 to 34)

Cases referred:
Girija Prasad vs. State of M.P., (2007) 7 SCC 625
Makhan Singh vs. State of Haryana, (2015) 12 SCC 247
Rakesh Kumar vs. State of H.P. 2005 (2) Sim. L.C. 332
Noor Aga vs. State of Punjab, (2008) 16 SCC 417

For the appellant :Mr. D.S. Nainta and Mr. Virender Verma, Addl. AGs.
For the respondents :Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

The learned Special Judge, (Fast Track Court) Kullu, Himachal Pradesh, has acquitted accused Kamlesh Kumar and accused Mahender Singh of the charge under Section 20(b)(ii) (c) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985

(hereinafter referred to as 'the Act' in short), whereas their co-accused Swaru Ram under Section 20(b)(ii) (c) read with Section 29 of the Act, vide impugned judgment dated 17.5.2011, passed in sessions trial No. 43 of 2010.

2. The allegations against accused Kamlesh Kumar, in a nut shell, are that on 22.3.2010, around 2:00 AM (midnight) at Khalara-nullah, District Kullu, during the course of checking of the bag he was carrying with him, charas weighing 2.500 kgs was recovered therefrom him whereas charas weighing 2.200 kgs from his co-accused Mahender Singh. Since accused Kamlesh allegedly was found to be in the possession of charas whereas facilitated the illicit trafficking of charas by his co-accused Mahender Singh, therefore stated to have committed an offence punishable under Section 20(b)(ii) (c) read with Section 29 of the Act. Similarly, charge against Mahender Singh is that he was not only found to be in possession of charas weighing 2.200 kgs but also facilitated the illicit trafficking of charas weighing 2.500 kgs. by his co-accused Kamlesh Kumar and thereby he has also committed an offence punishable under Section 20(b)(ii) (c) read with Section 29 of the Act. If coming to the allegations against their co-accused Swaru Ram, he allegedly facilitated the transportation of 2.500 kgs charas by accused Kamlesh Kumar and 2.200 kgs. of charas by accused Mahender Singh and thereby abetted the commission of offence by his co-accused and committed the offence punishable under Section 20(b)(ii) (c) read with Section 29 of the Act.

3. The record reveals that on 22.3.2010 around 1:00 AM in the midnight, a police party headed by PW-4 ASI Hem Raj of Police Station Sadar Kullu left towards village Bhadai on Lag Valley road for laying naka to detect the crimes. Rapat Ext. PW-2/A was entered in rapat Rojnamcha by PW-2 Constable Narender. The other members of the raiding party were PW-3 Const. Krishan Chand, HC Parmender Singh and Const. Khoob Ram. The official vehicle No. HP-34-A-9986 was being driven by HHG Aadh Nath. At about 2:00 AM, when the police party was present at Khalara nullah bridge, three persons were spotted coming down from village Bhadai towards Kullu side. They were seen with the help of search light. Accused Kamlesh and accused Mahender Singh were found to be carrying bags on their back whereas accused Swaru Ram was empty handed. They were spotted by the police and their antecedents ascertained. Accused Kamlesh Kumar was carrying military coloured bag with him whereas accused Mahender Singh was carrying cream coloured bag. The I.O. PW-4 ASI Hem Raj suspected that the accused might be carrying some narcotic drugs or psychotropic substance with them, therefore, the option was given to them for being searched either before a Magistrate or a Gazetted Officer, vide memos Ext. PW-3/A, PW-3/B and PW-3/C. They allegedly opted for being searched by the police officials present on the spot. On this, the I.O. first offered his own search vide memo Ext. D-1, however, nothing incriminating was recovered from him. Being odd hours and the place an isolated one, it was not possible to associate someone as independent witness, therefore, I.O. PW-4 ASI Hem Raj has associated Krishan Chand (PW-3) and HC Parminder as witnesses and conducted personal search of all the three accused. Nothing incriminating was found in their possession during their personal search. However, during the course of search of the bag allegedly military coloured, being carried by accused Kamlesh Kumar, one yellow coloured polythene bag was found kept therein. On search of the polythene bag, charas in the shape of sticks was found kept therein. The recovered charas was weighed and it was found to be 2.500 kgs. The same was again put in the same polythene envelope and in the same bag. Thereafter, the bag was wrapped in a piece of cloth (pulinda), which was sealed with seven seals of seal impression "A". During the course of checking of the bag being carried by accused Mahender Singh, one polythene bag was recovered therefrom. On the search of the said polythene bag, charas weighing 2.200 kgs. was recovered in the shape of sticks. The polythene envelope was put in the same bag and thereafter wrapped in pulinda, which was also sealed with seven impressions of seal "A". NCB-I form Ext. PW-1/C was filled in triplicate. Sample of seal Ext. PW-3/E was separately drawn on a piece of cloth. The parcels containing the recovered charas were thereafter taken into possession vide recovery memo Ext. PW-3/D. It is thereafter, rukka Ext. PW-4/A was prepared and sent through PW-3 Const. Krishan Chand to Police Station, Kullu for registration of the case. Site plan Ext. PW-4/B was also prepared and the statements of the witnesses recorded as per their version.

4. The accused were interrogated. The case file was brought to spot by PW-3 Constable Krishan Chand and received by IO PW-4 ASI Hem Raj at 6:15 AM. It is thereafter, the accused were arrested at 6:30 AM. Information qua the offence they committed and the provision for punishment therefor was given to all the three accused vide memos Ext. PW-3/F to Ext. PW-3/H and it is thereafter they were arrested.

5. On the completion of investigation on the spot, the I.O. along with the case property and accused came to Police Station, Kullu. The case property was produced before SHO Tej Ram (PW-7) along with sample of seal and NCB-I form in triplicate. PW-7 SHO Tej Ram has resealed both the pulindas with 3-3 impressions of seal "T". The relevant columns of NCB-I form Ext. PW-1/C were also filled in. The sample of seal "T" Ext. PW-7/B was also drawn separately. Thereafter, PW-7 SHO Tej Ram had handed over the case property along with documents to Ram Krishan, the then MHC, Police Station, Kullu. PW-1 has made the entries Ext. PW-1/A qua receipt of sealed pulindas in the malkhana register at Sr. No. 48. He handed over the case property vide RC No. 90/2010 Ext. PW-1/B to Const. Inder Dev PW-5 with a direction to deposit the same at FSL, Junga. Before that, the entries against sr. No. 12 of NCB-I form Ext. PW-1/C were made by him. Constable Inder Dev (PW-5) had deposited the case property in safe custody in the laboratory and produced the receipt on RC before PW-1, the MHC. The special report Ext. PW-6/A was prepared and handed over to Addl. SP, Kullu. PW-6, the then Reader to DSP (Hqs.) Kullu, has made entries Ext. PW-6/B in the relevant register in this regard.

6. On receipt of the report of the Chemical Examiner Ext. PW-8/A and on completion of the investigation, report under Section 173 Cr.P.C. was filed against all the three accused in the trial Court.

7. Learned trial Court, on consideration of the report and the documents annexed therewith as well as hearing the learned Public Prosecutor and also the defence counsel, has found a prima-facie case for the commission of offence punishable under Section 20(b)(ii) (c) read with Section 29 of the Act against all the three accused. The charge against them was, therefore, framed accordingly.

8. Since the accused persons have pleaded not guilty and claimed trial, therefore, the prosecution in order to sustain the charge framed against each of them, has produced on record oral as well as documentary evidence. The material prosecution witnesses are PW-3 Constable Krishan Chand and I.O PW-4 ASI Hem Raj. The remaining prosecution witnesses being police officials are also formal as they remained associated with the investigation of the case in one way or the other. Their testimony as such, at the most, can be used as a link evidence.

9. The learned Special Judge, after holding full trial and on analyzing the oral as well as documentary evidence available on record, has arrived at a conclusion that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. They all have, therefore, been acquitted of the charges framed against each of them. The State, being aggrieved and dissatisfied with the impugned judgment has questioned the legality and validity thereof on the grounds, inter alia, that the prosecution evidence has been appreciated by the learned trial Court in a slip shod and perfunctory manner. The trial Court has allegedly set unrealistic standards to evaluate the cogent and reliable evidence produced by the prosecution. The testimony of the prosecution witnesses has been discarded for untenable reasons in the absence of any proof of their enmity with the accused. The findings recorded by the Court below are stated to be based upon conjectures and surmises. Being so, the impugned judgment has been sought to be quashed and set aside and all the accused have been sought to be convicted and sentenced.

10. Learned Addl. Advocate General has vehemently argued that the testimony of police officials is as much good as that of any other independent person. Also that PW-3 Constable Krishan Chand and PW-4 IO ASI Hem Raj, while in the witness box, have made consistent statements qua material aspects of the case. Their testimonies have erroneously been brushed aside by learned trial Court and undue weightage has been given to non-joining of

independent witnesses by the I.O. The contradictions, minor in nature, are stated to be given undue weightage.

11. On the other hand, Mr. Ajay Chandel, learned defence counsel, has pointed out from the record that the contradictions in the statements of the prosecution witnesses as taken note of by learned trial Judge goes to the very root of the prosecution case. Therefore, in order to bring guilt home to the accused, it is not safe to place reliance upon the testimonies of official witnesses PW-3 Constable Krishan Chand and PW-4 IO ASI Hem Raj.

12. The only point need adjudication in this case is as to whether irrespective of prosecution having proved its case against the accused beyond all reasonable doubt, they have been erroneously acquitted of the charge framed against them.

13. In order to decide the fate of this case, the reappraisal of the evidence produced by the prosecution and the accused in their defence is required. However, before that it is desirable to note that an offence under the Act is not only heinous but serious in nature. An offence under the Act is not against an individual but against the Society, as a whole, because the illicit trafficking of drugs not only affects a particular individual but the public at large and in particular our young generation. The NDPS Act is a piece of social legislation enacted with the sole idea to curb illicit trafficking of drugs. A case registered under the Act, therefore, needs consideration, keeping in mind the above factors. At the same time, keeping in view there being provision of deterrent punishment against an offender, if ultimately held guilty, the provisions contained under the act to safeguard an offender from conviction and sentence also need to be looked into thoroughly so that any innocent person may not be convicted and sentenced.

14. The statute casts a duty upon the prosecution not only to prove beyond all reasonable doubts the commission of an offence by an offender, but additionally the compliance of various provisions mandatory in nature enshrined thereunder. Thus, law casts a duty on the Courts, seized of the case registered under the Act, to deal with it with all circumspect and caution and before recording the findings of conviction against an offender to satisfy itself about the compliance of procedural requirements and also the availability of cogent and reliable evidence connecting the accused with the commission of the offence.

15. The perusal of the judgment under challenge reveals that the pleas raised by the accused in their defence that the options under Section 50 of the Act has not been given to them in accordance with law and that on account of no independent person having been associated as a witness, they cannot be held guilty for the commission of the alleged offence, have been rejected by learned trial Court while concluding that there is no ambiguity in the matter of option for their search given by the I.O. ASI Hem Raj (PW-4), vide memos Exts. PW-3/A, PW-3/B and PW-3/C. Also that, being odd hours i.e. 2:00 AM (midnight) and the place where the accused were apprehended an isolated as well as witnesses PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj, both have stated that no one was available for being associated as independent witness, the non-joining of the independent witness in the instant case is stated t be not fatal to the prosecution case. The findings, so recorded by learned trial Court, have attained the finality, being not challenged by the accused persons by filing appeal(s) in this Court.

16. Learned trail Judge has recorded the findings of acquittal of the accused on being influenced by so called omissions and procedural irregularities and contradictions i.e. filling up of NCB-I form separately, availability of only one set of NCB-I form on record, there being no mention of parcel No. 1 and parcel No. 2 by the I.O. when the same were sealed after the recovery effected from accused Kamlesh and accused Mahender Singh whereas there is mention of parcel No. 1 and parcel No. 2 in the report of the chemical examiner Ext. PW-8/A, the I.O. failed to put any specific mark on the parcels to show as to which parcel contains the charas recovered from each of the accused and that in the NCB-I form, total weight of the charas has been mentioned and there is no mention as to how much charas was recovered from the bag recovered from the possession of accused Kamlesh and how much from that of accused Mahender Singh. The so called discrepancies in the statements of the witnesses PW-3 Const. Krishan Chand and PW-4

ASI Hem Raj qua the colour of the bag recovered from accused Kamlesh and one from accused Mahender Singh also weighed with learned trial Judge while recording the findings of acquittal against them. The plea in defence that one ITBP jawan had teased wife of *'rehriwala'* and that said Jawan was summoned to the Police Station where compromise was arrived at and it is accused Kamlesh who was one of the signatory to the compromise deed, as emerges from the trend of cross-examination of PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj, raised by the accused persons also weighed with learned trial Judge while acquitting the accused persons. Learned trial Judge after noticing such lapses, procedural irregularities and discrepancies in the prosecution evidence has acquitted all the accused from the charges framed against each of them. As regards the commission of offence punishable under Section 29 of the Act, learned trial Judge has concluded that no investigation was made to show the nexus, if any, between all the three accused. The evidence that there was meeting of mind and accused Kamlesh as well as accused Mahender Singh conspired with accused Swaru Ram and it is said accused Swaru Ram who had abetted the other co-accused in the commission of the offence under the Act is not available on record. The I.O. even is stated to have not recorded any confessional statement of accused Kamlesh and accused Mahender Singh regarding involvement of their co-accused Swaru Ram. It has rather been observed that merely accompanying accused Kamlesh and accused Mahender Singh in odd hours does not make accused Swaru Ram liable for the recovery of charas effected from them.

17. It is seen that learned trial Judge has rightly emphasized that the confessional statements of accused Kamlesh and accused Mahender Singh regarding involvement of accused Swaru Ram has not been recorded and as such no case under Section 29 of the Act has been found to be made out against accused Swaru Ram.

18. The present is a case of recovery of charas weighing 2.500 kgs. from the bag in possession of accused Kamlesh whereas 2.200 kgs from the bag in the possession of accused Mahender Singh during odd hours i.e. 2:00 AM (midnight). Learned trial Judge, after taking note of the procedural irregularities, discrepancies and contradictions in the prosecution evidence has concluded that the recovery of charas from the conscious and physical possession of the accused is not proved.

19. Be it stated that the recovery of the contraband from the exclusive and conscious possession of the accused is *sine qua non* to bring guilt home to him. This aspect needs evidence, cogent and reliable. The joining of independent persons to witness the search and seizure is always in the interest of fair trial. Anyhow, in this case learned trial Judge, has already concluded that it was not possible to join the independent person as a witness and also observed that the testimony of official witnesses, if inspire confidence, can also be relied upon to bring the guilt home to the accused. The Apex Court in ***Girija Prasad vs. State of M.P., (2007) 7 SCC 625*** has held that the testimony of official witnesses is as much good as that of independent person, however, the same is required to be examined with all circumspection and caution. Similar is the ratio of the judgment of the apex Court in ***Makhan Singh vs. State of Haryana, (2015) 12 SCC 247.*** Being so and the findings recorded by learned trial Judge that it was not possible for the I.O to have associated independent person as witness in this case, the testimony of official witnesses, who are PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj, is worthy of credence or not, has to be adjudged vis-à-vis given facts and circumstances of the case and also the documentary evidence available on record.

20. The present is a case of recovery of huge quantity of charas from the conscious and physical possession of accused Kamlesh and accused Mahender Singh. They were apprehended along with their co-accused Swaru Ram during odd hours. We can make reference to Ext. PW-2/A, daily diary report to arrive at a conclusion that the police party headed by PW-4 ASI Hem Raj left the Police Station at 1:00 AM (midnight) for laying nakka towards village Badhai side on the Lag valley road. All the three accused were nabbed by the police at Khalara-nullah at 2:00 AM. It is not their defence that they were not nabbed at Khalara-nullah in the manner as claimed by the prosecution. The plea in defence that on 21.3.2010 accused Kamlesh Kumar was

present in the Police Station and that he had witnessed compromise-deed in a case of teasing of wife of some *'rehriwala'* by an ITBP jawan rather reveals that the accused were present in the Police Station for the reason that such suggestion was made to PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj on their behalf by the learned defence counsel representing them. Had they not been apprehended in the manner as claimed by the prosecution, they would have explained the reason of their presence in the Police Station. The plea of accused Swaru Ram that he was waiting for arrival of bus at bus stand Kullu also reveals that the said accused has also admitted his presence at Kullu. Since all the accused belong to different villages in Tehsil Padhar, Distt. Mandi, it is not known as to why they had gone to Kullu and more particularly why they were in the Police Station on 21.3.2010. As a matter of fact, recovery of the charas has also been made from them during the night intervening 21/22.3.2010. Therefore, it would not be improper to conclude that the accused were nabbed by the police party headed by PW-4 ASI Hem Raj during the night intervening 21/22.3.2010 at Khalara-nullah around 2:00 AM. Spot map Ext. PW-4/B can also be relied upon to substantiate the prosecution case in this regard.

21. Now, if coming to the search and seizure, there is no need to go into the question of compliance of Section 50 of the Act because the findings recorded by learned trial Judge qua this aspect of the matter has attained finality. The search memo Ext. PW-3/D, rukka Ext. PW-4/A, FIR Ext. PW-7/A and the special report Ext. PW-4/C substantiate the prosecution case qua accused Kamlesh was carrying military coloured bag whereas accused Mahender Singh cream coloured bag. True it is that the cream coloured bag is Ext. P-2 whereas military coloured bag is Ext. P-6. No doubt, PW-3 Const. Krishan Chand has identified the bag Ext. P-2 to be the same which according to him was recovered from accused Kamlesh Kumar whereas bag Ext. P-6 from accused Mahender Singh. However, he seems to have confused himself because cream coloured bag Ext. P-2 as per the prosecution case supported by his own testimony in his examination-in-chief and the documents, search memo Ext. PW-3/D, rukka Ext. PW-4/A, FIR Ext. PW-7/A and the special report Ext. PW-4/C, was being carried by accused Mahender Singh whereas military coloured bag Ext. P-6 by accused Kamlesh. If coming to the testimony of PW-4 ASI Hem Raj, he has specifically stated that military coloured bag Ext. P-6 was being carried by accused Kamlesh whereas cream coloured bag Ext. P-2 by accused Mahender Singh. Therefore, the statement of PW-3 Const. Krishan Chand that cream coloured bag was being carried by accused Kamlesh whereas green (military) coloured bag by accused Mahender Singh is not a contradiction of such a nature to belie the prosecution case, which finds support from the testimony of PW-4 ASI Hem Raj and also the documentary evidence referred to hereinabove. Therefore, it would not be improper to conclude that the bag Ext. P-6 was being carried by accused Kamlesh Kumar whereas cream coloured bag Ext. P-2 by accused Mahender. We are, therefore, not in agreement with the findings to the contrary recorded by learned trial Judge.

22. This very set of evidence i.e. search memo Ext. PW-3/D, rukka Ext. PW-4/A, FIR Ext. PW-7/A and the special report Ext. PW-4/C as well as testimonies of PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj leave no manner of doubt that charas weighing 2.500 kgs. was recovered from a green coloured polythene bag i.e. rucksack (bag) Ext. P-6 which was being carried by accused Kamlesh Kumar with him. Also that charas weighing 2.200 kgs. was recovered from a polythene white coloured bag which was found to be kept in the rucksack (bag) Ext. P-2 being carried by accused Mahender Singh. The recovered charas was weighed by the I.O. and thereafter put in the same polythene bag and thereafter in the rucksacks (bags) Ext. P-6 and P-2, which were sealed in a parcel of cloth with 7-7 seals of impression "A".

23. If coming to filling up of NCB-I form, the findings recorded by learned trial Judge that two separate NCB-I forms were filled in are misconceived for the reason that no doubt in the seizure memo Ext. PW-3/D and rukka Ext. PW-4/A, there is mention of filling up of NCB-I form twice i.e. firstly after recovery of charas from the bag which was being carried by accused Kamlesh and secondly after the recovery of charas from the bag which was with accused Mahender Singh. NCB-I form Ext. PW-1/C also reveals that against column No. 2, name of both the accused numbering them as 1 & 2 i.e. 1-Kamlesh Kumar and 2- Mahender Singh, also find mention in the same form. However, it cannot be inferred from the above documentary evidence

that NCB-I forms were filled in separately. Merely that the I.O. has made reference of making entries in NCB-I form, in the seizure memo and also other documents referred to hereinabove at two different occasions i.e. firstly on the recovery of charas from the bag of accused Kamlesh and secondly after the recovery of charas from the bag of accused, could have not taken to infer that the NCB-I form qua recovery of charas from both the accused were filled in separately and that one set of NCB-I form is missing. True it is that the I.O. in order to rule out every doubt should have filled in NCB-I form separately, as though of late, directed by this Court in a recent judgment dated 2.8.2016 rendered in Cr. Appeal No. 332 of 2011, titled State of H.P. vs. Vijender Singh. However, such requirement of law in the given facts and circumstances should have not been given undue weight age for the reason firstly that no such guidelines were formulated for being followed by the I.Os. at the relevant time and secondly in view of cogent and reliable evidence which supports the recovery of charas from the bags accused Kamlesh and Mahender were carrying with them. Therefore, one set of NCB-I form which is Ext. PW-1/C was filled by the I.O and both accused numbered as 1 & 2 with necessary particulars, such as their name, parentage and address etc. therein. Against column No. 4, the quantity of charas recovered from them has been mentioned as 4.700 grams whereas its shape like sticks (batties). The non-mentioning of the quantity of the charas recovered from both the accused separately in the NCB-I form in view of the discussion hereinabove is also not fatal to the prosecution case for the reason that in the documentary evidence, as discussed hereinabove, the total quantity of charas i.e. 4.700 grams finds mention. Even the I.O. PW-4 ASI Hem Raj has clarified this aspect of the matter in his cross-examination that no separate NCB-I forms were prepared after effecting recovery from accused Kamlesh Kumar but both recoveries were mentioned in the single NCB-I form. The I.O. even has clarified that after making recovery from accused Mahender, NCB-I form was not filled in as a whole and rather few entries were added consequent upon such recoveries in the same form.

24. PW-3 Const. Krishan Chand has taken the rukka Ext. PW-3/D to the Police Station. It is thereafter FIR Ext. PW-7/A was registered. All the documents prepared before registration of the case find mention of the number of FIR in red ink.

25. The production of parcels containing case property along with sample of seal “A” and NCB-I form in triplicate stands proved from the perusal of daily diary rapat Ext. PW-2/B and also from the testimony of I.O. PW-4 ASI Hem Raj as well as that of the SHO Tej Ram (PW-7). Not only this, such evidence, if available on record, also substantiate the prosecution story qua resealing of the case property by SHO Tej Ram (PW-7) with 3-3 impressions of seal “T”. The impression of seal “T” has also been drawn and the same is Ext. PW-7/B. PW-1 HC Ram Krishan is MHC. It is with whom the SHO Tej Ram (PW-7) has entrusted the sealed parcels containing the recovered charas along with the NCB-I form in triplicate, sample of seals “A” and “T” and also the copy of seizure memo. He had received the same and entered at Sr. No. 48 of the malkhana register. The extract of such entries is Ext. PW-1/A. The parcels of case property were deposited with PW-1 Ram Krishan on 22.3.2010. The same were forwarded by him to Forensic Science Laboratory on 22.3.2010 through PW-5 Constable Inder Dev vide RC No. 90 of 2010 Ext. PW-1/B. The case property was received in the laboratory on 23.3.2010 as per the endorsement encircled red at point ‘A’ on the R.C. This aspect of the prosecution case finds support from the testimony of PW-1 MHC Ram Krishan and also PW-5 Constable Inder Dev. Now, if coming to the report of Forensic Science Laboratory Ext. PW-8/A, two parcels sealed with seals “A” and “T” along with samples of seals and NCB-I form were received in the laboratory. Merely that in the report against column No. 7, there is mention that parcels were marked as 1 & 2, is again not fatal to the prosecution case.

26. Above all, both the accused have been numbered as 1 & 2 in the NCB-I form as noticed, hereinabove. The I.O. may have numbered the parcels also as 1 & 2, however, omitted to make mention thereof in the documentary evidence i.e. seizure memo and recovery memo etc. Such a lapse, in our opinion, is not of such a serious nature so as to render the recovery of charas from the accused doubtful. At the most, it is a procedural lapse and also is the result of faulty investigation. If coming to the result of the chemical analysis, the report Ext. PW-8/A

reveals that the exhibits 1 & 2 which were sent for chemical analysis were found containing the extracts of cannabis and as such were samples of charas.

27. The non-mentioning of some specific marks on the parcels has also weighed with learned trial Judge, as in his opinion, without there being any such marks, it cannot be inferred as to which parcel contained the charas recovered from accused Kamlesh Kumar and which parcel from accused Mahender Singh. We, however, are not in agreement with such findings recorded by learned trial Judge also for the reason that the charas recovered from accused Kamlesh was 2.500 kgs. whereas from accused Mahender Singh, 2.200 kgs. In the Forensic Science Laboratory when both the exhibits were weighed, the same were found to be 2.188 kgs & 2.492 kgs which is 12 grams short so far as charas recovered from accused Mahender Singh and 8 grams short from accused Kamlesh. Such minor variation in weight on account of weighing the same at two different occasions and with two different set of scales and weights, is bound to occur. Therefore, the report of chemical examiner also indicate the separate quantity of charas, sealed in the parcels hence, it would not be improper to conclude that the exhibits sent for analysis i.e. 2.188 kgs in weight was the charas recovered from accused Mahender Singh whereas 2.492 kgs. from accused Kamlesh Kumar. The law laid down by a Single Bench of this Court in ***Rakesh Kumar vs. State of H.P. 2005 (2) Sim. L.C. 332*** relied upon by learned trial Judge is not applicable in this case and rather in the given facts and circumstances of the case, distinguishable.

28. True it is that a suggestion was given on behalf of accused to the prosecution witnesses i.e. PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj that one ITBP jawan was brought to the Police Station, Sadar Kullu as he allegedly had teased the wife of one *'rehriwala'* on 21.3.2010 and that the compromise was arrived at and accused Kamlesh was associated as one of the signatory thereto. The SHO Tej Ram (PW-7) though had admitted that one ITBP jawan was brought to Police Station, however, as per his version not in connection with some complaint against him qua teasing wife of *'rehriwala'* rather on account of there being an altercation of that jawan with the police personnel in the hospital. As per his further version, a compromise was effected and written at the Police Station. He also made the statement while in the witness box as PW-7 that he can produce the said compromise before the Court during the course of trial. Therefore, he was examined by the accused in their defence as DW-1. In his examination-in-chief as DW-1, he expressed his inability to produce that compromise as according to him, no such record was available in the Police Station. The suggestion that the compromise is available, however, he has withheld the same was denied, being wrong. In his cross-examination conducted on behalf of accused Swaru Ram, he expressed his inability to tell that accused Kamlesh was one of the marginal witness to the compromise, however, the suggestion that he is withholding the said document from the Court initially and that all the accused were present in the Police Station as they were brought there for interrogation regarding some unclaimed bag, have been denied by this witness, being wrong. Interestingly enough, the suggestions, so given, amply demonstrate that all the accused were brought by the police to the Police Station and present there, however, in connection with their interrogation regarding unclaimed bag is a false plea raised only during the cross-examination of SHO Tej Ram (PW-7) aforesaid, because no such suggestion was given to PW-3 Const. Krishan Chand and the I.O. PW-4 ASI Hem Raj during their cross-examination. The accused belong to Mandi district and if it is believed that there was some unclaimed bag, it was at Kullu. Where was the occasion to the police to have called them for interrogation in connection with that bag. Therefore, the plea the accused raised in their defence is hardly of any help to them and rather implicates them in the commission of the offence.

29. This Court is oblivious to the legal principle that in a case of this nature, where there is stringent provision qua punishment of offenders, if held guilty, the Court must look forward for cogent and reliable evidence and the prosecution is under obligation to prove its case beyond all reasonable doubt. This Court is also alive to the legal principle that more serious is the offence, the stricter degree of proof is required to hold the offender guilty. However, in view of the evidence discussed hereinabove, we find the present a case where the prosecution has proved its case against accused beyond all reasonable doubt. The findings hereinabove recorded by us

on re-appraisal of the evidence available on record, brings this case out of the purview of the judgment of the apex Court in ***Noor Aga vs. State of Punjab, (2008) 16 SCC 417,*** relied upon by learned trial Judge to form an opinion that the evidence produced by the prosecution is not cogent and reliable and that the same rather suffers from discrepancies as well as contradictions. We rather find the present a case where the prosecution has been able to bring guilt home to accused Kamlesh and accused Mahender Singh with the help of cogent and reliable evidence. The minor discrepancies and procedural irregularities, as we noticed hereinabove, neither goes to the very root of the prosecution case nor can be treated fatal to it. As a matter of fact, the present at the most, can be said to be a case of faulty investigation, hence does not render prosecution story doubtful. The testimonies of both the witnesses i.e. PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj are consistent and corroborate the entire prosecution case. Mere confusion that which of the bag was being carried by which of the accused, as highlighted hereinabove, is also of no help to the accused for the reason that the documentary evidence and also the testimony of PW-4 ASI Hem Raj, the I.O amply demonstrate that bag Ext. P-6 was being carried by accused Kamlesh whereas bag Ext. P-2 by accused Mahender Singh. Both the bags, when taken out from the parcels, were found to be green (military) coloured and creamish in colour. The prosecution case is also that accused Kamlesh was carrying military coloured bag i.e. green and accused Mahender Singh was carrying cream coloured bag.

30. The prosecution has been able to prove the recovery of charas weighing 2.500 kgs. from the exclusive and conscious possession of accused Kamlesh whereas 2.200 kgs. from that of accused Mahender Singh. Therefore, it was for the accused persons to have explained their innocence as envisaged under Section 35 and 54 of the Act. The present, as such, is a case where presumption as envisaged under Sections 35 and 54 of the Act has to be drawn against accused and as they failed to explain their innocence, hence on this score also, it would not be improper to conclude that the charas weighing 2.500 kgs and 2.200 kgs. has been recovered from their exclusive and physical possession. The findings to the contrary, as recorded by learned trial Judge, are neither legally nor factually sustainable.

31. Now if coming to the involvement of accused Swaru Ram in the commission of offence punishable under Section 29 of the NDPS Act, no evidence is forth coming to show that the said accused has abetted the commission of offence punishable under Section 20 of the NDPS Act by his co-accused Kamlesh Kumar and Mahender Singh. As a matter of fact, in order to bring the guilt home to an accused for the commission of offence under Section 29 of the NDPS Act, some positive evidence to show that all the accused conspired with each other and as a result of such conspiracy, abetted the commission of offence under the Act, can be said to have committed the offence punishable under Section 29 of the Act. In the case in hand, the I.O., PW-4 ASI Hem Raj, in his examination-in-chief, has not uttered even a single word that any such evidence with regard to meeting of mind having taken place in this matter and all the accused conspired with each other and as a result thereof, accused Swaru Ram agreed to accompany them to arrange for a buyer, to whom his co-accused could have sold the charas in their possession. True it is that in the cross-examination of this witness and also constable Krishan Chand PW-3, all the three accused during the course of their interrogation had canvassed that accused Swaru Ram agreed to arrange for a buyer so that his co-accused could sell the charas in their possession and for that his co-accused had agreed to pay Rs. 2,000/- to him. The I.O. in his cross-examination conducted on behalf of the accused Swaru Ram has admitted that no statement in this regard was recorded during the course of the investigation. Had it been so, it is not understandable as to what prevented the I.O. PW-4 ASI Hem Raj from recording such confession, if made by the accused persons. Learned trial Judge has also taken into consideration the provisions contained under Section 10 of the Indian Evidence Act, 1872 and also the case law attracted in such a situation. Therefore, in our opinion, the findings so recorded, call for no interference in the present appeal.

32. A perusal of the evidence available on record and also the given facts and circumstances as well as law cited at the Bar, make it crystal clear that the present is not a case where it can be said that the prosecution has failed to prove its case against accused Kamlesh

Kumar and Mahender Singh, beyond all reasonable doubts. No doubt, the witnesses are police officials, because as rightly observed by learned trial Judge, it was not possible to associate independent person as witness being odd hours of the night. However, the evidence as has come on record by way of testimony of official witnesses is consistent, categoric, cogent as well as reliable. The prosecution, as such, has discharged the onus to prove that the charas has been recovered from the exclusive and conscious possession of accused Kamlesh Kumar and Mahender Singh. As already observed, the present is a fit case where the presumption as envisaged under Section 35 and 54 of the Act can also be drawn against the accused because onus to prove otherwise that they were neither apprehended nor charas recovered from them stood shifted on them.

33. Both the accused, the residents of District Mandi have failed to explain as to what they were doing at Khalara-nullah and that too in odd hours during the night intervening 21/22.3.2010. The trend of the cross-examination of the prosecution witnesses and also that of DW-1 reveal that on that day, they were present in the Police Station. Why they would have been called from their native place in district Mandi for interrogation in connection with recovery of the so called unclaimed bag also remained unexplained. The accused, as such, have failed to discharge the onus upon them. Therefore, in view of the ratio of the judgment of the Hon'ble Apex Court in ***Noor Aga's*** case (supra), the presumption under Sections 35 and 54 of the Act is drawn against both of them. It being so, the only inescapable conclusion would be that the commission of offence punishable under Section 20 of the Act is proved against accused Kamlesh Kumar and accused Mahender Singh. They are, therefore, convicted accordingly. However, no case for the commission of offence punishable under Section 29 of the Act is made out against accused Swaru Ram. The findings of his acquittal as recorded by learned trial Judge are thus upheld. His personal bond is cancelled and surety discharged.

34. Convict Kamlesh Kumar and convict Mahender Singh, however, to surrender to their bail bonds and appear before this Court on 17.11.2016 at 10:00 AM for being heard on the quantum of sentence. Learned counsel representing the convicts submits that it may not be possible for him to contact them and ensure their presence in this Court on the date fixed. Being so, issue production warrants against convict Kamlesh Kumar and convict Mahender Singh for the date fixed and the Superintendent of Police, Kullu District to ensure the execution of the same upon them. List on 17.11.2016.

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

The State of H.P. and another ....Petitioners

Versus

Sh. Parveen Kumar ....Respondent

CWP No. 4073/2012
Reserved on : October 24, 2016
Decided on : October 28, 2016

Constitution of India, 1950- Article 226- The workman pleaded that he was not allowed to complete 240 days in the calendar years except 1997 and 1998- his services were disengaged without following the procedure under Industrial Disputes Act – employer contended that the workman was engaged subject to availability of the work and funds – the Tribunal held the workman entitled to re-engagement as fitter Grade-II and issued direction to re-engage him after giving the benefit of seniority and continuity of service – held, that the workmen was engaged as daily wage fitter where he continued to work till 2000, when his services were dis-engaged- State had failed to adhere the principle of 'last come first go' because two persons junior to the workman were retained - the Tribunal had rightly issued the direction of re-engagement – writ dismissed. (Para-9 to 19)

Cases referred:
Central Bank of India v. S. Satyam, (1996) 5 SCC 419
Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157

For the petitioners	Mr. P.M. Negi, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General.
For the respondent	Mr. Bhuvnesh Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Petitioner-State (hereinafter, 'State') being aggrieved with passing of Award dated 15.6.2011 by the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Dharamshala, HP in Ref. No. 207/2007, has preferred the instant petition under Articles 226/227 of the Constitution of India, praying therein for the following reliefs:

"(a). That the impugned award may be quashed and set aside on limitation grounds.

(b). That seniority and continuity of service from the date of termination awarded vide judgment passed by the Labour Court-Cum-Industrial Tribunal in Reference No. 207/2007 decided on 15.6.11 may kindly be quashed and set aside.

(c). The relevant record be called from Labour Court-Cum-Industrial Tribunal for perusal.

(d). The cost of petition may kindly be awarded to the petitioners."

2. Briefly stated the facts as emerge from the record are that the appropriate Government vide reference under Section 10(1) of the Industrial Disputes Act (herein after, 'Act'), framed following terms of reference for adjudication:

> "Whether the termination/retrenchment of Mr. Parveen Kumar S/o Mr. Ishwar Dass Village-Nangal Chowk, P.O. Guranwar, Tehsil Dehra, Distt. Kangra, H.P. by the Executive Engineer, I&PH, Division, Dehra, District Kangra, vide Assistant Engineer, I&PH, Sub division, Dada Siba letter No. 709-10 dated 31.07.2000 is legal and justified, if not, what amount back wages, seniority, past services benefits and compensation the above worker is entitled to?"

3. Respondent-workman (herein after, 'workman'), by way of statement of claim, filed before the learned Tribunal below, claimed that he was engaged by the Executive Engineer as daily wage Fitter in 1994 in Dada Siba Division, Tehsil Dehra, District Kangra, and as such, he continued to work till 2000. Workman further stated that he was a diploma holder in Fitter trade from ITI Nadaun and State had sufficient work available with it but despite that he was not allowed to complete 240 days in all calendar years except 1997 and 1998. On 31.7.2000, his services were disengaged by the State without any rhyme or reason, that too, without following procedure envisaged under Section 25 of the Act. Workman further claimed that the department had sufficient work of fitter at the time of illegal disengagement of his services and junior persons were retained. It is further averred that the Department has engaged other junior persons on daily wages on the said post. Workman also averred that for the redressal of his grievances, he earlier filed OA No. 3032/2000 before the Himachal Pradesh Administrative Tribunal, which was dismissed for want of jurisdiction. Workman by way of aforesaid claim, as discussed herein above, claimed reengagement with consequential benefits including seniority and continuity.

4. State refuted the claim of the workman by way of a detailed reply by stating therein that services of the workman were not utilized by the State till 31.7.2000 as claimed by workman, rather he was engaged subject to availability of work and funds and thereafter, vide

letter dated 31.7.2000, workman was informed that his services were not required due to non-availability of work. State further claimed that services of petitioner were disengaged by resorting to the principle of 'last come, first go' and no junior, as claimed by workman, was retained at the time of his retrenchment. In the aforesaid background, State prayed for dismissal of the claim put forth by the workman. The learned Tribunal below framed following issues for determination on 22.10.2008:

"1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief of service benefits and the amount of compensation the petitioner is entitled to? OPP

2. Whether the petitioner was engaged on daily wages basis subject to availability of work and funds. If so, whether there existed no work or funds at the time of termination of his services. OPR.

3. Relief."

5. However, the fact remains that on the basis of pleadings of the parties as well as evidence adduced on record by the respective parties, learned Tribunal below held workman entitled to reengagement as Fitter Grade II and accordingly issued directions to the department to reengage the workman as Fitter Grade II forthwith and to give benefit of seniority and continuity in service from the date of illegal termination but without back wages. In the aforesaid background, State approached this Court, by way of instant petition, praying therein for quashing and setting aside of Award dated 15.6.2011 passed by the Tribunal below.

6. Mr. P.M. Negi, Ld. Additional Advocate General duly assisted by Mr. Ramesh Thakur, Ld. Deputy Advocate General, vehemently argued that impugned award is not sustainable in the eyes of law since it is not based on correct appreciation of evidence available on record as well as law and as such same deserves to be set aside being contrary to the record as well as law. Mr. Negi, with a view to substantiate his aforesaid argument, invited attention of the Court to impugned Award passed by the Tribunal below to demonstrate that learned Tribunal has misread and mis-interpreted the evidence adduced on record by the department, as a result of which, undue benefit has been extended to the workman, who at no point of time was able to prove that his services were not disengaged by department by resorting to the provisions of the Act. Mr. Negi further contended that the department by way of leading cogent and convincing evidence proved on record that workman was appointed on daily wage basis subject to availability of work and funds and as such his services were rightly disengaged after 31.7.2000, due to non-availability of work and funds. Mr. Negi, while concluding his arguments also stated that findings recorded that principle of 'last come, first go', was not adhered to by the department while disengaging services of workman, is also contrary to the record because no person junior to the workman was engaged as fitter, after disengagement of the workman and as such, Award being contrary to the record is liable to be set aside.

7. Mr. Bhuvnesh Sharma, counsel appearing for the workman, supported the impugned award. Mr. Sharma, while referring to the award passed by the Tribunal below strenuously argued that the Award is based on correct appreciation of evidence adduced on record by the respective parties. There is no scope for interference by this Court, especially in view of the findings of fact recorded by the learned Tribunal below. Mr. Sharma, further argued that bare perusal of award suggests that each and every aspect of the matter has been dealt meticulously by the Tribunal below while upholding the claim of the workman. Mr. Sharma, while concluding his arguments forcefully contended that there is ample evidence on record suggestive of the fact that services of workman were disengaged without resorting to Section 25 of the Act. Similarly, principle of 'last come, first go' was bid goodbye while disengaging services of the workman because it stands duly proved on record that one Shri Ajay Kumar, who was junior to the workman was retained as Fitter Grade II in the Department.

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

9. After perusing the record made available to this Court, it is undisputed that workman was appointed as daily wage fitter in 1994 in Sub Division Dada Siba, Tehsil Dehra, District Kangra, by Executive Engineer of the Department, where he continued to work till 2000. It is also not disputed that at that point of time, workman was having required qualification of diploma in fitter trade from ITI Nadaun. State, while refuting the claim put forth on behalf of the workman, stated that workman was engaged subject to availability of work and funds but it nowhere refuted the claim of the workman that he kept on serving the Department till 31.7.2000, when his services were illegally dispensed with, without resorting to the provisions contained in Section 25 of Act. State claimed that services of workman were not required due to non-availability of work and funds and principle of 'last come, first go' was adhered to. But this Court carefully perused impugned Award as well as documents available on record, which clearly suggests that Department was not able to prove on record that services of the workman were disengaged on 31.7.2000 after following due procedure as prescribed under the Act. Similarly, this Court found that State failed to adhere to the principle of 'last come, first go' because it stands duly proved on record that two persons junior to the workman were retained against the post of Fitter after disengagement of workman. State has nowhere disputed that workman was engaged as Fitter Grade II in 1994. Department, with a view to substantiate that no junior person was retained after disengagement of the workman, placed on record seniority list of Fitters and Beldars as RW-1/D, which shows that Ashok Kumar son of Om Prakash and Ajay Kumar son of Vidya Sagar, were engaged as Fitter Grade II in 1987-88 and regularized w.e.f. 1.1.1998, whereas, admittedly, workman was appointed as daily wage fitter in 1994. As per Department, workman was disengaged strictly on the principle of 'last come, first go', as per Section 25-G of the Act, whereas learned Tribunal below, on the basis of record made available by the workman, i.e. photocopy of muster roll pertaining to 1994, wherein person namely Ajay Kumar, son of Vidya Sagar, has been reflected as Pipeline Man in 1994, came to conclusion that juniors to workman were retained at the time of illegal disengagement of workman.

10. Workman by leading cogent and convincing evidence before learned Tribunal below established beyond doubt that Ajay Kumar son of Vidya Sagar, was initially engaged as Pipeline Man in 1987-88 and thereafter he was engaged as Fitter Grade II in 1998 i.e. after workman, who was admittedly appointed as Fitter Grade II in 1994. Since workman by way of placing copy of muster roll pertaining to 1994 successfully proved on record that Ajay Kumar son of Vidya Sagar was initially appointed as Pipeline Man in 1987-88, meaning thereby, his retention, if any, as Fitter Grade II, after disengagement of workman i.e. 31.7.2000, was completely in violation of Section 25-G of the Act and principle of 'last come, first go'.

11. Perusal of Award clearly suggests that it had occasion to peruse the original record produced by the department, wherein, in para-14 of the Award, learned Tribunal below has clearly stated that perusal of muster roll of Ajay Kumar son of Vidya Sagar, clearly suggests that he was engaged as Beldar. Similarly, muster roll of 1994 shows that till 1994, Ajay Kumar was reflected as Pipeline Man and muster roll of 1998 further demonstrates that Ajay Kumar was Fitter Grade II meaning thereby Ajay Kumar became Fitter Grade II in 1998 i.e. definitely after the workman, who was appointed as Fitter Grade II in the year 1994.

12. Hence, this Court sees no illegality and infirmity in the findings returned by Tribunal, which are based on correct appreciation of record made available to it that Ajay Kumar was initially engaged as Beldar and till December, 1998, he was working as Pipeline Man. Since, Ajay Kumar, referred to herein above, was made Fitter in 1998, learned Tribunal below, while placing reliance upon the muster roll pertaining to 1994, placed on record by the respondent workman, has rightly come to the conclusion that Ajay Kumar was junior to the respondent workman, in the category of Fitter Grade II.

13. At the cost of repetition, it may be again stated that it is undisputed that respondent workman was engaged as Fitter Grade II in 1994 i.e. prior to Ajay Kumar, learned Tribunal below, on the basis of record made available, has returned categorical findings that initially Ajay Kumar son of Vidya Sagar, was engaged as Beldar and thereafter, he was working as

Pipeline Man till December, 1994. Record further reveals that aforesaid Ajay Kumar was engaged as Fitter Grade II in the year 1994, hence, this Court sees no force in the contentions put forth by the State that findings returned by the Tribunal are contrary to records.

14. Similarly, perusal of the Award passed by Tribunal below suggests that State was not able to prove on record by way of convincing evidence that services of respondents were disengaged for want of work and funds. Shri Rohit Dubey, while appearing as RW-1 though stated that no fresh hand was engaged after disengagement of respondent but failed to render explanation, if any, as far as retention of Ajay Kumar, Fitter Grade II, after disengagement of workman, is concerned. To demonstrate that services of workman were disengaged for want of funds, State has placed reliance upon Ext. RW-1/E but the Tribunal below has categorically concluded that perusal of extract RW-1/E shows that total budgetary allocation under the repair and maintenance head during the financial year 2000-01 was Rs.345.00 Lakh, which was inclusive of the expenditure i.e. labour, material and vehicles. As per the said extract, the scheme was still being run under repair and maintenance head since the time of its completion.

15. Close scrutiny of pleadings as well as findings returned in the Award makes it crystal clear that the workman was appointed as Fitter Grade II in 1994, whereas, Shri Ajay Kumar though was appointed as daily wager in 1987-88 but, admittedly, he was appointed as Fitter Grade II in 1998 i.e. after the appointment of workman. Since workman was senior to Ajay Kumar in the cadre of Fitter Grade II, his services could not have been disengaged by retaining Ajay Kumar, who was admittedly junior to workman, rather, retention of Ajay Kumar, Fitter Grade II, strengthens the claim of the workman that at the time disengagement of workman, work of Fitter Grade II was available with the Department and services of workman were illegally dispensed with, in violation of the principle of 'last come, first go'.

16. It is well settled by now that principle of 'last come, first go', as contained in Section 25G of the Act, is not confined to the workmen, who have been in continuous service for not less than one year. Reliance is placed upon the judgment rendered by their lordships of Hon'ble Apex Court in **Central Bank of India** v. **S. Satyam**, reported in (1996) 5 SCC 419, wherein it has been held as under:

> "8. Rule 77 requires the employer to maintain a seniority list of workmen in that particular category from which retrenchment is contemplated arranged according to the seniority of their service. The category of workmen to whom Section 25-F applies is distinct from those to whom it is in applicable. There is no practical difficulty in maintenance of seniority list of workmen with reference to the particular category to which they belong. Rule 77, therefore, does not present any difficulty. Rule 78 speaks of retrenched workmen eligible to be considered for filling the vacancies and here also the distinction based on. The category of workmen-can be maintained because those falling in the category of Section 25-F are entitled to be placed higher than those who do not fall in that category. It is no doubt true that persons who have been retrenched after a longer period of service which places them higher in the seniority list are entitled to be considered for re- employment earlier than those placed lower because of a lesser period of service. In this manner a workman falling in the lower category because of not being covered by Section 25-F can claim consideration for re-employment only if an eligible workman above him in the seniority list is not available. Application of Section 25-H to the. Other retrenched workmen not cove-red by Section 25-f does not, in Any manner, prejudice those covered by Section 25-F because the question of consideration of any retrenched workman not covered by Section 25-F would arise only, if and when, no retrenched workman covered by Section 25-F is available for re-employment. There is, thus, no reason to curtail the ordinary meaning of 'retrenched workmen' in Section 25-H because of Rules 77 and 78, even assuming the rules framed- under the Act could have that effect.
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> 9. The plain language of Section 25-H speaks only of re- employment of 'retrenched workmen'. The ordinary meaning of the expression 'retrenched workmen must relate to

the wide meaning of 'retrenchment' given in Section 2(oo). Section 25-F also uses the word 'retrenchment' but qualifies it by use of the further words 'workman' who has been in continuous service for not less than one year'. Thus, Section 25-F does not restrict the meaning of retrenchment but qualifies the category of retrenched workmen covered therein by use of the further words workman. Who has been in continuous service for not less than one year. It is clear that Section 25-F applies to the retread a workman who has been in continuous service for not less: one year and not to any workman who has bean in continuous service for less than one year; and it does not restrict or curtail the meaning of retrenchment merely because the provision therein is made only for the retrenchment of a workman who has been in continuous service for not less the one year. Chapter V-A deals with all retrenchments while Section 25-F is confined only to the mode of retrenchment of workmen in continuous service for not less than one year. Section 25-G prescribes the principle for retrenchment and applies ordinarily the principle of 'last come first so' which is not confined only to workmen who have been in continuous service for not less than one year, covered by Section 25-F.

10. The next provision is Section 25-H which is couched in wide language and is capable of application to all retrenched workmen not mere; covered by Section 25-F. It does not require curtailment of the ordinary meaning of the word 'retrenchment' used therein. The Provision for re-employment of retrenched workmen merely gives performance to a retrenched workmen in the matter of re-employment over other persons. It is enacted for the benefit of the retrenched workmen and there in no reason to restrict its ordinary meaning which promotes the object of the enactment without causing any prejudice to a better placed retrenched workman.

17. In view of aforesaid, this Court sees no reason to disagree with the findings of learned Tribunal below which appear to be based on correction appreciation of evidence, led on record by the respective parties.

18. Hence, this Court, after carefully examining the Award passed by the Tribunal below, sees no reason to interfere in the findings recorded by the Tribunal, which are otherwise also based on correct appreciation of evidence led on record by the parties, as such, impugned award deserves to be upheld. It is well settled law that the Courts while examining correctness and genuineness of award passed by Tribunal have very limited powers to re-appreciate the evidence led before the Tribunal below, especially the findings of fact recorded by the Tribunal below. Apart from above, findings of fact recorded by learned Tribunal below on the basis of appreciation of evidence cannot be questioned in writ proceedings and writ court cannot act as an appellate court. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case titled ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157***. It is profitable to reproduce paras 16, 17 and 18 of the judgment herein:

"16. ....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for

questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

17. The judgments mentioned above can be read with the judgment of this Court in Harjinder Singh's case (supra), the relevant paragraph of which reads as under:

> 21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and / or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:
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> > 10.... The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State.

18. A careful reading of the judgments reveals that the High Court can interfere with an order of the Tribunal only on the procedural level and in cases, where the decision of the lower Courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant." ***[Emphasis added]***

19. Consequently, in view of the aforesaid discussion, there is no merit in the present petition and the same is dismissed. Pending applications, if any, are also dismissed.

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

Tikka Maheshwar Chand ..Appellant/Defendant
Versus
Ripudaman Singh ..Respondents/plaintiff.

RSA No. 441 of 2004.
Reserved on : 25/10/2016
Date of decision: 28/10/2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit, which was compromised – a mutation was sanctioned on the basis of compromise – an appeal was filed, which was dismissed – a civil suit was filed against these orders – the suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held in second appeal that the jurisdiction of the Civil Court to go into the question, where adequate remedy has been provided under the H.P. Land Revenue Act is barred – a remedy of approaching Financial Commissioner was available to the plaintiff – the Appellate Court had wrongly discarded this reasoning of the trial Court- appeal allowed – the judgment of the Appellate Court and that of the trial Court restored. (Para- 7 and 8)

For the appellant: Mr. Aman Deep Sharma, Advocate.
For the respondent: Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

This appeal stands directed against the impugned rendition of the learned District Judge, Hamirpur, whereby he reversed the decree of dismissal of suit of the plaintiff wherein the plaintiff had claimed a decree for declaring valid the order pronounced by the Assistant Collecto 2nd Grade, Nadaun, whereby under the latters' orders mutation stood attested qua the suit property, orders whereof recorded by the Assistant Collector 2nd Grade, Nadaun stood anvilled on a compromise decree comprised in Ext.P-1, orders whereof recorded by the Assistant Collector 2nd Grade, Nadaun, stood rescinded by the Sub Divisional Collector, Nadaun, orders whereof of the Sub Divisional Collector, Nadaun, attained affirmation from the Divisional Commissioner under the latters' orders recorded on 6.8.1992, latter orders whereof stand canvassed to be declared to be null and void. The effect of the judgement of the learned District Judge, Hamirpur pronounced in reversal to the verdict of the learned trial Court is qua mutation qua the suit property attested on 10.02.1983 by the Assistant Collector 2nd Grade, Nadaun, on anvil of Ext.P-1 acquiring validation.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiff filed Civil Suit No. 45 of 1978 against the defendant which was compounded by the parties leading to compromise decree dated 3.11.1981 by the learned Sub Judge(I), Hamirpur. On the basis of compromise decree Assistant Collector 2nd Grade, Nadaun, sanctioned mutation qua the suit property in favour of the plaintiff. The plaintiff was exclusively possessing the suit land as owner but the defendant later on filed an appeal against the mutation order before the Sub Divisional Collector, Hamirpur, who set-aside the mutation wrongly on the ground that mutation could not have been sanctioned qua 'Gair Mumkin Land because the suit property never formed part of the compromise decree in Civil Suit No. 45 of 1978. Against it, the plaintiff went in appeal before the Divisional Commissioner, who also rejected the appeal vider order dated 6.8.1992. Both the orders of the Sub Divisional Collector and Divisional Commissioner are claimed to be wrong, illegal and against the law by the plaintiff in this appeal.

3. The defendant admitted passing of compromise decree in a suit brought by the plaintiff. He claimed that the mutation on the basis of compromise decree was wrongly

sanctioned by the A.C. IInd Grade, Nadaun and has rightly been reversed in appeal by the Sub Divisional Collector and also affirmed rightly by the Divisional Commissioner and claimed that the defendant is exclusive owner in possession of Gair Mumkin land of Patwar Circle, Dhaneta, Nauhngi, Choru and Sproh i.e. the suit property nor it was subject matter of previous suit. As the suit property never formed part of the suit, so it could not have been transferred without registration under Section 17 of the Registration Act. Therefore, orders of the Collector and Divisional Commissioner are legal and binding and suit deserves to be dismissed.

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

1. Whether the plaintiff is entitled to the relief of declaration, as prayed? OPP.

2. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff whereas the learned First Appellate Court allowed the appeal preferred therefrom before it by the plaintiff.

6. Now the defendant/appellant herein has instituted before this Court the instant Regular Second Appeal wherein he assails the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 22.03.2005, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

> "1. Whether the facts as established and proved on record of the case particularly the compromise decree Ext.PC and the statements of the parties Ext.PA and Ext.PB do establish the creation of new rights in favour of the plaintiff.
>
> 2. Whether during the pendency of the lis before the Revenue Courts, the Civil Courts have jurisdiction qua the same subject matter.
>
> 3. Whether the suit of the plaintiff/respondent is within limitation?"

Substantial questions of law.

7. Uncontrovertedly, Ext.P-1 holds therein a compromise decree recorded inter partes thereat who likewise are contestants hereat besides is qua suit property which is also the subject matter of contest in the instant suit. Also uncontrovertedly Ext.P-1 stands recorded not only qua suit property which fell for contest inter se the litigating parties thereat rather holds therewithin depictions besides reflections qua property which was not the subject matter of contest in the previous civil suit inter se the parties at lis hereat. Even though before the learned First Appellate Court an argument stood espoused qua the mandate of Section 17 of the Registration Act ordaining compulsory registration of instruments other than testamentary instruments besides instruments of gifts especially when the relevant instruments other than testamentary dispositions or instruments of gifts, operate to create, declare, assign limit or extinguish, whether vested or contingent of the value of Rs.100/- and upwards, to or in immovable property mandate whereof held therewithin stood enjoined to be read in conjunction with the provisions embodied in clause (Vi) of sub section (2) of Section 17 of the Registration Act (hereinafter referred to as the Act) wherein though a mandate stands encapsulated qua the diktat of the provisions engrafted in sub section (1) of Section 17 of the Act standing excluded qua any decree or order of the Court as is Ext.P-1 nonetheless with it also therewithin carving an exception to the exclusion of the mandate of sub section (1) of Section 17 of the Act qua any decree or order of a Civil Court, wherewithin a compromise stands enunciated interse the combatants therein qua a suit property vis.a.vis whereof no relief apposite to it stood canvassed therebefore whereupon a concomitant espousal was made qua with Ext.P-1 standing pronounced qua property whereupon the contestants thereat were not at lis, it hence warranting compulsory registration, whereas it remaining unregistered rendered the order of attestation of mutation of the Assistant Collector 2nd Grade, Nadaun, when read in consonance therewith warranting its standing pronounced to be set-aside, contrarily the orders recorded by the Collector, concerned whereupon he rescinded the relevant orders of mutation attested by the Assistant Collector 2nd

Grade, Nadaun, orders whereof attained affirmation from the Commissioner concerned rather warranting validation. The provisions of the Registration Act are extracted hereinafter:

17. Documents of which registration is compulsory

1. (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property;

xxx. xxx.. xxx…

2. (vi) any decree or order of a court [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding;] or

8. On analogy of various judicial pronouncements the learned First Appellate Court discounted the submission addressed herebefore by the learned counsel for the defendants. However, the reasoning as stands assigned by the learned First Appellate Court to on anvil thereof dispel the vigour of the aforesaid contention addressed herebefore by the learned counsel for the defendant, lacks in legal sinew nor also any dependence by it upon judicial pronouncements is apt, given the attraction hereat with aplomb, the relevant mandate of the provisions of the Registration Act, provisions whereof evidently extantly stand infringed. Irrefutably the mandate of Order 23 Rule 3 of the CPC, which stands extracted hereinafter:

(3). Compromise of suit:

Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by the parties), or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit."

empowers the Civil Court concerned to pronounce a compromise decree not only qua a subject matter which stands espoused in the apposite plaint besides qua a subject matter which remains unespoused in the apposite plaint constituted therebefore by the plaintiff. Though the mandate of the Order 23 Rule 3 of the CPC does hold leverage to a Civil Court to in the manner aforesaid record a verdict compromising the lis inter se the relevant contestants also the mandate of the apposite decree recorded by the Civil Court concerned when put therebefore for execution is enjoined to be meted deference by the authority concerned, nonetheless the mandate of the aforesaid provisions of the Code of Civil Procedure are enjoined to be read in conjunction with the mandate of clause (VI) of sub section(2) of Section 17 of the Act wherewithin a preemptory dictate is held qua a compromise decree being enjoined to be compulsorily registered predominantly when it holds therewithin recitals qua immoveable property whereagainst no contest occurred inter se the relevant contestants thereat. The learned First Appellate Court has excluded from consideration the mandate of clause (VI) of sub section (2) of Section 17 of the Act whereas it enjoined compulsory registration of Ext.P-1 significantly when it held therewithin pronouncements qua its recording a compromise vis.a.vis. the parties hereat qua immoveable property which was not in litigation inter se the contestants thereat. The reliance placed on judicial pronouncements by the learned First Appellate Court stands belittled by the aforesaid trite factum besides when the authority concerned on standing seized with an execution petition constituted therebefore stood enjoined to mete deference to Ext.P-1 yet meteing of deference thereto by it would stand sparked only when preceding thereto the parties to the lis mete deference also to the mandate of the relevant provisions of the Registration Act besides thereupon alone the relevant authority concerned held empowerment to record an order attesting mutation qua the suit property whereas evidently with Ext.P-1 standing unregistered prior to the Assistant

Collector 2nd Grade, Nadaun, recording an order attesting mutation qua the suit property, naturally rendered the relevant pronouncement recorded by the Assistant Collector 2nd Grade, Nadaun, to stand afflicted with a malady of invalidation fostered by non adherence of the apposite statutory mandate by the relevant contestants. Contrarily, the pronouncement in reversal thereto recorded thereon by the Sub Divisional Collector concerned, pronouncement whereof attained affirmation on 6.8.1992 from the Divisional Commissioner concerned warranted vindication, whereas the learned First Appellate Court holding contrarily has committed an illegality in undermining the impact of the relevant provisions of the Registration Act vis.a.vis. Ext.P-1 besides by slighting the impact of the relevant provisions of the Registration Act vis.a.vis the provisions of the Order 23 Rule 3 of the CPC significantly when both the statutory provisions aforesaid are complementary also when hence both warrant meteing of deference thereto, whereas evidently with deference remaining unmeted to the relevant provisions of the Registration Act, the impugned order of the Assistant Collector 2nd Grade, Nadaun, warranted interference. Contrarily it standing pronounced to be valid enjoins this Court to interfere with the verdict of the learned First Appellate Court. Dehors the aforesaid discussion, the learned trial Court concluded qua the suit of the plaintiff being barred by the mandate of Section 171 of the H.P.Land Revenue Act, mandate whereof excludes the jurisdiction of the Civil Court qua a lis qua which the aforesaid Act prescribes a remedy under Section 14 thereof, remedy prescribed therein is qua the plaintiff instituting before the Financial Commissioner an appeal against the order recorded by the Divisional Commissioner, remedy whereof remaining un-availed, whereupon it concluded of the suit of the plaintiff being statutorily barred. The aforesaid reasoning is well merited. The learned First Appellate Court in discarding the aforesaid reasoning has committed an illegality comprised in its misappreciating the aforesaid statutory provisions of the H.P.Land Revenue Act. The effect of the above discussion is of substantial questions of law No.1, 2 and 3 warranting theirs standing answered in favour of the appellant herein. Consequently, the appeal preferred by the defendant/appellant herein is allowed. The judgement and decree rendered by the learned first Appellate Court is set-aside and the judgement and decree rendered by the learned trial Court is maintained and affirmed. Consequently, the suit of the plaintiff is dismissed. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of accordingly. Records be sent back forthwith.

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

Balkar Singh ...Appellant.

Versus

Babar and others ...Respondents.

FAO No.502 of 2010.
Reserved on : 19.10.2016.
Decided on: 01.11.2016.

Motor Vehicles Act, 1988- Section 166- Claimant sustained injuries in an accident – MACT awarded compensation of Rs.5,60,000/- to him – held in appeal that Medical Officer stated that left leg of the claimant had become short by 1½ inch – he had suffered muscular injury to the left leg, right patella and right ankle – the petitioner shall not be able to commute long distance and carry weight – the Tribunal had rightly taken the disability to the extent of 25% to 35% - compensation of Rs. 2,75,000/- cannot be said to be excessive – the MACT had not awarded any interest – hence, interest awarded @ 7.5% per annum. (Para-9 to 12)

Case referred:

Raj Kumar vs. Ajay Kumar and another (2011) 1 Supreme Court Cases, 343

For the appellant : Mr. Jagdish Thakur, Advocate.
For the respondents : Nemo for respondent No.1.

Respondent No.2 stands deleted.
Mr. Ratish Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal under Section 173 of the Motor Vehicles Act, 1988, is maintained by the appellant/claimant/petitioner (hereinafter referred to as the 'petitioner') for enhancing the amount awarded by learned Motor Accident Claims Tribunal, Una, H.P, in MAC Petition No.18 of 2008, vide award dated 10.9.2010.

2. Brief facts giving rise to the present appeal are that the petitioner maintained a petition under Section 166 of the Motor Vehicles Act, for compensation on account of the injuries he suffered due to rash and negligent driving by respondent No.2 of the vehicle owned by respondent No.1, in an accident on 26.2.2008. As per the petitioner, respondent No.2, who was driving the offending vehicle rashly and negligently and struck it against the front right side of the tanker being driven by the petitioner, as a result of which, he suffered multiple injuries on his left femur right knee, right ankle and multiple fractures. The petitioner had been taken to local hospital for medical aid, thereafter referred to PGI, Chandigarh on 27.2.2008 and discharged on 9.4.2008. The petitioner had again been admitted in PGI, Chandigarh, on 22.4.2008. The petitioner had been under continuous medical treatment and spent a sum of Rs. 1 lac. Even after medical treatment of months together, the petitioner had not been keeping fit. The petitioner had not been able to earn after the alleged accident. He stood crippled for the rest of his life and had turned dependent on others. Respondent No.1 was registered owner of the truck bearing No. UP11T0884. Respondent No.1 was vicariously liable for rash and negligent act of his driver. Respondents No.1 and 2 have resisted the petition. They have admitted the ownership and possession of respondent No.1 of vehicle bearing No. UP11T0884. As per them, on 26.2.2008 respondent No.2 driving the truck with due care and caution and the accident had not taken place on account of rash and negligent driving of respondent No.2. The petitioner had not suffered any injury due to the act of respondent No.2. Respondent No.3 also resisted and contested the petition. Respondent No.3 provided insurance cover to vehicle bearing No. UP11T0884 for the period from 24.8.2007 to 23.8.2008. It has been averred that respondent No.2 had not been in possession of a valid and effective driving licence at the time of accident. Respondent No.1 plying his vehicle in contravention of the terms and conditions of the insurance policy.

3. The learned Tribunal below framed the following issues on 18.1.2010 :

> "1. Whether Sh. Balkar Singh had suffered injuries on account of rash and negligent driving of vehicle bearing No.UP11T0884 by respondent No.2 ? OPP.
>
> 2. If Issue No.1 is proved to what amount and from whom is the petitioner entitled to ? OPP.
>
> 3. Whether the respondent No.2 had not been in possession of a valid and effective driving licence, if so with what effect? OPR-3.
>
> 4. Whether the respondent No.1 had contravened the conditions of the insurance policy and registration certificate, if so with what effect ? OPR-3.
>
> 5. Relief."

4. After deciding Issue Nos.1 and 2 in favour of the petitioner, Issue Nos.3 and 4 against the respondents, the learned Tribunal below awarded compensation of Rs.5,60,000/- to the petitioner.

5. Learned counsel appearing on behalf of the petitioner has argued that the compensation as awarded by the learned Tribunal below is in on very lower side, as the learned

Tribunal below has not taken the disability qua the petitioner correctly. He has further argued that the disability was 100% qua the petitioner.

6. On the other hand, learned counsel appearing on behalf of respondent No.3 has argued that the disability as per the Doctor in Ex.PW4/B was not permanent disability and the same was temporary disability of 25%. As per the Doctor, it would have reduced to 10% later on. He has further argued that the impugned award is on the higher side, but he has admitted that no appeal has been filed by the Insurance Company.

7. In rebuttal, learned counsel appearing on behalf of the petitioner has argued that no interest on the awarded amount has been granted by the learned Tribunal below.

8. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the record of the case carefully.

9. The only question which requires determination is that whether the disability for the purpose of calculating the compensation has been rightly taken by the learned Tribunal below or not. The income of the driver is proved to be Rs.4,000/- per month. Now, coming to the disability, PW-4, Dr. N.S. Dogra, Orthopedic Surgeon, had medically examined the petitioner on 20.6.2009 and 21.8.2010. He has issued disability certificates Ex.PW4/A and Ex.PW4/B. He has stated that the left leg of the petitioner had turned short by 1 ½ inch. The petitioner had suffered muscular injury to left leg, right patella and right ankle. The petitioner shall not be able to commute long distance and carry weight. In his cross-examination, he has stated as follows :

> "It is correct that disability assessed by me on 21.8.2010 is temporary in character. Voluntarily stated that even after second operation disability of left femur would persist in any case upto 10%. Now the petitioner is on crutches and had been so observed by me on 21.8.2010 and today. After the rod implanted to the left femur had broken the petitioner is on crutches. It is wrong that the petitioner would be completely cured of the injury after second operation. Voluntarily stated that reduction of disability after second operation would depend upon the nature and successful character of the operation. In case the second operation fails the disability would persist or may increase as well. It is wrong that disability is of left femur alone. Voluntarily stated that disability of both lower limbs."

10. Learned counsel appearing on behalf of the petitioner has relied upon the judgment in ***Raj Kumar vs. Ajay Kumar and another (2011) 1 Supreme Court Cases, 343,*** wherein it has been held that in case the right hand was amputated and vision was affected of a person, who is a Engineering student is permanent disablement to be assessed as 70%. Considering the above judgment to the facts of the present case, this Court finds that even if, the disability is not permanent and is likely to be reduced in future, but taking into consideration the nature of job performed by the petitioner, no interference is required with a view of learned Tribunal below taking the disability of 35%.

11. From the above, it is clear that the disability can be reduced with a passage of time. The learned Tribunal below has taken disability from 25% to 35% and awarded an amount of Rs.2,75,000/-, on account of the loss of future income, loss of amenities of life and loss of expectation of life. Even if, the income of the petitioner is Rs.4,000/- per month, as claimed by him and is permanently disabled to the extent of 35%, the multiplier of 15 is applied. The amount of compensation for loss of income comes to Rs.2,52,000/-, but the learned Tribunal below has awarded an amount of Rs.2,75,000/-, so this Court finds that the impugned award is reasonable and requires no interference. At the same point of time, this Court finds that the learned Tribunal below has not granted any interest on the impugned award. The petitioner is definitely entitled for the interest, which is required to be granted to the petitioner. No other points argued so, needs no consideration.

12. Accordingly, the petition is partly allowed. Since, the vehicle was admittedly insured by respondent No.3, as such, respondent No.3 is directed to deposit the amount of interest at the rate of 7.5% per annum on the awarded amount from the date of filing the petition, till the deposit of the award amount to the petitioner. The appeal is accordingly disposed of. In the peculiar facts and circumstances of the case, parties are left to bear their own costs. Pending application (s), if any, shall also stands disposed of.

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

Dola Ram & others. ......Appellants.
Versus
Ganga Singh & others. ......Respondents.

RSA No. 378 of 2004 and
Cross Objection No. 583 of 2004
Reserved on: 05.10.2016
Decided on: 01.11.2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that the land is wrongly recorded to be in joint ownership of the parties – it has been partitioned in a family partition- the deceased plaintiff was taken to document writer and was told to sign on the papers for correcting the revenue entries and in this manner his signatures were obtained on the gift deed – the suit was filed to set aside the gift deed- the suit was dismissed by the trial Court- an appeal was preferred and the case was remanded – the suit was again dismissed by the trial Court- judgment and decree were partly modified in appeal- held in second appeal that no document regarding the family partition was placed on record – partition was also not recorded in the revenue record – it was proved by the evidence that gift deed was got executed by representing it to be a document of family partition – the evidence was rightly appreciated by the Courts - no relief of possession was sought and could not have been granted – appeal dismissed.

(Para-13 to 50)

Cases referred:

Venkati Rama Reddi and others vs. Pillati Ram Reddi and others, AIR 1917 (4) Madras 27 (Full Bench)
P. Venkatachalam Chetty vs. P.S. Govindasawmi Naicker, AIR 1924 Madras 605
Murikipudi Ankamma vs. Tummalacheruvu Narasayya and others, AIR (34) 1947 Madras 127
Subhas Chandra Das Mushib vs. Ganga Prosad Das Mushib and others, AIR 1967 Supreme Court 878
Amarsing Ratansing and another vs. Gosai Mohangir Somvargir and others, AIR 1972 Gujarat 74 (V 59 C 14)
Mst. Samrathi Devi vs. Parasuram Pandey and others, AIR 1975 Patna 140
Afsar Shaikh Devi vs. Parasuram Pandey and others, AIR 1975 Patna 140
P. Saraswathi Ammal vs. Lakshmi Ammal alias Lakshmi Kantam, AIR 1978 Madras 361
Munni Devi vs. Smt. Chhoti and others, AIR 1983 Allahabad 444
Savithramma vs. H. Gurappa Reddy and others, AIR 1996 Karnataka 99
Upasna & others vs. Omi Devi, 2001(2) Current Law Journal (Himachal Pradesh) 278,
Kripa Ram and others vs. Smt. Maina, 2002(2) Shimla Law Cases 213
N.V. Srinivasa Murthy vs. N.V. Gururaja Rao and others, (2005) 10 Supreme Court Cases 566
Jeet Kumar and another versus Jai Chand and another, 2013 (3) Him L.R. 1463
Moti vs. Roshan and others, AIR 1971 Himachal Pradesh 5 (V 58 C2)
Ku. Sonia Bhatia vs. State of U.P. and others, AIR 1981 Supreme Court 1274
Mallo vs. Smt. Bakhtawari and others, AIR 1985 Allahabad 160,

Digambar Adhar Patil vs. Devram Girdhar Patil (died) and another, AIR 1995 Supreme Court 1728
Rajendra Tiwary vs. Basudeo Prasad and another, AIR 2002 (89) Supreme Court 136
Krishna Mohan Kul alias Nani Charan Kul and another vs. Pratima Maity and others, (2004) 9 Supreme Court Cases 468
Ashwani Kumar Rana vs. Gaur Hari Singhania and others, 2005(2) SLJ 1243
Hari Shankar Singhania and others vs. Gaur Hari Singhania and others, (2006) 4 Supreme Court Cases 658,
Ramdev Food Products (P) Ltd. Vs. Arvindbhai Rambhai Patel and others, (2006) 8 Supreme Court Cases 726
M. Venkataramana Hebbar (Dead By LRs vs. M. Rajagopal Hebbar and others, (2007) 6 Supreme Court Cases 401
Bhagwan Krishan Gupta (2) vs. Prabha gupta and others, (2009) 11 Supreme Court Cases 33

For the appellants: Mr. K.D. Sood. Sr. Advocate, with Mr. Rajnish K. Lall, Advocate.
For the respondent: Mr. G.D. Verma, Sr. Advocate, with Mr. B.C. Verma, Advocate, for respondents No. 1, 3(a), 3(f), 4 to 6 & 14(a) to 14(g).

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal is maintained by the appellants/defendants (hereinafter referred to as "the defendants") laying challenge to the judgment and decree passed by the learned Additional District Judge, Mandi, in Civil Appeal No. 40 of 2002, dated 29.06.2004, whereby the learned District Judge, Mandi, has partly modified the judgment and decree, dated 31.12.2001, passed by learned Sub Judge 1st Class, Karsog, District Mandi, H.P., in Civil Suit No. 60-1 of 1994.

2. Brief facts giving rise to the present appeal are that the plaintiffs/respondents (hereinafter referred to as "the plaintiffs") filed a suit for declaration against the defendants. As per the plaintiffs, land comprised in Khatta No. 4, Khatauni No. 4, 5 to 7, Kita 54, measuring 63-12-2 bighas, situate at Village Shoungi, Illaqua Janubi Pargna, Tehsil Karsog, District Mandi, H.P. is recorded in joint ownership of the parties and the same has been wrongly recorded so. The land stands partitioned, in a family partition prior to 1940. It is further contended that as per the private partition, the land, as entered against Khewat Khatauni No. 4/4, Kitta-2, measuring 0-1-16 bighas in Khasra No. 140 & 142 and land entered against Khatauni No. 5, Khasras No. 6, 7, 29, 31, 32, 34, 63, 72, 143, 153, 164, 169, 180, 192, 199, 201, 207, 226, 236, 249, 262, 274, 276, 288, measuring 30-1-1 bighas fell to the share of the defendants. Consequent upon the private partition, the defendants have been recorded in separate possession of this land and the plaintiffs are not recorded in possession of the above land. On account of partition of the land, the defendants are in exclusive ownership of the land and the entries contrary to the claim of the plaintiffs are wrong and illegal. It is further contended that the land entered in Khata No. 4, Khatauni No. 6, Khasras No. 18, 20, 27, 28, 18, 65, 66, 68, 76, 152, 154, 155, 177, 178, 179, 188, 222, 223, 230, 235, 245, 247, 257, 275, 284, 289, Kitta 26, measuring 31-2-5 bighas and the land entered against Khewat Khatauni No. 7/7, Khasras No. 96, measuring 1-19-4 bighas and Khasra No. 75 measuring 0-8-16 bighas fell in the share of plaintiffs and now they are absolute owners-in-possession of this land and the adverse revenue entries are wrong and illegal. After the private partition, the plaintiffs and defendants have been put to their exclusive and separate possession of the shares.

3. The plaintiffs have further pleaded that deceased, plaintiff Ragu Ram, remained ill and was not able to move and walk. Defendants No. 1 and 2 by taking undue advantage of ill health of deceased, plaintiff Raghu Ram, swayed him that the suit land has since been

partitioned, but the revenue record has not been corrected to that extent in harmony with private partition. Defendants No. 1 and 2 took deceased, plaintiff Raghu Ram, to Tehsil office at Karsog and got some papers prepared, contents whereof were not disclosed. The papers were prepared on the pretext that revenue entries qua the joint Khatta were to be corrected. The deceased plaintiff, Raghu Ram, was taken to a Document Writer and under the bona fide belief that the revenue record is to be corrected consequent upon the private partition, he signed the requisite papers. Thus, defendants No. 1 and 2 executed a gift deed No. 414, dated 17.08.1993, through which 1/6th share of the land in Kheweat Khatauni No. 4/4 to 8, Kita 54, measuring 63-13-2 bighas was gifted to defendants No. 1 and 2. The gift deed, so executed, was the result of misrepresentation and fraud being played by defendants No. 1 and 2 on deceased, plaintiff Raghu Ram. As per the plaintiffs, deceased, plaintiff Raghu Ram, neither had an occasion to make a gift deed to defendants No. 1 and 2, nor he was competent, as the property is ancestral property and the deceased was not in possession of the land entered in Khewat Khataunis No. 4 and 5. Thus, the possession could not be delivered. Lastly, the plaintiffs prayed for a decree of declaration, declaring them as owners-in-possession of the land, mentioned in Khewat Khatauni No. 4, 6, 7 and 8, Kitta 28, measuring 33-10-5 bighas at Kauja Shoungi, Tehsil Karsog, District, Mandi, H.P., (hereinafter referred to as "the suit land"). A simultaneous prayer for correction in the revenue entries and declaring the gift deed No. 414, dated 17.08.1993 null and void, is also made.

4. The defendants, by filing the written statement, resisted the claim of the plaintiffs and took preliminary objections viz., valuation of the suit and estoppel. On merits, the defendants contended that the revenue entries are correct and the suit land is still joint and unpartitioned. The factum qua private partition has been denied and it is further contended by them in case there had been a private partition then a separate Khewat would have been created during the settlement operation. As per the defendants, the revenue entries, depicting the plaintiffs in possession of the suit land are not correct. The deceased, plaintiff Raghu Ram, executed a gift deed with his own free will and he was not ever tempted by the defendants. In fact, deceased, plaintiff Raghu Ram, himself asked the defendants to come to Karsog and he came with the revenue record from the Patwari. The gift deed was the result of love and affection. The deed was prepared through a Document Writer and the deceased, plaintiff Raghu Ram, also acknowledged the execution of the deed before the Sub Registrar, Karsog, who attested the same. The defendants have contended that deceased, plaintiff Raghu Ram, was having every right qua execution of a valid gift deed, which he had exercised voluntarily.

5. The learned Trial Court on 20.10.1994 framed the following issues for determination and adjudication:

> "1. Whether the plaintiff is absolute owner in possession of the suit land by way of private family partition between the parties, as alleged? OPP
>
> 2. Whether the gift deed No. 414 dated 17.08.1993 is illegal, wrong and void as alleged due to mis-represendation/fraud and fraud played upon the plaintiff? OPP
>
> 3. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction? OPD
>
> 4. Whether the plaint has not been prop0erly signed and verified as alleged? OPD
>
> 5. Whether the plaintiff is estopped to file the present suit by his own act and conduct? OPD
>
> 6. Relief."

6. It will be apt to highlight that initially the suit was dismissed by the Trial Court, vide its judgment dated 31.05.1996. The said judgment and decree were assailed and the learned First Appellate Court, vide judgment dated 11.05.2001 remanded the matter back to the learned Trial Court for recording the findings on the following two additional issues:

"5-A Whether the suit property inherited by plaintiff is ancestral in nature? OPP

5-B If issue No. 5-A is proved in affirmative, whether plaintiff was not competent to execute gift deed in favour of respondents No. 1 & 2 (defendants) as alleged? OPP."

After deciding the issues No. 1 and 2 against the plaintiffs, issues No. 3 and 4 against the defendants, issue No. 5 against the plaintiff and issues No. 5-A and 5-B against the plaintiffs, the suit of the plaintiffs was dismissed. Consequently, the plaintiffs laid challenge to the judgment and decree of the learned Trial Court before the learned First Appellate Court and the learned First Appellate Court vide its judgment and decree dated 29.06.2004, partly accepted the appeal qua issue No. 2 and the impugned judgment and decree of the learned Trial Court was modified to that extent, hence the present regular second appeal, which was admitted for hearing on the following substantial question of law:

"1. Whether the findings of the Court below are perverse, based on mis-reading of oral and documentary evidence, pleadings of the parties and the basic document of title Ex. DA?"

7. After the filing of the appeal by the appellants herein, the respondents herein filed Cross Objections (Cross Objections No. 583 of 2004) which were also admitted for hearing on the following substantial questions of law:

"1. Whether plea of private partition of the property in suit as raised on behalf of the Objectors has not been decided in accordance with Law and findings on this account are as a result of mis-reading and mis-construction of the pleadings of the parties and oral and documentary evidence on record?

2. Whether the findings as recorded by the learned District Judge against the Objectors are vitiated on account of mis-construction and misreading of oral as well as documentary evidence on record?

3. Whether the presumption of correctness as attached to the entries in the revenue record with respect to land in suit have been rebutted and in any case, the claim of the appellants about the partition of land in suit stand proved."

8. I have the learned counsel for the parties and also gone through the record in detail.

9. The learned Senior counsel for the appellants has argued that the findings recorded by the learned Lower Appellate Court are against the evidence which has come on record and the same are perverse. The law is not correctly applied by the learned Lower Appellate Court and, therefore, the present regular second appeal is required to be allowed. To support his arguments, the learned Senior counsel has relied upon the law, as settled by the Hon'ble Courts in the following judicial pronouncements:

1. Venkati Rama Reddi and others vs. Pillati Ram Reddi and others, AIR 1917 (4) Madras 27 (Full Bench),
2. P. Venkatachalam Chetty vs. P.S. Govindasawmi Naicker, AIR 1924 Madras 605,
3. Murikipudi Ankamma vs. Tummalacheruvu Narasayya and others, AIR (34) 1947 Madras 127,
4. Subhas Chandra Das Mushib vs. Ganga Prosad Das Mushib and others, AIR 1967 Supreme Court 878,
5. Amarsing Ratansing and another vs. Gosai Mohangir Somvargir and others,AIR 1972 Gujarat 74 (V 59 C 14),
6. Mst. Samrathi Devi vs. Parasuram Pandey and others, AIR 1975 Patna 140,
7. Afsar Shaikh and another vs. Soleman Bibi and others, AIR 1976 Supreme Court 163 (Patna),

8. P. Saraswathi Ammal vs. Lakshmi Ammal alias Lakshmi Kantam, AIR 1978 Madras 361,
9. Smt. Munni Devi vs. Smt. Chhoti and others, AIR 1983 Allahabad 444,
10. Savithramma vs. H. Garappa Reddy and others, AIR 1996 Karnataka 99,
11. Upasna & others vs. Omi Devi, 2001(2) Current Law Journal (Himachal Pradesh) 278,
12. Shri Kripa Ram and others vs. Smt. Maina, 2002(2) Shimla Law Cases 213,
13. N.V. Srinivasa Murthy vs. N.V. Gururaja Rao and others, (2005) 10 Supreme Court Cases 566 and
14. Jeet Kumar and another vs. Jai Chand and another, 2013(3) Himachal Law Reporter 1463.

10. On the other hand, the learned Senior counsel representing respondents No. 1, 3(a), 3(f), 4 to 6 and 14(a) to 14(g) has argued that the gift was never executed by the plaintiff, Raghu Ram, and in fact, the defendants by their cleverness had made plaintiff, Raghu Ram, to understand that some documents are to be executed with respect to family partition, which took place in the year 1940, and on that basis they persuaded him (Raghu Ram) to execute a gift deed without making him to understand the contents of the same. Learned Senior counsel has further argued that the cross-objections filed by the respondents are required to be allowed and the suit may be decreed in toto. To support his arguments the learned Senior Counsel has relied upon the law, as laid down in the following judicial pronouncements:

1. Moti vs. Roshan and others, AIR 1971 Himachal Pradesh 5 (V 58 C 2),
2. Ku. Sonia Bhatia vs. State of U.P. and others, AIR 1981 Supreme Court 1274,
3. Smt. Mallo vs. Smt. Bakhtawari and others, AIR 1985 Allahabad 160,
4. Digambar Adhar Patil vs. Devram Girdhar Patil (died) and another, AIR 1995 Supreme Court 1728,
5. Rajendra Tiwary vs. Basudeo Prasad and another, AIR 2002 (89) Supreme Court 136,
6. Krishna Mohan Kul alias Nani Charan Kul and another vs. Pratima Maity and others, (2004) 9 Supreme Court Cases 468,
7. Ashwani Kumar Rana vs. Balsharan Gautham and others, 2005(2) SLJ 1243,
8. Hari Shankar Singhania and others vs. Gaur Hari Singhania and others, (2006) 4 Supreme Court Cases 658,
9. Ramdev Food Products (P) Ltd. Vs. Arvindbhai Rambhai Patel and others, (2006) 8 Supreme Court Cases 726,
10. M. Venkataramana Hebbar (dead) By LRs vs. M. Rajagopal Hebbar and others, (2007) 6 Supreme Court Cases 401 and
11. Bhagwan Krishan Gupta (2) vs. Prabha Gupta and others, (2009) 11 Supreme Court Cases 33.

11. In rebuttal, the learned Senior Counsel for the appellant has argued that the gift deed was executed by the plaintiff, Raghu Ram, in favour of the defendants out of love and affection, as they were his nephews. He has further argued that the plaintiff, Raghu Ram, was fully aware about the consequences of the gift. He purchased the stamp papers and took the defendants to the Tehsil office at Karsog and executed a gift deed. He has argued that the appeal may be allowed.

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

13. At the very outset, as far as gift deed is concerned, the same is admitted by the plaintiffs, but it is argued that the defendants took undue advantage of the old age of deceased plaintiff (Raghu Ram) and they make him to understand that the document executed is with respect to family partition, which took place prior to the year 1940. This is how the defendants got the gift deed executed from deceased plaintiff (Raghu Ram).

14. In order to prove their case, the plaintiffs have examined nine witnesses, including Raghu Ram, who had executed a gift deed, Gauria, Man Singh, Shyam Singh, Lachmi Ram, Ganga Singh, H.Y. Sharma, Meer Singh and Prem Lal. On the other hand, the defendants, in order to prove their case, have examined four witnesses, namely, Dola Ram, Harish Chand, Chet Ram and D.S. Chandel.

15. The parties are co-owners of the suit land, however, they are in exclusive possession over certain portions of the land. Mere exclusive possession without the khata being dismembered is nothing, but it is still a joint possession of other co-owner.

16. The original deceased plaintiff, Shri Raghu Ram, has appeared in the witness-box as PW-1 and deposed that he is under treatment from P.G.I., Chandigarh. The defendants, who are from his in-laws' family, and the land, which is 63-64 bighas was partitioned 60 years ago, during the time of the ancestors. The defendants on the pretext that the partition will be given effect in the record got his signatures on the gift deed by mis-representation/fraud and when he came to know about this, he immediately filed the civil suit. In his cross-examination, nothing favourable to the defendants has come with regard to the gift deed. PW-2, Shri Gauria, had deposed with respect to separate possession of the parties after the settlement. PW-3, Shri Man Singh, has corroborated the statement of PW-2, Gauria. PW-4, Shri Shyam Singh, has also deposed with regard to the separate possession of the parties. PW-5, Shri Lachmi Ram, deposed that though he has signed gift deed, Ex. DA, as a witness, but the same was with respect to the settlement of the partition. In his cross-examination, this witness has stated that he does not know whether Ex. DA was read-over to Raghu Ram (deceased plaintiff). PW-6, Shri Ganga Singh, is the son of the plaintiff, who substituted the plaintiff. He has further stated that the land was partitioned during the time of the ancestors and he has produced on record the pedigree table to prove that he is successor. PW-8, Shri Meer Singh, is also one of the co-sharer, who has stated that they had separate possession on the land. He has shown his ignorance with respect to Ex. DA. PW-9 Shri Prem Lal, who has translated the documents from Urdu to Hindu.

17. On the other hand, the defendants have examined four witnesses, namely, Dola Ram, Harish Chand, Chet Ram, D.S. Chandel and Dola Ram was also re-examined.

18. DW-1, Shri Dola Ram (defendant No. 1), has stated that Raghu Ram has given 10½ bighas of land by making a gift deed. This witness tried to prove Ex. DA. To the similar effect he has examined other witnesses, that is, DW-2 Shri Harish Chand (Document Writer), DW-3 Chet Ram (Clerk) and DW-4, Shri D.S. Chandel (sub Registrar). DW-3, Shri Chet Ram, Clerk, sub Treasury, Karsog, was examined to prove the registration of the gift deed. From the above, it is clear that there was no occasion for Raghu Ram (deceased plaintiff) to have filed the civil suit after executing gift deed, Ex. DA, had he executed the gift deed.

19. Now this Court is faced with two situations, firstly, there is a registered gift deed and on the other hand the donor is claiming that he signed the documents taking into consideration the fact that the document is with regard to family partition, which took place 60 years before, as the defendants made him understand that by executing this document their position on the land, as per the family partition, will be recorded.

20. Adverting to the available revenue record, it unequivocally demonstrate that the parties are recorded as co-owners, however, it further reveals that the contesting parties are recorded in exclusive possession over some portions of the land. The land can be partitioned legally through an instrument of partition and the status of co-sharer in the revenue record is treated in the legal parlance as *"community of possession and unity of title of all co-sharers",* although they are depicted in the revenue record in exclusive possession over the separate

portions of the land. Precisely, exclusive possession of the contesting parties cannot at all be termed/treated as *"family partition"*, which is contended to have taken place inter se the predecessor-in-interest of the parties about 60 years back. As a matter of fact, no documentary evidence qua family partition has come on record. Moreover, even if we presume that *"khangi taksim"* took place between the predecessor-in-interest of the parties, then for such a long period of 50-60 years any of the parties should have taken steps to legally validate the same. Admittedly, there is no evidence on record which demonstrates that at any point of time steps were taken for recording the alleged private partition. Even the law mandates for legal validation of the private partition. No overt act is shown which proves that steps were taken for recording that private partition (Khangi taksim). In case the said private partition was legally validated, then the entries qua that should have been recorded in the revenue record, however, it is not so. For this reason only, the parties are still litigating. *Khangi taksim* is to be affirmed as per the provisions mandated by law. Separation of khata *inter se* the co-owners is the only mode to effect severance.

21. In the case in hand, as *Khangi taksim* was not recorded in the revenue record, the version of the plaintiff (deceased Raghu Ram), who appeared as PW-1, that papers of Ex. DA was signed by him assuming that the family partition is to be registered in the revenue record, has force. The original plaintiff (deceased Raghu Ram) immediately maintained a suit before the Court of law, by engaging an Advocate, when he came to know about the Ex. DA (gift deed). In these circumstances, the law, as cited by the learned Senior Counsel for the appellants, is required to be examined.

22. The Hon'ble Full Bench of Madras High Court in case titled as ***Venkati Rama Reddi and others vs. Pillati Ram Reddi and others, AIR 1917 (4) Madras 27 (Full Bench),*** has held that registration of a gift deed after the death of the donor is valid and the registration by the donor is not at all necessary. It has also been held in the judgment (supra) that execution of instrument duly signed is sufficient and the gift on registration takes effect from the date of its execution. However, this judgment is not applicable to the facts of the case in hand, as the executant has himself immediately maintained a suit with respect to mis-representation/fraud made by the defendants, which he has also proved on record by leading cogent and convincing evidence.

23. The Hon'ble High Court of Madras in yet another case titled as ***P. Venkatachalam Chetty vs. P.S. Govindasawmi Naicker, AIR 1924 Madras 605,*** has held that a deed which disposes of any immediate interest in property is not a gift but a will, relevant text of the judgment is extracted as under:

> " … *…It is contended that it is in effect a deed of gift operating in presenti and not a will at all and that as it is a deed of gift in respect of immoveable property which has not been registered, it is void and has no effect. A will is defined in Section 3 of the Probate and Administration Act (V of 1881), as "the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death." This document which, as I have said, is described as a gift deed purports to dispose of part of a house. The relevant portions of the document are as follows:*
>
> *"You shall yourself after my lifetime use and enjoy the two rooms built on the ground of the house Municipal No. 11…………I shall myself enjoy the rent in respect of those two rooms as long as I may be alive. You shall yourself use and enjoy after my lifetime that rent and that ground and the two rooms from son to grandson and so on in succession with power to gift, mortgage, exchange and sale. No one has any right to or interest in those rooms. To this effect is the gift deed document executed and given in respect of the aforesaid two rooms and their grounds."*
>
> *In the form it is a deed of gift and not a will, but in fact it is a declaration of the intentions of the donor with respect to her property which she desires to be*

carried into effect after he death, because there is no disposal of any immediate rights of possession or any immediate interest in the property. The fact that the document purports to reserve a life interest in the property to the donor is an argument against its being a will, but as was pointed out by the Privy Council in ***Thakur Ishri Singh vs. Thakur Baldeo, (1884) 10 Cal 792 (P.C.),*** *no great attention need be paid to that, because it is a frequent thing in this country to find documents which are in fact wills in terms making clear that the person disposing of the property reserves a life or immediate interest in the property."*

This judgment is not applicable to the facts of the present case.

24. The Hon'ble High Court of Madras in ***Murikipudi Ankamma vs. Tummalacheruvu Narasayya and others, AIR (34) 1947 Madras 127,*** has held that without there being any express reservation of a power of revocation in the gift deed, a donor does not have any right to revoke the gift and the only custody by the donor of the gift deed does not lead to any adverse conclusion against the donee, especially where the entire conduct of the donee shows that he accepted the gift and the document was kept in the family box to which the donee also had access. It has also been held that where the donor has the power to revoke and he validly exercises the same, he becomes the absolute owner of the property in question and in case he has no power of revocation, he ceases to have any interest or right in the property in question. However, this judgment is also not applicable to the facts of the present case, as the plaintiffs have proved mis-representation/fraud of the defendants and the deed writer with respect of Ex. DA (gift deed).

25. The Hon'ble Supreme Court in ***Subhas Chandra Das Mushib vs. Ganga Prosad Das Mushib and others, AIR 1967 Supreme Court 878,*** has held that in cases of undue influence the Court must consider relations between the donor and the donee and has the donee used that position to obtain an unfair advantage over the donor, Court must also scrutinise the pleadings to ascertain whether undue influence was exercised or not. In the judgment (supra) the meaning of expression 'collusion' was expounded as "secret agreement for illegal purposes or a conspiracy and implies that a man does something evil designedly". Apt paras of the judgment are reproduced below:

"3. Under s. 16 (1) of the Indian Contract Act a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. This shows that the court trying a case of undue influence must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor and (2) has the donee used that position to obtain an unfair advantage over the donor'?

... ...

7. The three stages for consideration of a case of undue influence were expounded in the case of ***Ragunath Prasad v. Sarju Prasad and others, 51 Ind App 101: (AIR 1924 PC 60)*** *in the following words :-*

"In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached - namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The

first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other?

... ...

10. Before, however, a court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6, Rule 4 of the Code of Civil Procedure. This aspect of the pleading was also given great stress in the case of Ladli Prasad Jaiswal, (1964) 1 SCR 270: (AIR 1963 SC 1279) above referred to. In tht case it was observed (at p. 295) (of SCR): (at p. 1288 of AIR):

"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."

... ...

12. It will at once be noted from the above that the two portions of the extracts from paragraph 4 are in conflict with each other. According to the first portion the plaintiff's father Prasanna colluded with his sister on the advice of his brother to execute the deed of gift. The word "collusion" means a secret agreement for illegal purposes or a conspiracy. The use of the word "collusion" suggests that Prasanna knew what he was about and that he did it secretly or fraudulently with the object of depriving the plaintiff. According to the second portion of the extract, Prasanna, because of his old age, was subject to senile decay and could not discriminate between good and evil. This hardly fits in with the case of collusion which implies that a man does something evil designedly. There is no suggestion in this paragraph of the plaint that Prasanna was under the domination of Balaram and that Balaram exercised his power over Prasanna to get the document executed and registered by Prasanna. It will be remembered that nominally the property stood in the name of the sister who was also a party to the document and according to the extract quoted above Balaram had exercised undue influence over her also.

... ...

25. There was practically no evidence about the domination of Balaram over Prasanna at the time of the execution of the deed of gift or even thereafter. Prasanna, according to the evidence, seems to have been a person who was taking an active interest in the management of the property even shortly before his death. The circumstances obtaining in the family in the year 1944 do not show that the impugned transaction was of such a nature as to shock ones conscience. The plaintiff had no son. For a good many years before 1944 he had been making a living elsewhere. According to his own admission in cross- examination, he owned a jungle in his own right (the area being given by the defendant as 80 bighas) and was therefore possessed of separate property in which his brother or nephew had no interest. There were other joint properties in the village of Parbatipur which were not the subject- matter of the deed of gift. It may be that they were not as valuable as the Lokepur properties. The circumstance that a grand -father made a gift of a portion of his properties to his only grandson a few years before his death is not on the face of it an unconscionable transaction. Moreover, we cannot lose sight of the fact that if Balaram was exercising undue influence over his father he did not go to the length of having the deed of gift in his own name. In this he was certainly acting very unwisely because it was not out of the range of possibility that Subhas after attaining majority might have nothing to do with his father."

This judgment is not applicable to the present case, as mis-representation/fraud on the part of the defendants stands cogently proved by the plaintiffs.

26. The Hon'ble High Court of Gujarat in ***Amarsing Ratansing and another vs. Gosai Mohangir Somvargir and others, AIR 1972 Gujarat 74 (V 59 C 14),*** has held that in cases of gift or will where the executant of the same intended to convey and confer immediate title on a person subject to his right of resident for the life time and no right of revocation was reserved, the document is "gift" and not a "will". Relevant paras of the judgment are reproduced below:

> *"6. Applying the twin tests to the document Ex. 45, what we find is that the said document is engrossed on a stamp-paper of the erstwhile State of Baroda and it was registered with the Registrar of document, the suit property was given in gift to the plaintiff No. 3, but the said deceased Bai Andar reserved a right to reside in the said property till her lifetime. It was, therefore, further directed that the plaintiff No. 3 and his heirs or assignees were entitled to use and enjoy and to transfer the same by mortgage, sale, gift or otherwise after her death and at that time the other heirs of the executant would have no relation or concern with it. The plaintiff No. 3 further directed to mutate the suit property in the Municipals office after her death and the plaintiff No. 2 should pay the taxes thereafter. On these conditions the suit property was given in gift to the plaintiff No. 3 and in spit of this document, if any heir or person claiming interest caused any obstruction or raise any objection, the executant would at her cost and expense remove the said objection or obstruction. It was further directed that the documents constituting title in respect of the said property were to be collected by the plaintiff No. 3 after the death of Bai Andar. On considering the above gist of the document, it is very clear that the deceased Bai Andar intended to convey and confer the title on plaintiff No. 3 immediately subject to her right of residence for the lifetime. It was, therefore, nothing more than reservation of life interest in the property. The mere fact of reservation of life interest in property would not convert a deed of gift into a testamentary instrument. The other test. Viz, there is any right of reservation, impliedly or expressly, for revocation of an instrument, I have been able to find none and Mr. Shah has not been able to point out any relevant provision in the document, Ex. 45, from which it could be suggested, remotely, that there was an intention to reserve the right of revocation. It was, however, contended by Mr. Shah that if it is held that this is a sill, then right of revocation is implicit in it. I am of the opinion that the last contention does not reserve any consideration because in order to determine that the instrument is a testamentary instrument, the various tests as suggested by the High Court of Bombay. AIR 1947 Bom 49, should be satisfied and the two main tests were, whether the arrangement was to be effective in praesenti and whether there is any right of revocation express or implied. On both these tests Mr. Shah has not been able to satisfy me that the document. Ex. 45, was in nature of a will I am therefore, of opinion that both the learned Judges were right in holding that the document, Ex. 45, was not a will but a deed of gift.*
>
> *7. The second contention of Mr. Shah that even if it is assumed that Ex. 45 is a deed of gift, it was not validly and legally attested also should be rejected. In the first place, in the written statement the defendants have not raised this plea of want of proper and legal attestment of the document in question. No issue has been raised by the trial Court, secondly no material has been brought out in cross-examination of the attesting witness which would show that the attestation was not legal and proper, I have been taken through the evidence of attesting witness and I have not been able to find any material from which it could be said that the attestation by the witnesses was not made as required by Section 3 of the Transfer of Property Act. On the contrary the evidence of the attesting witness Chandulal Bapalal, Ex. 41, shows that the persons signing on behalf of the executant as well as the other attesting witness, viz. Chimanlal Shyamlal, had put their signatures in his presence. The other attesting witness Chimanlal Shyamlal*

has died and therefore, it was not possible for the plaintiffs to examine him. In the cross-examination nothing has been brought out which would show that the attestation was not according to the law. Both the Courts below have also found that the document was attested and executed. The learned trial Judge has further found from the evidence that the defendant No. 1 has admitted in his cross-examination that he knew that Bai Andar had made a will in favour of plaintiff No. 3 and, therefore, apart from the question; whether the nature of document was a gift or a will, it was found by the Court that the deceased Bai Andar had executed the document. According to Section 68 of the Evidence Act the necessity of examining an attesting witness would arise only when a document which is required by law to be attested is sought to be used in evidence and the execution thereof is questioned. Here, it has been found by the learned trial Judge that the defendant No. 3 and had admitted that such a document was in fact executed in favour of plaintiff No. 3. In that view of the matter, therefore, the second contention of Mr. Shah should fail."

The judgment is not applicable to the facts of the present case.

27. The Hon'ble High Court of Patna has held as under in ***Mst. Samrathi Devi vs. Parasuram Pandey and others, AIR 1975 Patna 140,*** that the fact of the deed being handed over by the donor to the donee is sufficient evidence of his having accepted the gift and the acceptance of the said document is a relevant fact to prove the acceptance of the gift by him. In the judgment (supra) it has also been held that in second appeal matter relating to realm of fact, which was not raised earlier, cannot be permitted to be raised. Apt paras of the judgment are extracted below:

"7. Before proceeding to consider the various contentions raised by learned counsel appearing for the respective parties, I do not feel any difficulty to hold that the reason of the learned Munsif for holding that defendant No. 1 had, no right to execute the deed of gift in favour of the plaintiff as she was only a maintenance holder is unsustainable in law. In view of his own finding that defendant No. 1 was in adverse possession over the suit properties and had acquired a title thereby in her own rights, her status from a mere maintenance holder had changed, she having already perfected her title on that account. Accordingly, she was perfectly competent to deal with the properties in question in whatever manner she liked as the full owner of the same. The deed of gift executed by defendant No. 1 in favour of the plaintiff was, therefore, not correctly considered and appreciated. The only ground on which the said document was challenged by the defendants was fraud and coercion exercised on defendant No. I. In this court, Mr. Prem Lal, learned counsel appearing for the respondents, also invited my attention to the various recitals of fact in the said document, such as, the description of the plaintiff as the own daughter of defendant No. 1 and that she was living with her and nursing her which, according to the learned counsel, were not factually correct. Be that as it may, as already stated, the deed in question was not challenged by the defendants on these grounds at any stage. These are all matters relating to the realm of fact; and, if the defendants wanted to challenge the document on these materials, it was open to them to challenge this document on these grounds also and to establish as a fact that the testamentary disposition by defendant No. 1 was intended to take place and motivated due to the said factors. In this court, it is too late for them to urge these questions of fact for which no material was brought on the record.

8. Mr. Premlal, however, contended that the transfer by way of gift in favour of the plaintiff purported to have been made under the document (Ext. 5) was not complete as the same was not accepted by the plaintiff, and she herself had stated to this effect in the impugned document (Ext. D). It is true that a transaction of gift in order to be complete must be accepted by the donee during

the lifetime of the donor. The fact of acceptance, however, can be established by different circumstances, such as by the donee's taking possession of the property or by possession of the deed of gift alone. There are numerous authorities in support of the proposition that if a document of gift after its execution or registration in favour of the donee is handed over to him by the donor which he accepts, it should amount in law to be valid acceptance of the gift. In support of this proposition, Mr. J. C. Sinha relied upon a decision of the Judicial Committee in the case of ***Kalyanasundaram Pillai v. Karuppa Mooppanar****, (AIR 1927 PC 42). In this case, their Lordships approved the view of the Full Bench of the Bombay High Court in* ***Atmaram Sakharam v. Vaman Janardhan****, (AIR 1925 Bom 210) (FB) that where the donor of immovable property handed over to the donee an instrument of gift duly executed and attested, it would amount to the acceptance of the gift by the donee, and the donor had no power to revoke the gift even if the registration of the instrument had not taken place. This court also in* ***Ram Chandra Prasad v. Sital Prasad****, (AIR 1948 Pat 130) took a similar view and held that the fact of the deed being handed over by the donor to the donee was sufficient evidence of his having accepted the gift, and that the acceptance of the said document was a relevant fact to prove the acceptance of the gift by him. To the same effect is the view of the High Court of* ***Travancorc and Cochin in the case of Esakkimadan Pillai v. Esakki Amma,*** *(AIR 1953 Trav-Co 336). It is not necessary to multiply authorities in support of this proposition. From the above, discussion, it must be held that the deed of gift executed by defendant No. 1 in favour of the plaintiff was a valid and binding document resulting in a complete transfer of the interest of defendant No. 1 in respect of the suit properties to the plaintiff."*

The judgment is not applicable to the facts of the present case, as no new matter is raised by the in the present regular second appeal.

28. The Hon'ble High Court of Patna in ***Afsar Shaikh Devi vs. Parasuram Pandey and others, AIR 1975 Patna 140,*** has held it is question of fact where a person is in a position to dominate the will of another and procure certain deed by undue influence and the same cannot be reopened in second appeal, if decided in accordance with prescribed procedure. Separate pleadings qua "undue influence" are necessary and general allegation cannot spell out undue influence. Apt paras of the judgment (supra) are reproduced hereinbelow:

"15. While it is true that `undue influence', `fraud', `misrepresentation' are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are in view of Order 6, Rule 4, read with Order 6, r.2, of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the trial court, or, in the first round, even before the first appellate court.

16. The High Court has tried to spell out a plea of undue influence by referring to paragraph 7 of the written statement in which the defendant inter-alia stated that he was "looked after and brought up by the plaintiff as his son and he became very much attached to the plaintiff and since his infancy till the middle of this year this defendant always lived with the plaintiff and used to treat him as his father helped him and looked after all his affairs." This paragraph, according to the learned Judge, contains "a clear admission of the intimate relationship between the two indicative of the position of dominating the will of the plaintiff by defendant No. 1".

17. *We are, with due respect, unable to appreciate this antic construction put on the defendants' pleading. All that has been said in the written statement is that the relationship subsisting between the plaintiff and the defendant was marked by love and affection, and was akin to that of father and son. Normally, in such paternal relationship, the father, and not the son, is in a position of dominating influence. The defendant's pleading could not be reasonably construed as an admission, direct or inferential, of the fact that he was in a position to dominate the will of the plaintiff. In spelling out a plea of undue influence for the plaintiff by an `inverted' construction of the defendants' pleading, the High Court overlooked the principle conveyed by the maxim secundum allegataet probata, that the plaintiff could succeed only by what he had alleged and proved. He could not be allowed to travel beyond what was pleaded by him and put in issue. On his failure to prove his case as alleged, the court could not conjure up a new case for him by stretching his pleading and reading into it something which was not there, nor in issue, with the aid of an extraneous document. Thus considered, the High Court was in error when by its judgment, dated October 16, 1963, it remanded the case to the first appellate Court with a direction to determine the question of undue influence "on material already on record."*

… … … … … …

19. *It is well settled that a question whether a person was in a position to dominate the will of another and procured a certain deed by undue influence, is a question of fact, and a finding thereon is a finding of fact and if arrived at fairly, in accordance with the procedure prescribed, is not liable to be reopened in second appeal* ***(Satgur Prasad v. Har Narain Das, 59 Ind App 147 = (AIR 1932 PC 89); Ladli Parshad v. Karnal Distillery Co. Ltd., (2964) 1 SCR 270 = (AIR 1963 SC 1279).***

… … … … … …

21. *The law as to undue influence in the case of a gift inter vivos is the same as in the case of a contract. It is embodied in s. 16 of the Indian Contract Act. Sub-section (1) of s. 16 defines 'undue influence' in general terms. It provides that to constitute 'undue influence' two basic elements must be cumulatively present. First, the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other. Second, the party in dominant position uses that position to obtain an unfair advantage over the other. Both these conditions must be pleaded with particularity and proved by the person seeking to avoid the transaction.*

22. *In view of this sub-section, the Court trying a case of undue influence of the kind before us, must, to start with, consider two things, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor? and (2) has the donee used that position to obtain an unfair advantage over the donor ? (Subhas Chandra v. Ganga Prasad). 1 SCR 331 at p. 334 = (AIR 1967 SC 878 at p. 880).*

23. *Sub-section (2) of s. 16 is illustrative as to when a person is considered to be in a position to dominate the will of the other. It gives three illustrations of such a position, which adapted to the facts of the present case, would be (a) whether the donee holds a real or apparent authority over the donor, (b) whether he stands in a fiduciary relation to the donor, or (c) whether he makes the transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.*

24. *Sub-section (3) contains a rule of evidence. According to this rule, if a person seeking to avoid a transaction on the ground of undue influence proves-*

(a) that the party who had obtained the benefit was, at the material time, in a position to dominate the will of the other conferring the benefit, and

(b) that the transaction is unconscionable, the burden shifts on the party benefitting by the transaction to show that it was not induced by undue influence. If either of these two conditions is not established the burden will not shift. As shall be disussed presently, in the instant case the first condition had not been established, and consequently, the burden never shifted on the defendant.

25. In Subhas Chandra's case (ibid), this Court quoted with approval the observations of the Privy Council in Raghunath Prasad v. Sarju Prasad, 51 Ind App 101 = (AIR 1924 PC 60) which expounded three stages for consideration of a case of undue influence. It was pointed out that the first thing to be considered is, whether the plaintiff or the party asking relief on the ground of undue influence has proved that the relations between the parties to each other are such that one is in a position to dominate the will of the other. Upto this point 'influence' alone has been made out. Once that position is substantiated, the second stage has been reached - namely, the issue whether the transaction has been induced by undue influence. That is to say, it is not sufficient for the person seeking the relief to show that the relations of the parties have been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. "More than mere influence must be proved so as to render influence in the language of the law, 'undue' (Poosathurai v. Kappanna Chettiar, 47 Ind App 1 = (AIR 1920 PC 65)). Upon a determination of the issue at the second stage, a third point emerges, which is of the onus probandi". If the transaction appears be unconscionable, then the burden of proving that it was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

"Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of the parties. Were they such as to put one in a position to dominate the will of the other".

… … … … … …

28. Thus, even the slander shred in the plaint from which the High Court tried to spell out a whole pattern of fiduciary relationship between the parties and a position of dominant influence for Afsar, was torn and destroyed by the plaintiff himself in the witness-stand.

29. In the context of the first-stage consideration, the District Judge found on the basis of the evidence on record, that although the plaintiff was an old man-and he had intentionally, far overstated his age yet he was quite fit to look after his affairs. On this point, the District Judge accepted the version of the plaintiff's own witness (PW 7) which was to the effect, that the plaintiff himself yokes the bullocks, and unaided by anybody else, ploughs his lands. In the face of such evidence, the District Judge was right in holding that Ebad plaintiff, though old, was physically fit to carry on his affairs. There was no evidence to show that the mental capacity of the donor was temporarily or permanently affected or enfeebled by old age or other cause, so that he could not understand the nature of deed or the effect and consequences of its execution. The mere fact that he was illiterate and old, was no proof of such mental incapacity. None of the circumstances mentioned in sub-section (2) of s. 16, had been proved from which an inference could be drawn that the donee was in a position to dominate the will of the donor."

As mis-representation/fraud on the part of the defendants stands cogently proved by the plaintiffs, the judgment is not applicable to the facts of the present case.

29. The Hon'ble High Court of Madras in ***P. Saraswathi Ammal vs. Lakshmi Ammal alias Lakshmi Kantam, AIR 1978 Madras 361,*** has held that 'bargain is tainted by undue influence and it is only after particulars are made available and a reasonable proof thereof has been given, the onus would shift on the so called 'person of domination'. Until then the burden is on the complainant to establish it is so. The Court must scrutinize the pleadings and evidence to ascertain undue influence or coercion. Relevant paras of the judgment are reproduced hereinabove in extenso:

"11. The plea of undue influence as raised in the pleadings rests upon the following facts urged by the plaintiff. According to the plaintiff she came to understand that the defendants have taken undue advantage of the dominant position which they and the first daughter and the husbands of both the sisters occupied with reference to her and it was in that atmosphere she was compelled to execute the challenged sale deed. The second objection is that the consideration said to have been paid under the document is ridiculously low, the third contention is that the document is a sham one not intended to be acted upon. To further this contention, the plaintiff would allege that she was told that the mother was taking a loan and that she should attest the document and she believed her mother and signed the same. She would also add that the document on the face of it is unconscionable and gives the first defendant unfair advantage. But the telling irreconcilable part of it is that in the alternative, the plaintiff accepts the document partially and she is prepared to redeem the properties without payment of the consideration mentioned therein, if the Court ultimately holds that the money was lent under the document. She claims that she is not liable to pay any amount for such redemption, since the first defendant was in possession and enjoyment of the properties till the date of suit. In a case where a litigant intends to overlook and bypass a registered document under which prima facie certain rights have become vested and under which third parties have acquired indefeasible rights, then the challenging party should be in a position to give such particulars about such undue influence which should form the basis of her complaint. The primary ground on which the plea of undue influence is founded is based on relationship. It is axiomatic that mere proof of relationship however near it may be, is not sufficient for a Court to assume that one relation was in a position to dominate the will of the other. Such bonds of kinship which are universally felt should not be mistaken as equivalent to saying that one kinsman could unduly influence the other in the circuit of such bondage. Even if any advice is given it may be influence but not undue influence. The tie of relationship need not necessarily be used unwisely, injudiciously and unhelpfully so as to gain an unfair advantage by the relation who is advising the other relation. Particularly in a Hindu family a widowed mother, who would rather be fairly and affectionately inclined to an unmarried daughter would not make undue preferences in favour of a married one who has already been provided for and who was well set in life. The sentiment, the traditional features of a Hindu Home, the love and affection of a mother towards her natural and last child which is a always in one way unless there are very extraneous circumstances to assume otherwise should always prompt a Court to raise the reasonable presumption that any advice or influence which a parent brought to bear on his own child is not to gain an advantage for herself or to see that an unfair advantage is gained by another child of hers in preference to the challenging child. There is also one other important and salient feature which ought to be established on materials pleaded and acts established that the 'bargain is tainted by undue influence' and it is unconscionable that it could reasonably be said that the person to obtain unfair advantage for himself and so as to cause injury to the person sought relying upon his authority or aid. It is only after such particulars are made available and a reasonable proof thereof has been given, the

onus probandi would shift on the so-called 'person of domination'. Until then the burden is on the complainant to establish it is so.

12. In the instant case, the particulars given are not so appealing and telling. It is essential that in a case where fraud, undue influence or coercion is put at the forefront the complaining party should set forth the facts in full and give such essential particulars instead of making general allegations. That this is the legal requirement as provided for in Order 6, Rule 4, C.P.C. is reiterated by the Supreme Court in ***Subhas Chandra v. Ganga Prosad*** ***(AIR 1967 SC 878)*** *. The Supreme Court said that the Court must scrutinize the pleadings to find out that a plea has been made out and that full particulars thereof have been given before examining Whether undue influence was exercised or not. In the light of this, the pleadings and the evidence let in should be scrutinized.*

13. Before doing so, it would be convenient to refer to the plaintiff herself and her ability and capability. She had her early education in an Anglo Indian School and studied up to Pre-University Class in the Nirmala College, Coimbatore. She is, therefore, an educated lady and not an illiterate or a person, who could be said to be incapable of acting on her own. In cases where a person suffers from an infirmity or backwardness, then standards of proof regarding undue influence or coercion may be slightly different. The case cited by the learned counsel for the respondent in ***Nibaran v. Nirupama (AIR 1921 Cal 131)*** *deals with the transaction of a Pardanashin lady. They divided the decisions on the subject under two groups as follows:*

"...... First, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in fiduciary character or in some relation of personal confidence; and secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically".

A fortiori therefore, in a case where the challenging litigant is capable and literate and the parties are parent and child, the Courts, must be doubly careful and would certainly demand strict proof of the misuse of confidence and influence said to have been exercised by the other party when the other party is none else than the mother. P. Ws. 1, 2 and 3 do not convincingly refer to any unfair practice indulged in by the mother when she joined with the plaintiff to sell the property to the sister of the plaintiff. P. W. 4, the plaintiff's father-in-law, does not even wisper about undue influence having been exercised by the mother or any other member of the family. He would only ask us to draw some inference from surrounding facts. He would say that Dr. Punnaivanam, the husband of the first defendant took active part in arranging the marriage of the plaintiff and that the husband chosen was according to the choice of the plaintiff herself and that considerable sums were spent for her marriage. It is in this background of total lack of particulars of undue influence that we should read the evidence of P. W. 5, the plaintiff herself. She admits that she might have read the document Ex. B-2. This necessarily means that she has read it, since there is no denial of it. Her case is that she was not aware that she was executing a sale deed. Her specific particulars which she gives in the witness box about the practice of undue influence are that her mother, the second defendant, her elder sister, the first defendant, and Punnaivanam, the husband of the first defendant, informed her that another family house had been brought to sale in Court auction and that in order to save the property she must sign the document. There is no corroboration about this extraordinary version. The first defendant as D. W. 6 speaking to the contrary would say that the property had to be sold in order to secure money for purpose of the marriage of the plaintiff

and since she was inclined to purchase the property she bargained for and fixed a fair price of Rs. 10,000/- and purchased the property under Ex. B-2. No doubt the mother whose act has been challenged and who is obviously in an embarrassing position, did not choose to get into the box. D. W. 5 is characterised by the lower court as a respectable person. He deposed that Ex. B-2 was read over and after it was so read over only, the plaintiff signed Ex. B-2, But the trial Judge thought that D. W. 5 should have expressed an opinion besides having spoken the truth. He was of the view that D. W. 5 should have specifically stated that the plaintiff signed the document after knowing the true nature of it. We are unable to share the view of the trial court in this behalf. When once a person placed in the position of the plaintiff who is not an illiterate and who could be said to have such experience in life and matters to understand things it is very difficult to infer that the plaintiff has discharged her burden. She would say in the witness box that she signed because she wanted to avoid a sale of another property of the family. She improves her case in the witness box so as to satisfy the legal requirement about the particulars of undue influence by saying that she believed her mother and her elder sister and signed the document. She would pretend that she signed as a witness to some document. She also would say that there was no necessity for sale, since there were family jewels and other monies of her father which was available for celebrating her marriage. The document is of the year 1964. Her mother was sending her regularly some amounts by way of pocket money and there was therefore no ill-feelings or any difference of opinion in the family. It is only in 1969, when she was in Coimbatore, she came to know that her property has been sold. Excepting for this evidence that it was P. W. 3 who told her about it no other speak about it, P. W. 3 was examined on 23-3-1971 and P. W. 5 was examined on 24-3-1971. There is no consistent version which is acceptable even as regards the information said to have been given by P. W. 3 in 1969. P. W. 3 would not specifically refer to the meeting at Coimbatore in 1969, whilst P. W. 5 the plaintiff refers to it very vaguely. In the suit notices which were exchanged under Exs. A-4 and A-2 there is no specific reference to the plaintiff having been unduly influenced by her mother. One other important feature Which has to be borne in mind in the instant case is that the plaintiff should be deemed to have understood the challenged deed and signed it. The plea of non est factum is therefore not available to her. She says "PADITTHU ERUKKALAM" but she does not say " PADIKKAVILLI". The fair assumption is that she read it, understood it and signed it. To quote the observations of the Privy Council in ***Martin Cashin v. Peter j. Cashin (AIR 1938 PC 103):***

"In a case where the person executing the deed is neither blind nor illiterate, Where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of non est factum is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him not because he has read it or understands it, but because he has chosen to execute it".

Mr. Thiagarajan referred to various decisions. Narayanadoss Balakrishna Doss v. Buchrai Chordia Sowcar (53 Mad LJ 842) : (AIR 1928 Mad 6); Rama Patter v. Lingappa Gounder (69 Mad LJ 104) : (AIR 1935 Mad 726); Mannankatti Ammal v. Vaiyapur Udayar (1961-2 Mad LJ 367); Abdul Malick Sahib v. Md. Yousuf Sahib and other cases to show that this is a case where the plaintiff should be deemed to have been unduly influenced. In all those cases the following principles were laid down.

"(1) Where confidential relations exist, those standing in such relations cannot entitle themselves to hold benefits unless they can show that the persons who have conferred the benefits had competent and independent advice. In this case,

neither does the age nor the capacity of the person conferring the benefit affect the principle".

"(2) Age and capacity are considerations which may be important in cases where no confidential relation exists".

There can be no quarrel relating to such accepted and general proposition. But each case has to depend upon its facts. In the instant case, the parties are parent and child. The document was executed at a time when the marriage negotiations of the plaintiff were going on. According to us, the plaintiff understood that it was sale of her property for consideration. The story that there were other moveable properties such as jewels and cash which ought to have been sufficient for the conduct of her marriage though spoken to vaguely has not been established. No such evidence has been placed before us either. The normal circumstance of securing competent and independent advice would not enter for consideration in this case because it was all arranged in a family council in which there was no distrust or mistrust as between the one and the other. What was sold did not belong to the plaintiff at all on the date of sale. She had only a bare right of expectancy; it may be a vested right. The subject-matter of the sale was not fully appreciated by the trial court. Both life interest of the mother as well as the ultimate remainder vested in the plaintiff were act (sic) of the second defendant after freely exercising her independent will and mind. The case relied on by Tyagarajan in Lancashire Loans Ltd. v. Black (1934-1 KB 380) which, of course, is a case as between a daughter and a mother, is certainly distinguishable. There, the daughter, who did not understand the transaction, signed the document at the request of her mother. The only advice which the daughter received was that of a Solicitor, who also acted for the mother and the money-lenders, who duped the daughter and who prepared the documents. It was in those circumstances the Court of Appeal held that the daughter was under the undue influence of her mother when she entered into the transaction in question and as the money-lenders had notice of the facts which constituted undue influence on the part of the mother, the transaction must be set aside. The facts of our case are entirely different.

14. Learned counsel for the first respondent rests his case in the alternative on the inadequacy of consideration which was more or less the sole ground on which the lower Court found a case of undue influence. The Court thought that the price paid under Ex. B-2 was ridiculously low. We have already referred to the fact that the plaintiff came to Court with inconsistent plea and she was not able to substantiate her case of undue influence, by concrete evidence. The sale is both the life estate and the vested remainder. But the lower court did not have this in mind and went on evaluating the property on some uncertain evidence regarding the income which it fetched and came to the conclusion that the price paid was ridiculously low, and therefore, the document should be set aside. Ex. A-17 dated 3-3-1965 furnished data with reference to some other property but said to be similar. This was proved by P. W. 2, who asserts that the suit land would fetch an annual rent of Rs. 5,000/-. Reliance is also placed on Ex. A-37 which is a diary said to have been written by the second defendant. Apart from the fact that this diary appears to be a book, which cannot be relied upon in a Court of law, the entry therein does not show that the amount mentioned therein related to one year's period only. But according to the Court below Ex. A-41 dated 1'4-12-1950 and Exs. A-60 dated 25-1-1962 and A-61 provided clinching evidence about the income. The mother was a party to Exhibits A-60 and A-61. The lower Court accepted the materials furnished under Exs. A-41, A-60 and A-61 and came to the conclusion that the annual rent yield from the property would be about Rs. 3,500/- to Rs. 4,250/-. Prima facie it appears that a sale of a property for a sum of Rs.

10,000/- when its annual yield is in the range of Rs. 3,000/- to Rs. 4,000/-is not a fair transaction. But as we said, the second defendant, who is a party to Ex. B-2 had a life-interest over the property and she was selling her life-interest also under it. The second defendant is still alive. The document is of the year 1964, Even now she is reported to be hale and healthy. For six years, therefore, that is, six years before the suit, she lost her annual income of Rs. 4,000/- subsequent to the institution of the suit, she has lost another like sum. In cases where it is necessary to take subsequent events into consideration, the Court is not powerless to view those events also and weigh the reality of the situation or the equity of the bargain. If the mother has lost Rs. 48,000/- so far which ought to form part of the consideration, then the property should be deemed to have been sold for a sum of Rs. 60,000/- in 1964. This is not an unfair price even if the annual yield was about Rs. 4,000/-. This was not borne in mind by the learned Judge. The lower Court apparently was of the view that it was the plaintiff and the plaintiff alone who was entitled to the property on the date of sale and it is in that light, it considered the issue whether the price paid was ludicrously low. The plaintiff's case is that the property could have fetched only a sum of Rs. 40,000/-. Even on the date of suit, the consideration which should be deemed to have passed under the sale was very near that amount. But this is not all. The entirety of the transaction must be taken into consideration and the necessity for the sale, are all factors which should necessarily be borne in mind before a transaction could be set aside on the ground that the price paid therein is so low that it could be said to have been tainted by undue influence. In A. S. No. 644 of 1972 this Division Bench held :

"When once it is proved that the properties in question were sold for a consideration by the vendor without being influenced either by coercion or by undue influence then the question as to why he had sold the property may not loom large. More so in the instant case when the father of the vendor himself had attested the said document ... ..."

For the above reasons, we are unable to share the view of the trial court that Ex. B-2 should automatically fail and be held as an inoperative document on the only ground that prima facie the consideration is not adequate.

... … … … … … …

16. On the ground that what was sold was the life-interest and the ultimate remainder of the plaintiff in the property and that the price, therefore, paid therein cannot be said to be inadequate, for the mother parted with her life-interest, the value of which is considerable and on the ground that the mother cannot be said to have exercised any undue influence over her daughter and lastly on the ground that the suit itself should be held to be barred by limitation, we accept the dismissal of the suit made by the court below and would also hold that the plaintiff has failed to prove that Exhibit B-2 has to be set aside or cancelled on the ground that her mother or any of her near relations unduly influenced her to be a party to it."

The above referred judgment is also not applicable to the facts of the present case, as the alleged gift deed, Ex. DA, was executed by Raghu Ram (deceased original plaintiff) presuming that the same is a document giving effect to private family partition and when he came to know about the mis-representation/fraud committed by the defendants on him, he immediately maintained a suit by engaging an Advocate.

30. The Hon'ble High Court of Allahabad in ***Smt. Munni Devi vs. Smt. Chhoti and others, AIR 1983 Allahabad 444,*** has held that promise is not enforceable in law where a gift deed of property executed by mother in favour of only daughter with promise by daughter of being looked after and maintained throughout her life. Apt para of the judgment is reproduced hereinbelow:

"7. The plaintiff-respondent's allegation that the defendant-appellant was residing with her and was solicitous of her comfort and assured to look after her and maintain her throughout her life was probably true, for the defendant-appellant was the plaintiff-respondent's only daughter, so too the desire of the defendant-respondent to settle her property on the defendant-appellant by way of gift-deed which was executed on 6th Dec. 1963. There was nothing unnatural or improbable in the plaintiff-respondents' expectation that in case of need the defendant-appellant would look after her and maintain her though at the same time the plaintiff-respondent hoped that she would never have to look to her daughter for maintenance and for that purpose she had four bighas of land reserved with her. It, however, appears that some two years before the suit the defendant-appellant shifted to her husband's place. Probably, that was the proper thing for her to do. But the plaintiff-respondent transferred the remaining four bighas of land to her brother. It may be that her brother got that sale-deed executed by some sort of undue influence or it may be that the plaintiff-respondent thought that that was the best thing for her to do. Nevertheless, this act of the sale of the remaining property by the plaintiff-respondent to her brother seems to have annoyed the defendant-appellant, at any rate her husband and that seems to have led to the litigation. The facts so far did not admit of much controversy. The question is of their legal effect and the rights of the parties. The plaintiff-respondent undoubtedly had the right to sell off the remaining four bighas of land to whomsoever she pleased. That sale could not detract from her right to maintenance against the defendant-appellant in case she had any such right in law. So far as the plaintiff's claim for cancellation of the gift-deed was concerned, that was clearly barred by limitation. Under the circumstances, the only claim that could properly be considered by the Court was the plaintiffs claim for maintenance that was made in the alternative. The foundation of that claim is to be found in S. 20 of the Hindu Adoptions and Maintenance Act, 1956. The assurance or the promise, which the plaintiff might have had or might have believed to have had from the defendant-appellant of being looked after and maintained throughout her life when she made the gift is not enforceable as such in law, because the gift must have been made on account of natural love and affection and not in consideration of the said assurance or promise."

The judgment is applicable to the facts of the present case.

31. The Hon'ble High Court of Karnataka in ***Savithramma vs. H. Gurappa Reddy and others, AIR 1996 Karnataka 99,*** has held allegation of fraud and misrepresentation are high allegations and it can be rated on par with criminal trial. Relevant para of the judgment (supra) is extracted below:

"8. In need to dispose of this aspect of the matter which 1 propose to do on a very clear cut consideration. The position that emerged was that after the death of Kalappa Reedy, it was necessary that the legal heirs be brought on record. The wife and the sons were infact impleaded and it is true that the remaining family members were not impleaded, particularly the four married daughters. The position would have been entirely different if the remaining family members were impleaded and only the present applicant was not in which case there might have been some basis for the allegations that have been made. Furthermore, what needs to be stated is that the matter came to be negotiated and it is impossible for any court to attribute dishonesty, mala fides or any other such imputations to the parties in the absence of very strong and cogent material. To my mind, had the matter been compromised in a manner whereby only the land belonging to the present applicant was conceded to Gurappa Reddy, there might have been some warrant for the allegations. On an examination of the facts, I find that an even larger portion of the land belonging to the other heir has been made a part of the

compromise. This clearly indicates that there was neither any hostility, ill will nor any form of involvement but that the negotiation for whatever it was worth, was carried on and that it was according to the best judgment of the parties who were before the Court at that time that the compromise was carved out and recorded. It is a well settled law that even within the province of civil litigation when an allegation of misrepresentation or fraud is made, that the level of proof required is extremely high and is rated on par with a criminal trial. On the basis of the material before the Court here, it would therefore be impossible to uphold the charge that the compromise decree stood vitiated on grounds of either misrepresentation or fraud. To my mind, therefore that contention cannot be upheld."

In the case in hand, the allegation of mis-representation/fraud has been sufficiently proved by the plaintiff without any doubt, therefore, the judgment is not applicable to the present case.

32. The Hon'ble High Court of Himachal Pradesh in ***Upasna & others vs. Omi Devi, 2001(2) Current Law Journal (Himachal Pradesh) 278,*** document of gift deed has been found to be valid and proper. Apt text of the judgment is as under:

"17. ....the allegation of fraud, coercion and undue influence could not be proved by the plaintiffs and as such both the Courts below have rightly held that the plaintiffs have failed to prove that the gift deed was as a result of fraud, coercion and undue influence. The possession of the land in dispute was given to the defendant and the mutation of entry in the revenue record in her name was made by the Patwari in the presence of Beli Ram during his life time. The execution of the gift deed was the personal right of the donor and since Beli Ram had not assailed the gift made by him in favour of the defendant during his life time, the plaintiffs have failed to establish that the donee had not rendered any service to the donor during his life time. The gift has been validily made by the donor in favour of the donee voluntarily and with his free will and accepted by the donee it cannot be said that the gift was induced by undue influence under Section 16(2) & (3) of the Indian contract Act, 1872 and was as a result of fraud as defined under Section 1 of the Act. The ratio of the judgment in Ladli Parshad Jaiswal vs. The Karnal Distillery Co., Ltd. Karnal & ors.. Air 1963 Supreme Court 1279 strongly relied on by the learned counsel for the plaintiffs in my view does not advance the case of the plaintiffs that the gift in question was as a result of undue influence under S. 16(2) & (3) of the Contract Act, 1872. In Subhas Chandra Das Mushib v. Ganga Prasad Das Mushib & ors., AIR 1967 Supreme Court 878, it has been observed that law under Section 122 of the Transfer of Property Act, 1882 as to undue influence is the same in case of a gift inter vivos as in case of a contract. It has further been held that the court trying a case of undue influence under Section 16 of the Contract Act, 1872 must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor, and (2) has the donee used that position to obtain an unfair advantage over the donor? Upon the determination of these issues a third point emerges, which is that or the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. The judgment further proceeded to observe that merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. In this view of the matter, as noticed hereinabove, the plaintiffs have miserably failed to establish that the gift deed was executed by donor in favour of the donee under undue influence or fraud. ... ...

In the present case, the plaintiffs have proved on record that gift deed, Ex. DA, was the result of mis-representation/fraud, therefore, the judgment is of no help to the defendants.

33. The Hon'ble High Court of Himachal Pradesh in ***Shri Kripa Ram and others vs. Smt. Maina, 2002(2) Shimla Law Cases 213,*** has held there is presumption of correctness of endorsement on a document. Relevant paras of the judgment are extracted hereunder:

> *"10 Section 60 of the Registration Act specifically provides that certificate endorsed on the document, registered by the Registrar, shall not only be admissible in evidence for the purpose of proving that document has duly been registered in the manner provided under the Act but also that the facts mentioned in the document referred to in Section 59 have taken place as mentioned therein.*
>
> *It is now well settled that presumption of due execution of a document arises from the endorsement of the Sub Registrar under Section 60 of the Act. As far back as in 1928 Privy Council in Sennimalai Goundan and another v. Sellappa Goundan and others, AIR 1929 Privy Council 81, interpreting the provisions of Section 60 (2) read with Section 115 of the Evidence Act held that where a person admits execution before the Registrar after the document has been explained to him, it cannot subsequently be accepted that he was ignorant of the nature of transaction. In that case, the plaintiff alleged that his father and brothers, with an intention of defrauding the plaintiff of his legitimate share in the family properties, entered into a fraudulent collusive partition. The trial Court found that plaintiff's case was proved and he decreed the suit. In appeal, it was held that the plaintiff failed to make out the alleged fraud and allowed the appeal. The decree of the trial Court was set aside. The Subordinate Judge had found that the partition was unequal because the land allotted to the plaintiff was less than allotted to other brothers. It was found that contemporaneously with the partition, some land that fell into the share of plaintiff Karuppa were conveyed to his second wife Nachakkal by a registered sale deed. Nachakkal gave evidence that the transaction was bogus, as she never paid the consideration for the sale though she admitted execution of the sale deed before the Registrar. Her story that she was ignorant of the nature of the transaction, it was held, cannot be accepted as she had admitted the execution of the sale deed before the Registrar.*
>
> *... ... ...*
>
> *13. A Single Judge of this Court in Rewat Ram Sharma v. Munish Ram (RSA No. 242 of 1994) decided on December 13, 2001, relying upon Kanwarani Madna Vati, Sennimalai Goundan (supra) and Dinesh Chauhan Chandra Guha v. Satchindannanda Mukhereji, AIR 1972 Orissa 235, held that admission of signatures on the endorsement made by the Registrar by an executant of the document in the absence of anything else to the contrary, would lead to the inference that the plaintiff was present before the Sub Registrar when the document was presented for registration and the onus to rebut the presumption under Section 60(2) of the Registration Act was heavily on the plaintiff which the plaintiff did not discharge. In that case, the case of the plaintiff was that he had borrowed some money from the defendant and had agreed to mortgage his property in favour of the defendant. The plaintiff was taken to the Tehsil Headquarters for the purpose of execution of the mortgage deed. His signatures were obtained by the defendant by making him to believe that it was a mortgage deed and later on, the defendant proclaimed that the property has been gifted to the defendant and plaintiff realized that instead of mortgage deed, gift deed was executed from him fraudulently by the defendant. He repudiated the gift deed and filed a suit that the gift deed was a result of misrepresentation, fraud and undue influence on the part of the defendant. It is in this context that the Court held that*

Section 60(2) of the Evidence Act raises presumption as to the correctness of the endorsements made on the document by the Registering Officer."

Again, the judgment referred hereinabove is of no help to the defendants as the alleged gift deed, Ex. DA, has been found to be tainted with mis-representation/fraud.

34. The Hon'ble Apex Court in ***N.V. Srinivasa Murthy vs. N.V. Gururaja Rao and others, (2005) 10 Supreme Court Cases 566,*** has held that jurisdiction under Section 100 can only be exercised in second appeal on the basis of said question of law framed at the time of admission or modified or substituted later, then the appeal is to be heard and decided only on the basis of such duly framed substantial question of law. As the mis-representation/fraud is a question of fact and now of law, so the judgment referred to hereinabove is of no help to the defendants.

35. In ***Jeet Kumar and another versus Jai Chand and another, 2013 (3) Him L.R. 1463,*** *this Hon'ble High Court held as under:*

*"24. The learned Single Judge **in Subramanian Asari and another** Vs. **Kanni Ammal Velamma**, A.I.R. 1953 T.C. has held that to attract Section 126 of the Transfer of Property Act, the conditions to be satisfied are: (1) that the donor and the done must have agreed that the gift shall be suspended or revoked on the happening of a specified event; (2) such event must be one which does not depend on the will of the donor; (3) that the donor and the done must have agreed to the condition at the time of accepting the gift and (4) that the condition should not be illegal or immoral and should not be repugnant to the estate created under the gift. The learned Single Judge has held as under:*

"2. It is not disputed that if an absolute and indefeasible estate was created in favour of the done under Ex. II, the sole heir to succeed to that estate on the death of the done is the plaintiff. But it is argued on behalf of the appellants that the documents read as a whole will show that only a life estate was intended to be created in favour of the done. This contention does not gain any support from the clear and definite expressions used in Ex.II. The donor has unequivocally stated in the document that he is transferring all his right over the property to the done and that she is being put in possession of the property forthwith. It is also stated that from the date of the gift the done is to enjoy the property for ever with absolute powers to deal with the same and that she is to obtain Pattah for the property in her own name and to pay the tax due in respect of the property. No rights of any kind have been reserved in favour of the donor. Thus there is no scope for contending that only a life estate was created in favour of the done. On the other hand, it is clear that the demise under Ex. II was absolute. The gift was accepted by the done and she obtained Pattah for the property and continued to pay the tax in her own name. Reference to these facts is made in the hypothecation bond Ex. I to which the donor was also a party and as such it is clear that the gift came into effect.

All the same it is seen from the gift deed Ex. II that after conveying the property absolutely to the done, the donor has inserted a clause in the document intending to regulate the devolution of the property on the death of the done. That clause is to the effect that on the death of the done, the property shall not devolve on any of her heir but that it is to revert back to the donor himself. It is argued on behalf of the appellants that this provision amounts to a condition subsequent and that a demise subject to such a condition can be validly made. Section 126, Transfer of Property Act, is relied on in support of this contention. That section lays down that "the donor and the done may agree that on the happening of any specified

event which does not depend on the will of the donor, a gift shall be suspended or revoked."

In order to attract this provision, the conditions to be satisfied are: (1) that the donor and the done must have agreed that the gift shall be suspended or revoked on the happening of a specified event, (2) such event must be one which does not depend on the will of the donor, (3) that the donor and the done must have agreed to the condition at the time of accepting the gift and (4) that the condition should not be illegal or immoral and should not be repugnant to the estate created under the gift."

*25. The learned Single Judge in **M. Venkatasubbaiah** Vs. **M. Subbamma and others**, AIR 1956 Andhra 195 has held that gift cannot be revoked for neglecting to maintain donor under Section 126 of the Transfer of Property Act. The learned Single Judge has held as under:*

"9. The present case cannot be brought within the ambit of the section firstly for the reason that there is no agreement between the parties that the gift should be either suspended or revoked; and secondly this should not depend on the will of the donor. Again, the failure of the donee to maintain the donor as undertaken by him in the document is not a contingency which could defeat the gift under Ex. A-4.

All that could be said is that the default of the done in that behalf amounts to want of consideration of a document of gift for failure of consideration. If the donee does not maintain the donor as agreed to by him, the latter could take proper steps to recover maintenance etc. It is not open to a settler to revoke a settlement at his will and pleasure and he has to get it set aside in a Court of law by putting forward such pleas as bear on the invalidity of gift deed."

*29. In **Mst. Samrathi Devi** Vs. **Parasuram Pandey and others** AIR 1975 Patna 140, the learned Single Judge has held that handing over a gift deed to done amounts to valid acceptance of gift. The learned Single Judge has held as under:*

"8. Mr. Premlal, however, contended that the transfer by way of gift in favour of the plaintiff purported to have been made under the document (Ext. 5) was not complete as the same was not accepted by the plaintiff, and she herself had stated to this effect in the impugned document (Ext. D). It is true that a transaction of gift in order to be complete must be accepted by the donee during the lifetime of the donor. The fact of acceptance, however, can be established by different circumstances, such as by the donee's taking possession of the property or by possession of the deed of gift alone. There are numerous authorities in support of the proposition that if a document of gift after its execution or registration in favour of the donee is handed over to him by the donor which he accepts, it should amount in law to be valid acceptance of the gift. In support of this proposition, Mr. J. C. Sinha relied upon a decision of the Judicial Committee in the case of Kalyanasundaram Pillai v. Karuppa Mooppanar, (AIR 1927 PC 42). In this case, their Lordships approved the view of the Full Bench of the Bombay High Court in Atmaram Sakharam v. Vaman Janardhan, (AIR 1925 Bom 210) (FB) that where the donor of immovable property handed over to the donee an instrument of gift duly executed and attested, it would amount to the acceptance of the gift by the donee, and the donor had no power to revoke the gift even if the registration of the instrument had not taken place. This court also in Ram Chandra Prasad v. Sital Prasad, (AIR 1948 Pat 130) took a similar view and held that the fact of the deed being handed over by the donor to the donee was

sufficient evidence of his having accepted the gift, and that the acceptance of the said document was a relevant fact to prove the acceptance of the gift by him. To the same effect is the view of the High Court of Travancorc and Cochin in the case of Esakkimadan Pillai v. Esakki Amma, (AIR 1953 Trav-Co 336). It is not necessary to multiply authorities in support of this proposition. From the above, discussion, it must be held that the deed of gift executed by defendant No. 1 in favour of the plaintiff was a valid and binding document resulting in a complete transfer of the interest of defendant No. 1 in respect of the suit properties to the plaintiff."

*30. The learned Single Judge in **Kasi Ammal** Vs. **Vellai Gounder and another** 1980 Vol. 2 Madras Law Journal 232 has held that first requirement is that a gift of immovable property should be made by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses and the second requirement is that there must be acceptance of the gift by the done. The learned Single Judge has held as under:*

"2. Under Section 123 of the Transfer of Property Act, a gift of immovable, property should be mad(c) by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. The second requirement is there must be acceptance of the gift by the donee. In the instant case there is no dispute regarding the compliance of the first condition. Regarding the compliance of the second condition viz., acceptance of the gift by the donee, the plaintiff herein, the appellate Court has held, that there, is no acceptance of the gift by the donee and even the original of Exhibit A-1 was not handed over to her. Exhibit A-4 recites: (Editor: The text of the vernacular matter has not been reproduced. Thus Exhibit A-1 clearly recites that the possession of the property covered under it has been handed over to the donee, the plaintiff herein. Apart from the recitals in Exhibit A-1, P.Ws. 2 and 3, the attestors to Exhibit A-1 have also given evidence that plaintiff has accepted the gift under Exhibit A-l. Thus the twin requirements of valid execution of the gift deed and acceptance of the gift by the decree, are clearly established by the evidence on record. Exhibit A-1 shows that it is an irrevocable deed and the plaintiff's husband Seetharama Goundar has not reserved any power of revocation under Exhibit A-l. On the other hand, Seetharama Goundar has clearly stated in Exhibit A-1, that he would not revoke the settlement deed (Exhibit A-l) for any reason whatsoever. The recitals in Exhibit A-1, thus clearly establish that it is an unconditional, absolute gift in favour of the plaintiff. When there is a valid gift under Exhibit A-1 and the property has vested in favour of the plaintiff, Seetharama Goundar is not competent to execute Exhibit B-5 and revoke the settlement deed which he had executed under Exhibit A-1. Exhibit B-5, is therefore an invalid instrument and has been rightly ignored as not affecting the rights of the plaintiff to the suit property which she got under the original of Exhibit A-l."

As noticed hereinabove, in this case, the donee, i.e. Jai Chand has also signed the gift, i.e. Ex. PW2/A.

*32. In **Smt. Shakuntla Devi** Vs. **Smt. Amar Devi**, AIR 1985 Himachal Pradesh 109, the Division Bench of this Court has held that the gift not based on fraud, undue influence or misrepresentation, the cancellation of the same is not valid. Their Lordships have further held that the acceptance of a gift can be either expressed or implied. The Division Bench has held as under:*

"6. It is contended by Shri D.D. Sud, vice Shri Chhabil Dass, learned counsel for the appellant that the gift made by Shri Sansar Singh being void, he as also his legal representatives were entitled to redeem the

mortgage. It is stated by him that the gift was rightly cancelled by Shri Sansar Singh as the donees failed to fulfil the conditions contained in the gift deed. It is also urged that the possession of the property was not delivered to the donees as also the gift was not accepted by them. He has placed reliance on a decision in Mt. Anandi Devi V. Mohan Lal, AIR 1932 All 444. It is convenient to extract relevant observations made in the said decision:

"……….We accept the findings of the learned Judge as regards the value to be attached to the oral evidence called on behalf of the plaintiff and his finding that an express acceptance by Mt. Kapuri has not been proved. The learned Judge however merely finds acceptance not proved, because he disbelieves the actual case set up by the plaintiff as regards express acceptance. He never directed his mind to the vital question as to whether there was proof of acceptance within the meaning of S. 3, Evidence Act. It has been argued here by counsel for the respondents that the only acceptance under S. 122, T.P. Act, contemplated by that section is an express acceptance. We however do not find anything in the section to limit acceptance to an express acceptance, and we must take it that acceptance may be either express or implied. As the learned Judge has not considered the question of an implied acceptance based upon circumstantial evidence at all, we must consider it. It has been argued by counsel for the appellant that the law in India based upon S. 122, T.P. Act, is similar to the Common Law of England with regard to acceptance. There is no doubt that in England the law is that acceptance of a gift will be presumed unless dissent is shown. That would mean that in this case, it would be for the defendants to prove that Mt. Kapuri had dissented from the gift. Lord Halsbury in his Laws of England (Vol. 15, P. 418) says:

"Express acceptance by the done is not necessary to complete a gift. It has long been settled that the acceptance of a gift by the done is to be presumed until his dissent is signified, even though he is not aware of the gift, and this is equally so although the gift be of an onerous nature or of what is called an onerous trust."

This rule of law has been applied to India by a Single Judge of the Patna High Court in the case of Muhammad Abdul Nayeem V. Jhonti Mahton. We however are not prepared to go so far. If S. 122 stopped short at saying that the gift must be accepted by or on behalf of the done as it would be natural for any person to accept a non-onerous gift, we might be prepared to hold that the English law applied in India."

The aforesaid observations in the above quoted decision do not help the appellant. The acceptance of a gift can be either express or implied. In fact, there is no evidence on record to show that the donees had dissented from accepting the gift."

*33. The learned Single Judge of this Court in **Mool Raj** Vs. **Jamna Devi and others**, AIR 1995 Himachal Pradesh 117 has held that failure of donee to render services to donor or to maintain donor not specified to be a condition for revocation, in gift deed, the same cannot be revoked being not conditional. The learned Single Judge has held as under:*

"27. Thus, the present gift deed, whether considered as an outcome of custom or of general law, cannot be said to be revocable one on the ground that it was executed for past and future services. When no specific condition for revocation has been made in the deed itself in the event of

failure of the donee to render services to the donor or maintain the donor, the gift cannot be revoked.

29. As held above, the gift under reference was not a conditional one and could not be revoked. But on the other hand the donor could ask for maintenance from the defendants. To the donor to get maintenance through the Court would amount to perpetuate her agony in case the donees were not rendering any service and were not maintaining donor. The donees in the present case are none else but donor's husband's brother's sons. It is expected of them to look after the donor who happens to be their uncle's wife. Under the circumstances, it would be essential, in the interests of justice, to direct the donees to maintain and look after the donor properly throughout her life. Such an obligation, otherwise also rested upon the defendants and their father and this obligation becomes legal when the defendants have bound down themselves to render services to the donor throughout her life on account of the averments made in the gift deed. The defendants, as such, are directed to render proper services and maintain the plaintiff-donor throughout her life failing which the donor shall be at liberty to take such legal action against the donees as would be permissible to her under the law."

34. Their Lordships of the Hon'ble Supreme Court in ***Khushal Chand Swarup Chand Zabak Jain, Jalgaon*** *Vs.* ***Sureshchandra Kanhaiyalal Kochar and another****, 1995 Supp. (2) Supreme Court Cases 36 have held that once execution of the gift deed is admitted, due execution under Registration Act is presumed to have been done, it being a registered document. Their Lordships have further held that the testator having divested herself of her title to the property by gift in favour of respondent after due execution and registration of the gift deed, subsequent will executed by her in favour of the appellant would not confer any right in the bequeathed property on the appellant. Their Lordships have held as under:*

"4. Section 68 of the Evidence Act prescribes proof of execution of the document required by law to be attested. It says that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there by an attesting witness alive and subject to the process of the Court and capable of giving evidence: Provided that it shall not be necessary to call the attesting witness in proof of execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, unless its execution by the person by whom it purports to have been executed is specifically denied.

5. It is seen from the pleadings that the execution of the document has not been denied. On the other hand the recitals in the Will executed by Raja Bai establish that she admitted the execution. However, she stated therein that it has been obtained by fraud and misrepresentation. Fraud and misrepresentation have been specifically dealt with and rejected by the learned Single Judge of the High Court as well as by the Division Bench. Once the execution of the document has been specifically admitted, the due execution under the Registration Act is presumed to have been done as the gift is admittedly a registered document. Moreover in this case, as seen from paragraph 7 of the judgment of the High Court, one attesting witness has been examined on behalf of the appellant who admitted in the cross-examination that he attested the document. Son of another attesting witness and also the son of the scribe of the document have also been examined on behalf of the respondent. That evidence was considered and

the High Court found that the document has been duly proved. Under these circumstances it must be concluded that due execution of the gift deed has been proved by the respondent. It is no doubt clear from the evidence that Raja Bai retained the possession of the property. Obviously the beneficial enjoyment of the property has been retained by her for her lifetime. Under these circumstances Raja Bai having divested (sic herself) of her title to the property after due execution and registration of the gift deed, she has been divested of her right and interest except her beneficial right to enjoyment of the property during her lifetime. Therefore, the Will executed in favour of the appellant is a document which does not confer any right in the bequeathed properties on the appellant and is inconsequential. The appeal is, therefore, dismissed with costs."

35. In ***Kamakshi Ammal*** *Vs.* ***Rajalakshmi and others,*** *AIR 1995 Madras 415 the Division Bench has held that when there is a specific recital in deed that possession is given, the presumption of acceptance arises. The Division Bench has held as under:*

"21 Further, paragraphs 3 and 4 of the plaint specifically says that Pavunambal accepted the settlement. Further, the plaint also says that the original settlement deeds are also filed along with the plaint. As against this particular allegation regarding the original settlement deeds being filed by the plaintiff, the written statement only states that the original settlement deeds were always with the 7th defendant and they were never in the custody of Pavunambal or plaintiff or defendants 1 to 6. In other words, there was no allegation a all in the written statement that the original settlement deeds were stolen by the plaintiff's father (1st defendant) from the 7th defendant. The suggestion comes in only when PW 1 is examined. Further, DW 1, the 8th defendant does not at all depose so. We cannot accept the story of plaintiff's father or the plaintiff stealing away the original settlement deed from the 7th defendant. Once that story is not acceptable there could be the necessary inference that the original settlement deeds were given over to the donee Pavunambal at the time of the gifts. In Samrathi v. Parasuram (AIR 1975 Pat 140) also it has been held, relying on Kalyana-sundaram Pillai v. Karuppa Moopanar (AIR 1927 PC 42) and Atmaram Sakharam v. Vaman Janardhan (AIR 1925 Bom 210 (FB)), that the fact of the gift deed being handed over by the donor to the donee, was sufficient evidence of his having accepted the gift. Learned counsel for the appellant was vehemently contending that despite the settlement deed, the 7th defendant alone continued to possess and enjoy the property and that there was also no mutation of names in the Municipal register pursuant to the settlements. According to him, from this, it can be inferred that there was no acceptance of the gift by the donee. But, we are unable to accept this contention. Even assuming that the 7th defendant continued to possess and enjoy the property alter the above referred to settlements, that by itself would not necessarily lead to the inference that there was no acceptance by the donee of the gifts. Even after accepting the gifts, the donee Pavun-ambal could have allowed her father, the 7th defendant to enjoy the income from the properties settled in view of the relationship of father and daughter between the donor and donee. Further, Exs.A.3 and A.4 specifically recite that possession has been handed over to the donee. When such recital is there, a presumption arises that possession has been handed over to the donee. (Vide Fatima Bibi v. Khairum Bibi (AIR 1923 Mad 52). No doubt, it may be rebuttable presumption. But, in the present case, delivery of possession of the gifted

property is not absolute requirement, for the completeness or the validity of the gift as found in Muslim Law of Gifts. All that we have to find in the present case is whether there was acceptance of the gift by the donee. Even assuming that the donor continued to be in possession and enjoyment of the property gifted, from that alone, it cannot be necessarily inferred that acceptance by the donee of the gift was not there. No doubt in Venkatasubbamma v. Narayana-swami (1954) 1 Mad LJ 194: (AIR 1954 Mad 215) it was held that the facts relied on to draw an inference of acceptance must be by acts of positive conduct on the part of the donee, and not merely passive acquiescing such as standing by when the deed was executed or registered. But, the facts in the present case are different as mentioned above and there are enough features as mentioned above to at least hold that there was implied acceptance of the gifts in question. Even (1954) 1 Mad LJ 194 (supra) has held that law requires acceptance, which may even be implied. Therefore, we concur with the Court below in holding that Exs.A.3 and A.4 settlements are valid."`

*36. In **Naramadaben Maganlal Thakker** Vs. **Pranjivandas Maganlal Thakeer & Ors**. 1997(1) S.L.J. 80, their Lordships of the Hon'ble Supreme Court have held that execution of a registered gift deed, acceptance and delivery of property together make the gift complete. Their Lordships have held as under:*

"3. It is now well settled legal position that a document has to be read harmoniously as a whole giving effect to all the clauses contained in the document which manifest the intention of the persons who execute the document. The material part of the gift deed reads as under:

"The said immovable property as described above with the ground floor and with the ways to pass and with the water disposal and with all other concerned rights, titles is gifted to you and the possession whereof is handed over to you under the following conditions to be observed by you and your heirs and legal representatives as long as the Sun and the Moon shine. Therefore, now I or my heirs or legal representatives have no right on the said property. You and your heirs and legal representatives have no right on the said property. You and your heirs and legal representatives have become the exclusive owners of the same. You and your heirs and legal representatives are entitled to enjoy, to transfer or to use the said property as you like under the conditions mentioned in this deed. id immovable property as described above with the ground floor and with the ways to pass and with the water disposal and with all other concerned rights, titles is gifted to you and the possession whereof is handed over to you under the following conditions to be observed by you and your heirs and legal representatives as long as the Sun and the Moon shine. Therefore, now I or my heirs or legal representatives have no right on the said property. You and your heirs and legal representatives have no right on the said property. You and your heirs and legal representatives have become the exclusive owners of the same. You and your heirs and legal representatives are entitled to enjoy, to transfer or to use the said property as you like under the conditions mentioned in this deed. Except myself, there is nobody's right, title, interest or share on the said property: I have not mortgaged the same by any document. Yet however anybody comes forward to claim the fight, I shall remove the same. The said property is gifted to you on such conditions that and you are made owners by the gift deed of said property on such conditions that there are 15 rooms on the said property at present. I am rightful to receive the rents and the mesne

profit whatsoever accused from the said rooms throughout my life. I am only entitled to receive the mesne profit of the said property till I live. Therefore, I, the executants, shall be entitled to let out the said buildings (rooms), to receive the rent amount to make all the other arrangement throughout my life. Similarly, the said property shall be in my possession till I live. Therefore, I have gifted this property to you by reserving permanently my rights to collect the mesne profit of the existing rooms throughout my life. And by this gift deed the limited ownership right will be conferred to you till I live. After my death you are entitled to transfer the said property. I shall not give in any way my right to anybody to collect the mesne profit. You may get transferred the said property in your name in support of this deed. This gift deed is executed to you under the aforesaid conditions."

4. The material part of the cancellation deed reads as under:-

"I have, on 15.5.65, executed a conditional gift deed of Rs.9,000/- in words Rupees nine thousand in favour of you. The said deed has been presented in the office of the Sub Registrar, Baroda at Sr. No. 2153 of the book no. 1 and it is registered on 15.5.65. The description of the property mentioned in the said deed is as under:

"I executed to you a conditional gift deed of the said property from sky to earth. You had promised me to fulfil the oral conditions between us. But immediately after making the gift accordingly, you denied to fulfil the said conditions. The possession of the gifted property is not handed over to you. So in fact you have not accepted the conditional gift of the property and I am also not willing to act according to the conditional gift. It is also mentioned in the said conditional gift deed that the possession shall be kept with me. And so accordingly my possession is continued. My possession is from the beginning and it is permanent. You are not ready to act according to our conditions. Therefore, I have to execute immediately this deed of cancelling the conditional gift deed between us. Therefore, I hereby cancel the conditional gift deed dated 15.5.65 of Rs.9,000/- in words rupees nine thousand presented at the serial no. 2153 on 15.5.65 in the office of the Sub Registrar Baroda for registration. Therefore, the said conditional gift deed dated 15.5.65 is hereby cancelled and meaningless. The property under the conditional gift has not been and is not to be transferred in your name."

6. Acceptance by or on behalf of the done must be made during the life time of the donor and while he is still capable of giving.

7. It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery of the property, together make the gift complete. Thereafter, the donor is divested of his title and the done becomes the absolute owner of the property. The question is: whether the gift in question had become complete under Section 123 of the TP Act? It is seen from the recitals of the gift deed that Motilal Gopalji gifted the property to the respondent. In other words, it was a conditional gift. There is no recital of acceptance nor is there any evidence in proof of acceptance. Similarly, he had specifically stated that the property would remain in his possession till he was alive. Thereafter, the gifted property would become his property and he was entitled to collect mesne profits in respect of the existing rooms throughout his life. The gift deed conferred only limited right upon the respondent-donee. The gift was to become operative after the death of the donor and he was to be entitled to have the right to transfer the property absolutely by way of gift or he would be entitled to collect the

mesne profits. It would thus be seen that the enjoyment of the property during his life time. The recitals in the cancellation deed is consistent with the recitals in the gift deed. He had expressly stated that the respondent had cheated him and he had not fulfilled the conditions subject to which there was an oral understanding between them. Consequently, he mentioned that the conditional gift given to him was cancelled. He also mentioned that the possession and enjoyment remained with him during his life time. He stated, " I have to execute immediately this deed of cancelling the conditional gift deed between us. Therefore, I hereby cancel the conditional gift deed dated 15.5.65 of Rs. 9000/- in words rupees nine thousand presented at the Serial no. 2153 on 15.5.65 in the office of the Sub-Registrar Baroda for registration. Therefore, the said conditional gift deed dated 15.5.65 is hereby cancelled and meaningless. The property under the conditional gift has not been and is not to be transferred in your name." Thus, he expressly made it clear that he did not hand over the possession to the respondent nor did the gift become complete during the life time of the donor. Thus the gift had become ineffective and inoperative. It was duly cancelled. The question then is: whether the appellant would get the right to the property? It is not in dispute that after the cancellation deed dated June 9, 1965 came to be executed, duly putting an end to be conditional gift deed dated May 15, 1965, he executed his last Will on May 17, 1965 and died two days thereafter."

In the instant case, the gift deed is registered and the possession as per recital contained in the gift has been handed over to the done, i.e., Jai Chand.

*37. The learned Single Judge in **Tokha** Vs. **Smt. Biru and others** AIR 2003 Himachal Pradesh 107 has held that once the possession of immovable property viz land delivered to done, the gift is complete and when no condition of revocation in gift deed in case services were stopped to be rendered by done, the gift deed cannot be termed as conditional and revocable one. The learned Single Judge has held as under:*

"22. In the case in hand there is no specific condition either for giving maintenance or for revoking of the gift deed in case services are stopped to be rendered by the donee. Anyway, the fact remains, as has been stated in the deed of gift that the gift was in lieu of services meaning thereby that the donee had to render services to the donor-plaintiff but in the absence of any specific condition in the event of failure of the donee to render services, the gift could not be revoked. Thus, the deed of gift Ext. D-1 if considered as an outcome of general law cannot be said to be revocable one when no specific condition for its revocation has been made in the deed Itself in the event of failure of the donee to provide services to the donor or maintain the donor, the gift cannot be revoked.

23. In that view of the matter, and in the light of the above said decisions of various High Courts, the first appellate Court acted illegally in considering the document of gift to be conditional and revocable one. The above first question of law accordingly stands answered in favour of the defendants and as a consequence thereof it is held that deed of gift Ext. D-1 was unconditional, it could not be revoked on account of the failure of donee (since deceased) to render services or to maintain the plaintiff.

29. In Thakur Raghunath Ji Maharaj v. Ramesh Chandra, (2001) 5 SCC 18 : AIR 2001 SC 2340 the facts were that land was gifted for a specific charitable purpose for constructing a Degree College building thereon with the condition attached to it that if the building was not

constructed within six months the deed would come to an end and donor would become entitled to the property. An agreement was also executed on the same day when the deed of gift was executed. In the facts of that case their Lordships held that relationship between the donor and donee was fiduciary nature, donee continued to be trustee and donor could claim back the property on breach of the conditions mentioned therein and donee having failed to fulfil the conditions the suit for possession filed by the donor was rightly decreed by the first appellate Court. The ratio of this judgment is not applicable in the facts of the present case. In the case on hand the agreement Ext. PW-3/A was not executed on 12-1-1984 when the deed of gift was executed by the plaintiff in favour of donee Singh whereas the alleged agreement was only executed on 5-3-1984 just one day prior to the registration of the deed of gift on 6-3-1984 and in these circumstances the deed of gift and the agreement would not form part of the same transaction and cannot be read together and given effect to as held by the first appellate Court."

*38. The learned Single Judge in **Balai Chandra Parui** Vs. **Smt. Durga Bala Dasi and others**, AIR 2004 Calcutta 276 has held that in the absence of coercion, fraud and undue influence, the gift deed could not be revoked. The learned Single Judge has held as under:*

"31. Now, let me come to the submissions of the learned counsel for the respective parties as well as the document on record. From the evidence on record and from the judgments and decrees passed by the Court-be-low it appears that there are some facts which are admitted. Such as Smt. Durga Bala Devi executed the deed of gift in favour of Mr. Balai Chandra Parul that is the defendant/said Balai Chandra Parui accepted the deed of gift. In the said deed of gift there remains three attesting witnesses. One Sri Ganesh Chandra Das, the deed writer, another Sri Patitosh Chakraborty and the third is Sri Sarada Charan Das. In the last line of the deed it has been written in Bengali Sri Balai Chandra Parui read and explain the purport of the deed of gift to Smt. Durga Bala Devi the donor herein. Up to this stage everything is admitted and/or comes out of record. Now, let me see the provisions of Section 42 and Section 126 of the Transfer of property Act, Both the Sections are quoted hereinbelow :-

"42. Transferred by person having authority to revoke former transfers - where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of power."

"126. When gift may be suspended or revoked -the donor and donee may agree that on the happening of any specified which does not depend on the Will of the donor a gift shall be suspended or revoked; but a gift which the parties agreed shall be irrevocable wholly or impart, at the mere Will of the donor, is void wholly or impart, as the case may be.

Gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract it might be rescinded. Save as aforesaid, a Gift cannot be revoked. Nothing contained in this section shall be deemed to effect the rights of transferees for consideration without notice."

33. The above being the position there I is no scope in normal course for revocation of a deed of gift when the said deed of gift i was executed by the donor accepted by the ! donee and registered by the registering authority. From the provisions of

Registration Act it is clear that the registering authority I shall enquire . This term "shall Enquirer" is really important and most relevant here. The Transfer of Property Act also provides that normally a deed of gift cannot be revoked. The Registration Act as referred to above also provides that the registering officer will satisfy himself about the identity of the parties. Therefore, identification and enquiry about the execution of deed of gift completes the deed.

34. Reading the provisions of Section 42 and Section 126 of the Transfer of Property Act the ratio which comes out is that the deed of gift can be revoked if there is an agreement for revocation. In such circumstances the deed of gift is not at all a gift because if somebody agrees to gift some property to anybody at the same time the donor retains the power to revoke the deed then it cannot be termed to be a deed of gift.

34A. The deed of gift however can be revoked :-

(i) If there is any prior condition that the gift can be revoked or if the deed of gift has been executed under undue influence or donee commits fraud. The Registration Act also give support to the conditions that Registration or execution of the deed-is done after the satisfaction of the registered regarding identification.(ii) If the donee obtain the deed of gift executing under influence or committing fraud. These are the three conditions 'in which the deed of gift can be revoked. Let me now see whether either of the three conditions successfully prevailing over the first deed of gift which was executed and registered.

35. Second question remains the question of coercion. This coercion is not the point involved in the instant case inasmuch as it is nobody's case that the first deed 'of gift executed in favour of the defendant was done under undue influence."

39. Their Lordships of the Hon'ble Supreme Court in ***<u>Asokan</u>*** *Vs.* ***<u>Lakshmikutty and others</u>*** *(2007) 13 Supreme Court Cases 210 have held that in order to constitute a valid gift acceptance thereof is essential. Their Lordships have further held that there may be various means to prove acceptance of a gift. The document may be handed over to a done, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance. Their Lordshps have also held that once a gift is complete, the same cannot be rescinded. And for any reason whatsoever, the subsequent conduct of a done cannot be a ground for rescission of a valid gift. Their Lordships have further held that when a registered document is executed and the executors are aware of the terms and nature of the document, a presumption arises in regard to the correctness thereof. Their Lordships have held as under:*

"11. Mr. M.P. Vinod, learned counsel appearing on behalf of the appellant, submitted that the first Appellate Court as also the High Court committed a serious error in arriving at the aforementioned findings insofar as they failed to take into consideration the fact that the deeds of gift being not onerous ones and the factum of handing over of possession of the properties which were the subject matter of the gift, having been stated in the deeds of gift themselves, it was not necessary for the appellant to prove that he accepted the same. It was furthermore urged that keeping in view the provisions of Sections 91 and 92 of the Indian Evidence Act, no plea contrary to or inconsistent with the recitals made in the deeds of gift is permissible to be raised.

13. We have noticed the terms of the deeds of gift. Ex facie, they are not onerous in nature.

The definition of gift contained in Section 122 of the Transfer of Property Act provides that the essential elements thereof are:

(i) the absence of consideration;
(ii) the donor;
(iii) the donee;
(iv) the subject matter
(v) the transfer; and
(vi) the acceptance.

14. Gifts do not contemplate payment of any consideration or compensation. It is, however, beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. We must, however, notice that the Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction which may be relevant for determining the question. There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance. [See Sanjukta Ray v. Bimelendu Mohanty AIR 1997 Orissa 131, Kamakshi Ammal v. Rajalakshmi, AIR 1995 Mad 415 and Samrathi Devi v. Parsuram Pandey AIR 1975 Patna 140]

16. While determining the question as to whether delivery of possession would constitute acceptance of a gift or not, the relationship between the parties plays an important role. It is not a case that the appellant was not aware of the recitals contained in deeds of gift. The very fact that the defendants contend that the donee was to perform certain obligations, is itself indicative of the fact that the parties were aware thereabout. Even a silence may sometime indicate acceptance. It is not necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift.

18. Mr. Iyer, however, submitted that it would be open to the donors to prove that in fact no possession had been handed over. Strong reliance in this behalf has been placed on S.V.S. Muhammad Yusuf Rowther and another v. Muhammad Yusuf Rowther and other [AIR 1958 Madras 527] and Alavi v. Aminakutty & Others [1984 KLT 61 (NOC)].

22. Section 91 of the Indian Evidence Act covers both contract as also grant and other types of disposal of property. A distinction may exist in relation to a recital and the terms of a contract but such a question does not arise herein inasmuch as the said deeds of gift were executed out of love and affection as well as on the ground that the donee is the son and successor of the donor and so as to enable him to live a good family life.

23. Could they now turn round and say that he was to fulfill a promise? The answer thereto must be rendered in the negative. It is one thing to say that the execution of the deed is based on an aspiration or belief, but it is another thing to say that the same constituted an onerous gift.

What, however, was necessary is to prove undue influence so as to bring the case within the purview of Section 16 of the Indian Contract Act. It was not done. The deeds of gift categorically state, as an ingredient for a valid transaction, that the property had been handed over to the donee and he had accepted the same. In our opinion, even assuming that the legal presumption therefore may be raised, the same is a rebuttable one but in a case of this nature, a heavy onus would lie on the donors.

26. It will bear repetition to state that we are in this case concerned with the construction of recitals made in a registered document.

30. Once a gift is complete, the same cannot be rescinded. For any reason whatsoever, the subsequent conduct of a donee cannot be a ground for rescission of a valid gift."

*40. The learned Single Judge in **Bakhtawar Singh and others** Vs. **Jagdish and another**, Himachal Law Reporter 2012 (2) 6 has held that delivery of possession is only one of the means but not the sole mean of accepting the gift. The learned Single Judge has held as under:*

"9. Be that as it may, for the reasons stated above I am of the considered view that delivery of possession is only one of the means but not the sole mean of accepting the gift. This answers the third question now framed."

The judgment referred to hereinabove is of no help, as the gift deed, Ex. DA, here in the present case is proved to be the result of mis-representation/fraud.

36. Now the law, as cited by the learned Senior Counsel for respondents No. 1, 3(a), 3(f), 4 to 6 & 14(a) to 14(g), is required to be scanned in depth.

37. In ***Moti vs. Roshan and others, AIR 1971 Himachal Pradesh 5 (V 58 C2),*** this Hon'ble High Court has held that the Trial Court should not only ascertain the matters really at issue between the parties but also see that the evidence given by each of the parties corresponds to the claim or right pleaded by them. Apt para of the judgment (supra) is extracted hereinbelow:

"11. The Trial Court should not only ascertain the matters really at issue between the parties, but it should also take care to see that the evidence given by each party corresponds to the claim or right pleaded by the party. In other words, it has to see that the pleadings and proof correspond. In the instant case, the trial Court failed to perform that elementary duty. The plaintiff cannot take advantage of it and ask this Court to hold that the gap in evidence had been filled up because neither the plaintiffs nor the defendants had seen it earlier."

In the present case, the plaintiff has convincingly and conclusively proved on record that the original plaintiff (Raghu Ram) was mis-represented/defrauded by the defendants in execution of alleged gift deed, Ex. DA.

38. In ***Ku. Sonia Bhatia vs. State of U.P. and others, AIR 1981 Supreme Court 1274,*** the Hon'ble Supreme Court has held gift is a transfer without consideration and in fact where there is consideration it ceases to be a gift. Love, affection spiritual benefit etc. are held to be filial considerations and not the legal considerations as understood by law. Monetary consideration are held to be completely foreign to the concept of gift having regard to the nature, character and the circumstances under which such a transfer takes place. Relevant para of the judgment is extracted below:

"20. from a conspectus, therefore, of the definitions contained in the dictionaries and the books regarding a gift or an adequate consideration, the inescapable conclusion that follows is that 'consideration' means a reasonable equivalent or other valuable benefit passed by the transferor to the transferee, similarly, when the word 'consideration' is qualified by the word 'adequate', it makes consideration stronger so as to make it sufficient and valuable having regard to the facts, circumstances and necessities of the case. It has also been seen from the discussions of the various authorities mentioned above that a gift is undoubtedly a transfer which does not contained any element of consideration in any shape or form. In fact, where there is any equivalent or benefit measured in terms of money in respect of a gift the transaction ceases to be a gift and assumes a different colour. It has been rightly pointed out in one of the books referred to above that we should not try to confuse the motive or the purpose of making a gift with the consideration which is the subject matter of the gift. Love, affection, spiritual benefit and many other factors may enter in the intention of the donor to make a gift but these filial considerations cannot be called or held to be legal considerations as understood by

law. It is manifest, therefore, that the passing of monetary consideration is completely foreign to the concept of a gift having regard to the nature, character and the circumstances under which such a transfer takes place. Furthermore, when the legislature has used the word 'transfer' it at once invokes the provisions of the Transfer of Property Act. Under Section 122 of the Transfer of Property Act, gift is defined thus:

> *" 'Gift' is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.*
>
> *Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.*
>
> *If the donee dies before acceptance, the gift is void."*

In the present case, there is no question with respect to donee not accepting the gift, so the judgment is of no help to the plaintiffs.

39. The Hon'ble High Court of Allahabad in ***Smt. Mallo vs. Smt. Bakhtawari and others, AIR 1985 Allahabad 160,*** has held that mere admission by executant donor about the existence of gift deed obtained by fraud did not dispense with proof of attestation. Apt para of the judgment (supra) is reproduced below:

> *"13. In AIR 1972 Gauh 44 it was held that the 'Attestation' and 'Execution' are two different acts, one following the other in the order stated. Attestation is meant to ensure that the executant was a free agent, and not under pressure nor subject to fraud while executing the same.*
>
> *13.A. In view of law laid down it has now to be seen as to whether the witnesses for attestation were required to be produced. In the present case the validity of the gift deed was specially denied, in the sense that the document had no effect in law. In such circumstances it was necessary for the donee to have produced the attesting witnesses of the gift-deed. The appellate Court on the assessment of evidence found that the attestation of gift deed in question was not proved rather it was dispro9ved. In view of that finding the Appellate Court correctly held that the gift-deed in question did not confer any right on donee the defendant-appellant in respect to the property in question."*

The judgment referred to hereinabove is applicable to the facts of the present case, as the plaintiff has proved on record that the alleged gift deed, Ex. DA, was the result of mis-representation/fraud.

40. The Hon'ble Apex Court in ***Digambar Adhar Patil vs. Devram Girdhar Patil (died) and another, AIR 1995 Supreme Court 1728,*** has held that entries in records of rights maintained in official course of business is a relevant piece of evidence in case where there is requirement of proof qua factum of partition. Relevant para of the judgment is extracted hereunder:

> *"5. We find no force in the contention. Section 32B clearly postulates that the land held as an owner or as a tenant alone should be taken into consideration to determine ceiling limit and if the land held as owner or tenant is within the ceiling limit, he shall be entitled to purchase the land held by him as a tenant. Admittedly, the respondent held the land as an owner to the extent of 36 acres 1 gunta. The area of dispute is only in respect of the land held by his minor son and the land allotted at a partition to his brother Ram Chander. With regard to the land held by the son, even assuming that it is a joint family property for the purpose of the Act and it is includable in his holding yet he is within the ceiling limit, namely, 43 acres 35 guntas. As rightly held by the High Court he cultivated it on behalf of his minor*

son. As to the land allotted to the brother of the respondent, the Tribunals below negatived it on two grounds, namely, in the cultivation column of the Revenue records, it was shown that the respondent had cultivated the land and no documentary evidence of partition was produced before the authorities. The Tribunals below did not advert to the entries in the Record of Rights or to the factum of partition, while the High Court has taken this factor into consideration, which in our considered view had rightly been taken into account. The entries in the Record of Rights regarding the factum of partition is a relevant piece of documentary evidence in support of the oral evidence given, by the respondent and his brother to prove the factum of partition. Even in the evidence of Ram Chander, he dearly stated that there was a partition but he could not give the date and year in which the partition was effected nor the deed of the partition was produced. Under the Hindu Law, it is not necessary that the partition should be effected by a registered partition deed. Even a family arrangement is enough to effectuate the partition between coparceners and to confer right to a separate share and enjoyment thereof. Under those circumstances, when the factum of partition was evidenced by entries in the Record of Rights, which was maintained in official course of business, the correctness thereof was not questioned, it corroborates the oral evidence given by the brother and lends assurance to accept it."

The judgment is not applicable to the facts of the present case.

41. The Hon'ble Supreme Court in another case titled as ***Rajendra Tiwary vs. Basudeo Prasad and another, AIR 2002 (89) Supreme Court 136,*** has held that where the relief prayed for in the suit is a larger relief and if no case is made out for granting the same but the facts, as established, justify granting of a smaller relief, Order VII, Rule 7 permits granting of such a relief to the parties. However, under the said provisions a relief larger than the one claimed by the plaintiff in the suit cannot be granted. Apt para of the judgment (supra) is extracted in extensor as under:

"14. Where the relief prayed for in the suit is a larger relief and if no case is made out for granting the same but the facts, as established, justify granting of a smaller relief, Order VII, Rule 7 permits granting of such a relief to the parties. However, under the said provisions a relief larger than the one claimed by the plaintiff in the suit cannot be granted."

The judgment (supra) is not applicable to the facts of the present case as the relief of possession to the plaintiffs is a separate relief, which the plaintiffs have not claimed and it has come on record that the land was in the possession of the defendants, therefore, it is correct that relief can be enlarged, but a new relief of possession cannot be granted in a suit for declaration. In this context, I had considered the arguments of the learned Senior counsel for the plaintiffs that the relief is required to be enlarged for the plaintiffs, but as the relief of possession was not prayed for in the suit, this relief cannot be granted. Therefore, without their being pleadings and evidence to that effect, this Court cannot grant the relief of possession. Thus, the findings recorded by the learned Lower Appellate Court on this account, needs no interference.

42. The Hon'ble Supreme Court in ***Krishna Mohan Kul alias Nani Charan Kul and another vs. Pratima Maity and others, (2004) 9 Supreme Court Cases 468,*** has held that a person in a fiduciary relation has a duty to protect the interest of the person under his care and when the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the fiduciary relation to show that the transaction is perfectly fair and reasonable and no advantage has been taken of his position. This principle is embodied in Section 1 of the Evidence Act, 1872, and the corollary to this principle is incorporated in Section 16(3) of the Contract Act, 1872. Relevant paras of the judgment is extracted as under:

"12. As has been pointed out by the High Court, the first Appellate Court totally ignored the relevant materials and recorded a completely erroneous finding that

there was no material regarding age of the executant when the document in question itself indicated the age. The Court was dealing with a case where an old, ailing illiterate person was stated to be the executant and no witness was examined to prove the execution of the deed or putting of the thumb impression. It has been rightly noticed by the High Court that the courts below have wrongly placed onus to prove execution of the deed by Dasu Charan Kul on the plaintiffs. There was challenge by the plaintiffs to validity of the deed. The onus to prove the validity of the deed of settlement was on defendant No. 1. When fraud, mis-represendation/fraud or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with zealously all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position. This principle has been engrained in Section 111 of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). The rule here laid down is in accordance with a principle long acknowledged and administered in Courts of Equity in England and America. This principle is that he who bargains in a matter of advantage with a person who places a confidence in him is bound to show that a proper and reasonable use has been made of that confidence. The transaction is not necessarily void ipso facto, nor is it necessary for those who impeach it to establish that there has been fraud or imposition, but the burden of establishing its perfect fairness, adequacy and equity is cast upon the person in whom the confidence has been reposed. The rule applies equally to all persons standing in confidential relations with each other. Agents, trustees, executors, administrators, auctioneers, and others have been held to fall within the rule. The Section requires that the party on whom the burden of proof is laid should have been in a position of active confidence. Where fraud is alleged, the rule has been clearly established in England that in the case of a stranger equity will not set aside a voluntary deed or donation, however, improvident it may be, if it be free from the imputation of fraud, surprise, undue influence and spontaneously executed or made by the donor with his eyes open. Where an active, confidential, or fiduciary relation exists between the parties, there the burden of proof is on the donee or those claiming through him. It has further been laid down that where a person gains a great advantage over another by a voluntary instrument, the burden of proof is thrown upon the person receiving the benefit and he is under the necessity of showing that the transaction is fair and honest.

… … … … … …

14. It is now well established that a Court of Equity, when a person obtains any benefit from another imposes upon the grantee the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it. The proposition is very clearly started in Ashburner's Principles of Equity, 2nd Ed., p. 229, thus :

"When the relation between the donor and donee at or shortly before the execution of the gift has been such as to raise a presumption that the donee had influence over the donor, the Court sets aside the gift unless the donee can prove that the gift was the result of a free exercise of the donor's will.

15. The corollary to tht principle is contained in sub-section (3) of Section 16 of the Indian Contract Act, 1872. "

The judgment is fully applicable to the facts of the present case, as the defendants have mis-represented/defrauded the original plaintiff (deceased Raghu Ram), so the gift deed, Ex. DA, is *non est* and non-existent in the eyes of law.

43. The Hon'ble High Court of Punjab and Haryana in ***Ashwani Kumar Rana vs. Gaur Hari Singhania and others, 2005(2) SLJ 1243,*** has held that the tenant has no right to challenge the family settlement. Apt para of the judgment (supra) is extracted in extensor as under:

"5. After hearing the learned counsel for the parties, I am of the considered view that the tenant-petitioner has no right to challenge the family settlement as has been held by this Court in the case of ***Ram Lal vs. Harbhagwan Dass 1995(2) Rent Law Reporter 557.*** *It has been repeatedly held by the Supreme Court that even oral partition of Hindu Undivided Family property is not prohibited. Reference in this regard could be made to the judgments of the Supreme Court in the cases of* ***Nani Bai vs. Gita Bai AIR 1958 SC 706 and Roshan Singh vs. Zile Singh AIR 1988 SC 881 and Hans Raj Agarwal vs. CII 2003(2) SCC 295.*** *Moreover, oral partition to which reference has been made has been implemented as is evident from the fact that landlord-respondent No. 1 has to run his clinic from the passage and that father of landlord-respondent No. 1 has not been paid rent by the tenant-petitioner after 7.4.1995 i.e. after the judgment and decree passed on the basis of family settlement. In such a situation no doubt can be entertained with regard to the genuineness of the oral partition. Moreover, both the Courts below have concurrently found that the need of the landlord-respondent No. 1 is bona-fide and it has to be considered as covered by Section 13(3)(a)(i) of the Act as interpreted by the Supreme Court in the case of* ***Harbilas Rai Bansal vs. State of Punjab (1996) 1SCC 1.*** *In* ***Harbilas Rai Bansal's (supra)*** *it was categorical held that the amendment incorporated by Punjab Act No. 29 of 1956 was ultra vires of Article 14 of the Constitution as it deleted the right of occupation of commercial building on the ground of personal necessity while retaining the same in respect of residential building."*

The judgment (supra) is not applicable to the facts of the present case.

44. The Hon'ble Supreme Court in ***Hari Shankar Singhania and others vs. Gaur Hari Singhania and others, (2006) 4 Supreme Court Cases 658,*** has held that a family settlement is treated differently and it meets with approval of the Courts and they are also governed by a special equity principle where the terms are fair and bona fide, taking into account the wellbeing of a family. Relevant paras of the judgment are reproduced as under:

"Family Arrangement/Family Settlement:-

42. Another fact that assumes importance at this stage is that, a family settlement is treated differently from any other formal commercial settlement as such settlement in the eyes of law ensures peace and goodwill among the family members. Such family settlements generally meet with approval of the Courts. Such settlements are governed by a special equity principle where the terms are fair and bona fide, taking into account the well being of a family.

43. The concept of 'family arrangement or settlement' and the present one in hand, in our opinion, should be treated differently. Technicalities of limitation etc should not be put at risk of the implementation of a settlement drawn by a family,

which is essential for maintaining peace and harmony in a family. Also it can be seen from decided cases of this Court that, any such arrangement would be upheld if family settlements were entered into ally disputes existing or apprehended and even any dispute or difference apart, if it was entered into bona fide to maintain peace or to bring about harmony in the family. Even a semblance of a claim or some other ground, as say affection, may suffice as observed by this Court in the case of Ram Charan v. Girijanandini Devi, AIR 1966 SC 323.

... ...

53. Therefore, in our opinion, technical considerations should give way to peace and harmony in the enforcement of family arrangements or settlements."

The judgment referred hereinabove, is also not applicable to the facts of the case in hand.

45. The Hon'ble Supreme Court in yet another case titled as ***Ramdev Food Products (P) Ltd. Vs. Arvindbhai Rambhai Patel and others, (2006) 8 Supreme Court Cases 726,*** has held as under:

"35. We may proceed on the basis that the MoU answers the principles of family settlement having regard to the fact that the same was actuated by a desire to resolve the disputes and the courts would not easily disturb them as has been held in ***S. Shanmugam Pillai vs. K Shanmugam Pillai, (1973) 2 SCC 312, Kale vs. Dy. Director of Consolidation, (1976) 3 SCC 119 and Hari Shankar singhania vs. Gaur Hari Singhania, (2006) 4 SCC 658."***

The judgment (supra) is also not applicable to the facts of the present case.

46. The Hon'ble Supreme Court in ***M. Venkataramana Hebbar (Dead By LRs vs. M. Rajagopal Hebbar and others, (2007) 6 Supreme Court Cases 401,*** has held that before the court rejects a claim for partition of joint family property, at the instance of all the co-owners, it must be established that there had been a partition by metes and bounds. Apt para of the judgment (supra) is as under:

"11. For the purpose of this case, we will proceed on the assumption that the said deed of family settlement was not required to be compulsorily registered, in terms of Section 17 of the Registration Act as by reason thereof, the relinquishment of the property was to take effect in future. But there cannot be any doubt whatsoever that before the court rejects a claim of partition of joint family property, at the instance of all the co-owners, it must be established that there had been a partition by metes and bounds. By reason of the family settlement, a complete partition of the joi9nt family property by metes and bounds purported to have taken place. One of the co-sharer, however, did not join in the said purported family settlement."

The judgment (supra) is applicable to the facts of the present case, as the family partition was not validated/affirmed legally by effectuating the entries in the revenue record, it stands fully established by the plaintiffs, by leading cogent evidence, that the original plaintiff (deceased Raghu Ram) had signed alleged gift deed, Ex. DA, taking it as a document for enforcing the private family partition, which was contended to be entered into between the predecessor-in-interest of the parties 60 years ago.

47. The Hon'ble Apex Court in ***Bhagwan Krishan Gupta (2) vs. Prabha gupta and others, (2009) 11 Supreme Court Cases 33,*** has held that the doctrine of family settlement may not be applicable in *stricto sensu* in cases of property being self-acquired one. However, where both brother declare each other to be owners of the property having equal shares, arrangement like family settlement is permissible in law, such settlement was not only in relation to the title of the property, but also to the use and possession thereof. Relevant paras of the judgment (supra) is extracted as under:

"12. To the Revenue Authority for the purpose of mutation in respect of the premises in question, the testator issued a letter which reads as under:

"I, Murari Lal Gupta S/o Late Sri Ganga Ram hereby informed that I and late Girdhari Lal Gupta are real brothers from late Shri Ganga Ram, House No. C-11, Green Park Extension, New Delhi-110016 is owned jointly by myself and my aforesaid brother Late Sri Girdhari Lal Gupta. My share in the aforesaid house is one half i.e. ground floor and the other one half share i.e. Ist floor and Barsati Floor belongs to my brother late Sh. Girdhari Lal Gupta. The completion plan of the house showing the details is enclosed herewith. The share belonging to me has been shown in red whereas the share belonging to my brother Late Shri Girdhari Lal Gupta has been shown in green.

It is requested that the division of property be made in my name & in the name of my brother's wife Smt. Subz Kali since my brother has expired. The house tax bill of the property be sent separately in future.

… … … … … …

15. Although when a property is a self-acquired one, the doctrine of family settlement stricto sensu may not be applicable but in a case of this nature where both the brothers declare each other to be owners of the property having equal share therein, an arrangement between them by way of a family settlement is permissible in law. Such a family settlement was not only in relation to the title of the property but also in relation to the use and possession thereof."

The above referred judgment is not applicable to the facts of the case in hand.

48. In the light of what has been discussed hereinabove, this Court finds that the findings arrived at by the learned Lower Appellate Court are after appreciating the oral and documentary evidence, pleadings etc. to their right and true perspective and the findings call for no interference, hence the only substantial question of law, which was framed by this Court for determination and adjudication of the present appeal and substantial questions of law framed in cross-objections are answered as under:

Substantial question of law:

The findings of the learned Courts below are just and reasoned and gift deed, Ex. DA, has been properly appreciated by the Court below. It stands convincingly proved on record that the original plaintiff (deceased Raghu Ram) was mis-represented/defrauded by the defendants in making him believe that Ex. DA, is a document for recording private family partition. The substantial question of law is answered accordingly.

Substantial question of law No. 1 in Cross-objection::

The plea of family partition has been rightly decided by the learned Court below, as the plaintiffs have failed to prove the partition and it is the case of the plaintiffs themselves that document was executed to record partition, though they have proved that the parties are enjoying separate possession. A coparcener can be at separate possession without any partition, so the plaintiffs have failed to prove the partition, the cross-objection is answered holding that the Court below has appreciated the pleadings, oral and documentary evidence to their right and true perspective and law has been rightly applied.

Substantial question of law No. 2 in Cross-objection::

As the pleadings and documents have been properly appreciated, so the judgment and decree, passed by the learned Lower Appellate Court is just and reasoned and needs no interference.

<u>Substantial question of law No. 3 in Cross-objection::</u>

As the factum of family partition has not been proved conclusively, the cross-objection is answered accordingly.

49. One more substantial question of law arises for determination and adjudication in the cross-objection, which is as under:

"Whether the Court below should have passed a decree for possession after enlarging the claim."

It is found that there was no pleadings/prayer/suit for possession and simple in the suit for declaration, the Lower Appellate Court was right in dismissing the prayer of the appellant for possession.

50. In view of what has been discussed hereinabove, the judgment of the learned Lower Appellate Court does not suffer from any infirmity and the same is legally sustainable. Thus, the net result of the discussion made hereinabove is that the appeal and cross objection, being devoid of merits, deserve dismissal and are accordingly dismissed. However, parties are left to bear their own costs in the facts and circumstances of the case. Pending application(s), if any, stand(s) disposed of.

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

Sh. Jagdish Raj and another ....Petitioners.
Versus
Smt. Dhali Devi ....Respondent.

CMPMO No. 210 of 2016
Date of decision: 1st November, 2016

Code of Civil Procedure, 1908- Order 41 Rule 27- A civil suit was dismissed by the trial Court – an appeal was filed during which an application for bringing on record the documents was filed, which was allowed – held, that no explanation was given for non-production of the documents at the time of the trial – further, the application for the additional evidence was to be considered along with the appeal and not in isolation- the order set aside and the case remanded to the Appellate Court with the direction to consider the application along with the main appeal.

(Para-7 to 9)

Case referred:

State of Rajasthan V. T.N. Sahani and others (2001) 10 Supreme Court Cases 619

For the petitioners: Mr. Bimal Gupta, Senior Advocate with Mr. Vineet Vashisth, Advocate.
For the respondent: Mr. Rajiv Jiwan, Advocate.

The following judgment of the Court was delivered:

<u>Dharam Chand Chaudhary, Judge</u> <u>(Oral)</u>**.**

Order dated 10.05.2016 passed by learned District Judge, Kullu in an application under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure registered as Civil Miscellaneous Application No. 144 of 2015, is under challenge in this petition. Learned lower appellate Court has allowed the application and permitted the respondent-plaintiff to produce the documents i.e. sale deeds and gift deeds executed by Poshu, a co-sharer in the suit land measuring 4-4-0 bighas entered in Khasra No. 576, Khata Khatauni No. 104/166 to the extent of 68/672 shares situated at Phati Balh Kothi Maharaja, Tehsil and District, Kullu.

2. The respondent (hereinafter referred to as the 'plaintiff') claims herself to be the owner in possession of the suit land, as according to her Shri Poshu has gifted away the same to her. The petitioners (hereinafter referred to as the 'defendants') when allegedly started causing interference in the suit land, she filed a suit in the Court of learned Civil Judge (Senior Division), Kullu, District Kullu, Himachal Pradesh for the decree of permanent prohibitory injunction on several grounds, however, mainly that in view of alienation of the suit land by said Shri Poshu, partly in favour of defendant No. 2 and partly in favour of Sunita Kumari, Dushyant Thakur and Khekh Ram by way of sale deeds and also the gift deeds, he was not left with any land for being gifted away to the plaintiff.

3. On the pleadings of the parties issues including as to whether plaintiff is neither owner nor in possession of the suit land came to be framed in the suit in the trial Court. The parties were put to trial. After having taken on record the evidence produced by the parties on both sides and affording opportunity of being heard, learned trial Judge has dismissed the suit.

4. The plaintiff is now in appeal before learned lower appellate Court. It is during the pendency of the appeal, an application under Order 41 Rule 27 of the Code of Civil Procedure has been filed, which has been accepted by learned lower appellate Court vide order under challenge in this petition.

5. On behalf of the petitioners-defendants, it is canvassed that onus to prove issue No. 4, no doubt, was on them and they discharged the same satisfactorily. The plaintiff, however, has failed to produce any rebuttal evidence at an appropriate stage during the course of proceedings in the suit. Now the application having been filed at a belated stage, that too, without any explanation as to what prevented her from producing the evidence at an appropriate stage, the application has been sought to be dismissed. Mr. Bimal Gupta, learned Senior Advocate has also urged that otherwise also, the application should have been considered along with the main appeal at the time of final hearing and not in isolation.

6. On the other hand, Mr. Rajiv Jiwan, learned counsel representing the plaintiff has contended that the documents being certified copies of the sale deeds and gift deeds have rightly been allowed to be produced in additional evidence by learned lower appellate Court. According to Mr. Jiwan, the order under challenge calls for no interference in these proceedings.

7. Having gone through the record of the case and also analyzing the rival submissions, no doubt, a party to the *lis* can be allowed to produce additional evidence, however, before the commencement of trial. The proviso to Order 41 Rule 27 provides for seeking such permission even after the commencement of trial also, however, before allowing the application the Court ceased of the matter should record its satisfaction that the party seeking the permission to produce additional evidence failed to do so at an appropriate stage despite due diligence. In the application Annexure P-2, no plausible explanation except for that it is despite due diligence, the plaintiff has failed to produce the evidence, has come on record. Any how, without going into this controversy, I switch over to the alternative submissions made on behalf of the petitioners-defendants that the application should have been considered and decided at the time of final hearing of the appeal. The submissions so made find support from the judgment of the Hon'ble Apex Court in ***State of Rajasthan*** V. ***T.N. Sahani and others (2001) 10 Supreme Court Cases 619***.

> "4. It may be pointed out that this Court as long back as in 1963 in K. Venkataramiah v. Seetharama Reddy pointed out the scope of unamended provision of Order 41 Rule 27 (c) that though there might well be cases where even though the court found that it was able to pronounce the judgment, on the state of the cord as it was, and so, additional evidence could not be required to enable it to pronounce the judgment, it still considered that in the interest of justice something which remained obscure should be filled up so that it could pronounce its judgment in a more satisfactory manner. This is entirely for the court to consider at the time of

hearing of the appeal on merits whether looking into the documents which are sought to be filed as additional evidence, need be looked into to pronounce its judgment in a more satisfactory manner. If that be so, it is always open to the court to look into the documents and for that purpose amended provision of Order 41 Rule 27(b) CPC can be invoked. So the application under Order 41 rule 27 should have been decided along with the appeal. Had the Court found the documents necessary to pronounce the judgment in the appeal in a more satisfactory manner it would have allowed the same; if not, the same would have been dismissed at that stage. But taking a view on the application before hearing of the appeal, in our view, would be inappropriate. Further the reason given for the dismissal of the application is untenable. The order under challenge cannot, therefore, be sustained. It is accordingly set aside. The application is restored to its file. The High Court will now consider the appeal and the application and decide the matter afresh in accordance with law."

8. In the given facts and circumstances of this case also, the appropriate course available to learned lower appellate Court was to have considered the application along with the main appeal at the time of final hearing and not to decide the same in isolation. Therefore, subject to the rights and contentions of the parties with respect to the merits of the case, the impugned order is quashed and set aside. There shall be a direction to learned lower appellate Court to consider and decide the application afresh at the time of final hearing of the appeal. The parties through learned counsel representing them are directed to appear in learned lower appellate Court on ***5th December, 2016***. The record of the case be sent back so as to reach there well before the date fixed.

9. The petition stands disposed of accordingly. Pending application(s), if any, shall also stand disposed of.

10. The observations hereinabove shall remain confined to the disposal of this petition and have no bearing on the merits of the case.

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

Papinder Singh ...Appellant.

Versus

Gokal Chand (Now deceased) through his LR's and others. ...Respondents.

RSA No.53 of 2007.
Reserved on : 19.10.2016.
Decided on: 01.11.2016.

Code of Civil Procedure, 1908- Section 100- Plaintiff claimed to be the owner in possession of the suit land- there is a gali, which is being used an approach to reach the ground floor of the building – the defendants denied any right of the plaintiff to use the gali – the suit was dismissed by the trial Court – an appeal was preferred, which was dismissed- held in second appeal that gali is owned and possessed by defendant No. 1 and owner has right to raise construction over the same – the plaintiff does not have any right to claim the demolition of the wall – plaintiff has an alternative passage to approach his building – appeal dismissed. (Para-9 to 11)

For the appellants Mr. Bhupender Gupta, Sr. Advocate with Mr. Ajeet Jaswal, Advocate.
For the respondent : Mr. G.D. Verma, Sr. Advocate with Mr. Vipul Sharda, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Regular Second Appeal under Section 100 of the Code of Civil Procedure is maintained by the appellant against the judgment and decree passed by learned Additional District Judge (Presiding Officer, Fast Track Court) Solan, District Solan, H.P, in Civil Appeal No.22FT/13 of 2006, dated 17.11.2006, vide which the learned Appellate Court has partly modified the judgment and decree passed by learned Civil Judge (Senior Division), Kasauli, District Solan, H.P, in Civil Suit No.303/1 of 2002, dated 20.6.2006.

2. Briefly stating facts giving rise to the present appeal are that appellant/plaintiff (hereinafter referred to as 'the plaintiff') has succeeded to the original plaintiff Neelam, maintained a suit against the respondents/defendants (hereinafter referred to as 'the defendant') claiming that plaintiff is owner-in-possession of land and building comprised in Khata/Khatauni No.19/40 and 41, Khasra Nos.853, 854, 855, Kitas 3, measuring 144.33 sq. meters, situated in mauza Dangyar, Tehsil Kasauli, District Solan, H.P (hereinafter referred to as 'the suit land'). The alleged property was owned and possessed by Fakir Chand, who sold it to the plaintiff in the year 1985. It is alleged that the plaintiff is owner-in-possession of the same since 1979, but the sale deed was executed in the year 1985. The dispute is with regard to '*gair mumkin gali'* of defendant No.1 in Khasra No.850, which is in the shape of staircase of the plaintiff, which is being used by the plaintiff as approach to reach the ground floor of his building. So, the 'gali' is claimed as path on the ground of easement of necessity as well as on the basis of easement by prescription. As per the defendants, the plaintiff purchased only two biswas of vacant land denoted as Khasra No.80/2/2/1 (6 karms x 6 karams) from Fakir Chand through sale deed No.186, dated 6.8.1985. The husband of the plaintiff, who is property dealer manipulated the things and instead of showing the measurement of two biswas, which is 84 square meters, shown 144 sq. meters of the land in her ownership and possession. The existence of building on the spot for the last more than 50 years is denied. It is further submitted that the plaintiff has constructed the building and the same has been renovated and the staircase from the first floor to the ground floor has been removed. The door and windows from the back side of the building have been closed and additional *godown* has been added in the back side of the building towards the vacant land. It is further alleged that defendant No.1 is owner-in-possession of said '*gair mumkin gali'* situated in Khasra No.850. Defendants constructed his building in the year 1971-72 and they had left the vacant space, as the set back which was duly fenced and possessed by the defendants and their family members. The plea of easementary rights through the 'gali' by way of necessity is denied. Further submitted that the plaintiff does not reside in Parwanoo and settled in Mumbai with her family, her husband occasionally visits Parwanoo. As per the defendants, the plaintiff recently removed the staircase, which was on the back side of the first floor and is claming the 'gali' on the basis of easement.

3. The learned trial Court framed following issues on 21.5.2003 :

"1. Whether the plaintiff is owner-in-possession of the property i.e. land and building, as alleged?

2. Whether the building and the suit property is existing for the last more than 50 years, as alleged? OPP

3. Whether the suit property was owned and possessed by Sh. Fakir Chand s/o Sh. Bhagi Ram, who had sold the same to the plaintiff in the year 1985, as alleged ? OPP

4. Whether in the year 1985 the plaintiff has renovated and reconstructed the building at the spot, as alleged? OPP

5. Whether the defendants are stranger to the suit property and have no concern with the suit property? OPP

6. Whether the disputed gali is the only path which leads to the ground floor of the building of the plaintiff and without which path/gali the plaintiff cannot approach and reach to the ground floor, as alleged? OPP
7. Whether the plaintiff has been using the disputed gali as path for the last more than 50 years by herself and through her predecessors in interest openly, continuously and without any interruption, obstruction, as alleged? OPP
8. Whether the plaintiff has been using the disputed gali as easement of necessity for going to the ground floor of the building, as alleged? OPP
9. Whether the defendants in connivance and in collusion with each other had illegally constructed a brick wall towards eastern side of the disputed gali touching Khasra No. 628, as alleged? OPP
10. Whether the defendants have also put up a grill gate towards western side of the disputed gali and had put up a lock on the said grill gate, as alleged? OPP
11. Whether the plaintiff is entitled to a decree of mandatory injunction directing the defendants to open the lock of the grill gate and remove the grill gate from the western side of the disputed gali and also to dismantle and remove the brick wall from the eastern side of the disputed gali, as alleged? OPP
12. Relief."

4. The learned trial Court has decided Issue No.1 partly in favour of the plaintiff, Issues No.2, 6, 7, 8, 10 and 11 against the plaintiff, Issue No.3 in favour of the plaintiff, Issue No.4 and 9 not pressed and dismissed the suit. Thereafter, the appeal was maintained before learned Addl. District Judge, (Presiding Officer Fast Track Court), Solan, has partly allowed the appeal of the plaintiff and set aside the judgment and decree of the learned Court below, but upheld the findings of learned Court below to the extent that the plaintiff has no easementary right to use the 'gali' of the defendants. Against the findings of the learned lower Appellate Court that the plaintiff has no easementary right to use the 'gali' of the defendants, the plaintiff has come in appeal before this Court. No cross appeal is maintained by the defendants. Hence, the present regular second appeal, which was admitted on the following substantial question of law:

> "Whether the Courts below have misappreciated and misconstrued the evidence and the provisions of law?"

5. Mr. Bhupinder Gupta, learned Senior Counsel for the plaintiff has argued that report of Local Commissioner clearly shows that there is no other path to go to the lower storey of the house of the plaintiff and the findings of the learned lower Appellate Court to this extent holding that the plaintiff has no right to use the 'gali' is required to be set aside. He has further argued that these perverse findings are required to be set aside.

6. On the other hand, Mr. G.D. Verma, learned Senior Counsel for the defendants has argued that there was a staircase from the back side of his house in the first floor to go to the lower side, which he has removed and claiming the 'gali' of the defendants on the basis of easement of necessity, therefore, the appeal deserves to be dismissed.

7. In rebuttal, learned Senior Counsel appearing on behalf of the plaintiff has argued that the easement of necessity still subsists, as per the report of Local Commissioner, therefore, the appeal requires to be allowed and suit be decreed in totality.

8. To appreciate the arguments of learned Senior Counsel for the parties, I have gone through the record in detail.

9. The only question which arises determination in this appeal is that whether the findings of the learned Appellate Court are perverse in not holding that the plaintiff has easementary right to use the 'gali' in the nature of staircase for going to his ground floor, as rest of the suit of the plaintiff is decreed by the learned lower Appellate Court and no cross objections or cross appeal is there and rest of the findings attained finality. Now, as far as the staircase in

the form of 'gali' is concerned, the same is admittedly on the land of the defendants. It is proved on record that the plaintiff is neither entitled to claim the path by way of necessity nor by prescription. The plaintiff is not entitled for claiming the easementary rights either by necessity or by prescription. It is admitted fact that the said 'gali' is owned and possessed by defendant No.1. Once the property is owned by defendants, it is the 'sweet will' of the defendants to raise construction as desire by them. The defendants illegally constructing the brick wall towards eastern side of the disputed 'gali' touching Khasra No.628, does not give any fruitful purpose to the plaintiff to claim demolition of the said wall. The case of the plaintiff fails by its own force and has no right to point against the defendants those had constructed the wall upon their own land. Further, there is no deposition of plaintiff and her witnesses to show the illegality in the said wall.

10. From the above, it is clear that the plaintiff was having stairs from inside the house and also an alternative path through the plot from its back side of the plaintiff's building. So, in these circumstances the findings of the learned Appellate Court to the extent that the plaintiff has no right to use the staircase/'gali' of the defendants, needs no interference, as the same have been arrived at after appreciating the facts to its true perspective and the law has been applied correctly. It is again reiterated that rest of the suit of the plaintiff was decreed by the learned lower Appellate Court. There is neither any cross objections nor any appeal has been filed against the said decree, therefore, the same has attained finality. The substantial question of law, as framed by this Court, is answered holding that the findings arrived at by the learned lower Appellate Court are just, reasoned and after appreciating the facts, which has come on record, to its true perspective and the law has been correctly applied.

11. With these observations, the appeal of the appellant/plaintiff being without any merit deserves dismissal, hence the same is dismissed. However, in the peculiar facts and circumstances of this case, parties are left to bear their own cost (s). Pending application (s), if any shall also stands disposed of.

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

Sh. Shiv Singh and others …Petitioners

Versus

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

CWP No. 2159 of 2016
Judgment reserved on: 22.10.2016
Date of Decision : 01 November, 2016.

Constitution of India, 1950- Article 226- Petitioners had been continuously representing to the Government to construct link road- they also donated their lands by executing gift deeds – no objection certificates were issued by various authorities – family of Pardhan objected to the construction of the road- a notification was issued by the Government proposing to acquire the land for the construction of the road through different village – representations were filed but in vain - respondents stated that two factions of the villagers want the road to be constructed from different areas – it would not be proper to construct the road from the place specified by the petitioners- held, that the Government has issued the instructions that road would be constructed only if the land is donated by the Villagers – Government can deviate from the instructions on the basis of valid reasons – the decision to construct road from different place was taken to save the trees from being axed, which is in the larger public interest – family of Pardhan was not arrayed as party and no order can be passed without hearing them- the Court cannot examine the correctness of the decision, unless, it is arbitrary or contrary to the statute – the petition has been filed to satisfy the ego and not in the larger public interest- petition dismissed. (Para-9 to 18)

Case referred:
Rajan Singh and others vs. State of Himachal Pradesh and others 2016 (3) Him. L.R. 1571

For the Petitioners	Mr. Ramakant Sharma Senior Advocate, with Mr. Basant Thakur, Advocate.
For the respondents	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma, Addl. Advocate Generals and Mr. J.K.Verma, Dy. Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The instant writ petition has been filed seeking direction against the respondents to construct the link road from Saur-Ruhil Dhar via Guttu and not via Kuper as is proposed in the notifications dated 8.12.2015 (Annexure P-18) and 29.7.2016 (Annexure P-25) issued for some other land under the 'Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 2013 Act) and have further sought quashment of such notifications.

2. It is averred that the petitioners had been continuously representing to the Government for construction of link road from Saur-Ruhil Dhar via Guttu and had even donated their lands by executing gift deeds in favour of Public Works Department annexed with the petition as Annexures P-1 to P-8, respectively. It is averred that the 'No Objection Certificate' by Forest Rights Committee had been issued on 7.6.2014 and even the Deputy Commissioner in the meeting held on 9.9.2014 had recommended the aforesaid road. Thereafter, the other authorities including the Gram Panchayat have also issued No Objection Certificates. However, when the proceedings were conducted by the Sub Divisional Officer, Rohru on 4.11.2015 for arriving at a consensus for construction of this link road all except one family of the Pradhan, Gram Panchayat, Nandpur objected to this construction as he was interested to see that the road instead of passing via 'Guttu' is constructed through Kuper.

3. On 8.12.2015 the respondents issued a notification under Section 11 of the 2013 Act proposing to acquire the land for construction of the Saur –Ruhil Dhar road via Kuper, constraining the petitioners to make a representation to their elected representatives i.e. MLA, Jubbal and Kotkhai –cum- Chief Parliamentary Secretary (Agriculture) to the Government of H.P., who in turn, vide his communication dated 3.5.2016 wrote to respondent No.1 and requested him to intervene and withdraw the notification in view of the fact that the petitioners had already executed gift deeds for construction of the link road via Guttu.

4. Respondent No.1, in turn, vide its communication dated 9.5.2016 informed respondent No.2 that as per the Government Policy, objections would be entertained only where the land owners offer or gift the land free of cost to the Government and, therefore, follow up decision be taken up strictly in accordance with the instructions already issued on 12.6.2001.

5. It is averred that despite the petitioners having repeatedly objected to the construction of the link road via 'Kuper', the respondents proceeded to issue notification under Section 19 of the 2013 Act, whereby it proposed to acquire 250 meters of land which is contrary to the policy issued by the Government on 12.6.2001 and is further against the H.P. Road Construction Policy framed by the respondent pursuant to the directions issued by this Court in CWPIL No. 9 of 2013.

6. The respondents have opposed the petition by filing reply wherein it has been stated that there are two groups of local people in Village Ruhil, who are in conflict with each other with respect to alignment and survey of the road. One group of the local inhabitants wants the road to be constructed from Bus Stand Ruhil to Village Ruhil via Guttu, whereas the other

faction wants the road to be constructed via Kuper. It was after analyzing the various factors like distance of the road from Bus Stop Ruhil Dhar to Village Ruhil , impact on environment, involvement of forest area, number of land holdings of the villagers and other factors that the respondents decided to construct the road from Ruhil Dhar Bus Stoppage to Ruhil via Kuper. This decision has been taken keeping in view the fact that no forest area is involved in construction of road via Kuper, whereas there is thick forest of various species of trees on the alignment/land towards place via Guttu. In case the road is constructed through place Guttu, the same will destroy and damage the ecology of the area as large number of trees will be required to be axed. On the other hand, there are no trees on the land via Kuper through which the road is proposed to be constructed.

7. It is further averred that all the local inhabitants whose land will be used for construction of the road via Kuper have surrendered their land in favour of the respondents for construction of the road and only a path of 250 mtr. in length at the initial point has been objected by its owner and for the purpose of acquiring the said small portion of the land, proceedings under the 2013 Act have already been initiated.

8. It is lastly averred that it would not be in larger public interest to construct the road in question via Guttu and such decision of the respondents is uninfluenced by any extraneous factors and the same has been taken only in the larger public interest.

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

9. A perusal of the notification dated 12.6.2001 shows that the same was issued in the backdrop of the Budget Speech of 1998-99 wherein the Hon'ble Chief Minister had announced as under:

> *"New Roads to be constructed only if communities give land free of cost, work to start only after the land is transferred to the Government. Alternative land to be allotted to those who become landless or otherwise eligible, subject to availability of land with the Government."*

10. It was as a follow up of this speech that these instructions were issued and the relevant portion of the instructions is extracted below:

> *"As you are already aware of the fact that the Government has been following the policy since the budget 1998-99 to the fact that the rural/arterial roads are to be constructed only if the rural community contribute the land free of cost. However, for the period prior to 1.4.98 back of cases for acquisition of land under Land Acquisition Act, 1894 are being received in the Department. These cases are required to have much stiffer scrutiny with a view to ensuring that land under the Act ibid is not required for acquisition in those cases where the work was started by the Public Works Department on the assurance of the people of the area that the land required for the road would be transferred free of cost to the Government.*
>
> *In view of the above, you are requested to examine all the cases prior to 1.4.98 pertaining to rural/arterial roads on case to case basis and the land acquisition proceedings would be initiated only when these are found to be absolutely necessary.*
>
> *These instructions would be complied with meticulously."*

11. Similarly, the Clause 8 (b) of the H.P. Road Construction Policy (for short Policy), reads as under:

> "**<u>8(B). Construction stage:</u>**
>
> *1. For construction of new roads, the alignment finalised earlier during the planning stages should strictly be followed. However, in private land, alignment*

may be changed, if necessary, provided alternate land is made available by the land owners free of cost."

Therefore, the moot question that arises for consideration is as to whether the respondents can in the larger public interest be permitted to deviate from its policy.

12. It cannot be disputed that once the Government has laid down the norms and policy, there must be valid reasons to deviate from that as it is the salutary duty cast upon it to comply with the terms of the policy. However, even then the Government is entitled to make pragmatic adjustments after all the extraordinary situations require extraordinary remedies and if so required, the Government can deviate from the letter and spirit of the instructions and provide relief in cases where it is so warranted. To hold as a matter of law that the Government cannot deviate even minutely from the policy would be to ignore the realities of life. The Government can always pass orders which would best serve the interest of the people and further qualify the test of reasonableness and non-arbitrariness as these are the core of our constitutional scheme and structure.

13. It is more than settled that the action by the State, whether administrative or executive, has to be fair, reasonable and non-arbitrary and even if there are no rules in force to govern the executive action still such action is stated functional, should be just, fair and transparent. The exercise of discretion, in line with principles of fairness and good governance, is an implied obligation upon the authorities. There has to be reasonableness and the State cannot be bogged down in every minuscule detail of a subordinate legislation, like a policy decision and it is open for it to depart, provided it fulfills the aforesaid test. The courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality in the respondents' action nor can the Court substitute their opinion for the bona fide opinion of the State executive. The Courts are not concerned with the ultimate decision, but only with the fairness of the decision making process.

14. Adverting to the facts, it would be noticed that the decision to have the road constructed via Kuper, has been taken to avoid axing of large number of trees that exist on the alignment/land towards via Guttu and this fact has not even been denied by the petitioners. There cannot be any denying of fact that the people have long referred to the trees as 'Earth's lungs' as they play a crucial role in our existence, consuming large quantities of carbon dioxide and producing oxygen which enables us to breathe. Apart from providing oxygen, they also cleanse the air and improve its quality, control climate, protect soil and support vast varieties of wildlife. It is universally accepted that deforestation is major contributing factor of climate change and that is why it is so important to protect trees and secure our natural landscapes for future generations.

15. In case the respondents have chosen to protect the pristine forest, obviously then the same has definitely been taken in the larger public interest and individual interest(s) has to give way. Though, the learned counsel for the petitioners would vehemently argue that the decision taken by the respondents is malafide and has taken to protect the interest of one family. However, we do not find it to be so, more particularly, when it has come on record that there are two groups of local people in Village Ruhil, who are in conflict with each other with respect to alignment and survey of the road. Whereas, the respondents have taken the decision to construct the road via Kuper in larger public interest after keeping in view the factors like distance of the road from Bus Stop Ruhil Dhar to Village Ruhil, impact on environment, involvement of forest area, number of land holdings of the villagers etc.

16. That apart, the petitioners have not even chosen to array the said family or any of its members as party-respondent and, therefore, no order can be passed behind the back of such family adversely affecting it and such an order if passed, is liable to be ignored being not binding on such party as the same would be passed in violation of the principles of natural justice.

17. In addition to the above, it is not for the Court to sit in appeal and examine correctness of decision taken by the respondents, more particularly, when the same has not been

shown to be unfair, arbitrary or against any statutory or non-statutory policy or tainted with malafide intent. It is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. 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. The Court confines itself to the question of legality and is only concerned 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 unreasonable decision or abused its powers. There is a long line of decision of the Hon'ble Supreme Court on the subject and which has been followed and reiterated by this Court from time to time and reference in this regard can conveniently be made to a recent decision rendered by this Court in ***Rajan Singh and others vs. State of Himachal Pradesh and others 2016 (3) Him. L.R. 1571.***

18. It is evident from the pleadings as well the material placed on record that the instant petition has been filed out of ego problem rather than on the ground of violation of any right and we observe so because despite the pressure sought to be exercised by the petitioners through their elected representative, the respondents have stood their ground and taken decision in the larger public interest without succumbing to such pressure.

19. In view of the aforesaid detailed discussion, we find no merit in this petition and the same is accordingly dismissed, so also the pending applications, leaving the parties to bear their own costs.

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

Uttam Singh ...Appellant.
Versus
Tej Ram and others ...Respondents.

LPA No. 64 of 2011
Decided on: 01.11.2016

Constitution of India, 1950- Article 226- Writ Petitioner remained absent and the petition should have been dismissed in default but the Writ Court granted the petition without hearing the petitioner – further, the appointment was quashed after recording the findings that experience certificate does not seem to be genuine- however, no inquiry was conducted to ascertain the facts- hence, appeal allowed, order passed by Writ Court set aside and Case remanded to Administrative Tribunal for a fresh decision. (Para-3 to 7)

For the appellant: Mr. Maan Singh, Advocate, vice Mr. Tek Chand Sharma, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

In terms of the note of the Registry, respondent No. 1 has been served after admission, has chosen not to appear. Hence, he is set ex-parte.

2. Challenge in this appeal is to judgment and order, dated 21st February, 2011, made by the learned Single Judge/Writ Court in CWP (T) No. 7364 of 2008, titled as Tej Ram versus State of Himachal Pradesh and others, whereby the writ petition filed by writ petitioner-respondent No. 1 herein was allowed and the appointment of writ respondent No. 4-appellant herein as Takniki Sahayak in Gram Panchayats Thachi, Murah, Kau came to be quashed (for short "the impugned judgment").

3. The writ record does disclose that the writ petitioner-respondent No. 1 herein has chosen to remain absent on 9th December, 2010 and 6th January, 2011. In terms of the mandate of Order IX of the Code of Civil Procedure (for short "CPC"), the writ petition was to be dismissed in default and the Writ Court had no occasion to grant the writ petition without hearing the writ petitioner. But despite the fact that nobody appeared on behalf of the writ petitioner-respondent No. 1 herein, the writ petition was allowed and the appointment of writ respondent No. 4-appellant came to be quashed.

4. Only on this count, the impugned judgment merits to be quashed.

5. It is also apt to record herein that the Writ Court, in para 4 of the impugned judgment, while recording the findings that "The experience certificate produced by respondent No. 4 does not seem to be genuine", has quashed the appointment of writ respondent No. 4-appellant herein without ordering for any inquiry or obtaining any expert opinion qua the genuineness of the experience certificate, which, on the face of it, is illegal and without any basis.

6. Having said so, the impugned judgment is set aside, the appeal is allowed, the writ petition is ordered to be restored to its original number and is transferred to the H.P. State Administrative Tribunal (for short "the Tribunal") with a request to the Tribunal to decide the matter on merits after hearing the parties.

7. Parties to cause appearance before the Tribunal on 28th November, 2016. The Tribunal is requested to issue notice to the writ petitioner-respondent No. 1 herein.

8. Pending applications, if any, are also disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Court on its own motion …Petitioner.

Versus

The Chief Secretary and others …Respondents.

CWPIL No. 21 of 2016
Decided on: 02.11.2016

Constitution of India, 1950- Article 226- A decision was taken to house the corporate office under one roof- in view of this decision, writ petition is disposed of with liberty to challenge the same, if so advised. (Para-2 to 5)

For the petitioner: Mr. Dilip Sharma, Senior Advocate, as Amicus Curiae, with Ms. Nishi Goel, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 1 to 3.

Mr. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

A letter was received by the Secretariat of the Chief Justice, *suo motu* cognizance was taken by this Court on 8th September, 2016, and Mr. Dilip Sharma, learned Senior Counsel, was requested to assist this Court as Amicus Curiae.

2. Respondents No. 4 and 5 have filed the reply. It is apt to reproduce relevant portion of Annexure R-4/H herein:

> ***"Item No. 54.23 Shifting of Corporate Office, HPPCL along-with its allied offices from existing location to HIMFED Building at BCS, New Shimla.***
>
> *The Memorandum was discussed at length. The Director (Personnel) informed that presently, the offices of the Corporation at Shimla are housed in three/four buildings situated at different locations of the city. The access and approach to each other official hampers the working, while disposing off different issues particularly of urgent nature. Further, the congestion and traffic jams also add to poor efficiency.*
>
> *It was further explained that the accommodation presently occupied by the SJVNL at Himfed Building, Shimla is likely to be vacated by them after 6-8 months, which can be taken over by HPPCL on rent. The issue was discussed with the Himfed as well as with the SJVNL authorities. The SJVNL authorities have decided to shift the furniture lying in this building to their new office except fixed work stations and wood work etc. carried out by them. These work stations except a few, being in a dilapidated condition need replacement for which additional cost has to be borne by HPPCL. Further, appropriate cost of fixtures and other immovable fittings has to be negotiated with the SJVNL authorities.*
>
> *Various issues including concerns of the staff, data center, additions in the form of work stations and installation of elevator etc. by HPPCL in the existing Himfed Bhawan, on account of shifting of offices were also deliberated threadbare.*
>
> *Considering the proposal, the Board deemed it appropriate that to house the Corporate Office under one roof. The Board also debated that though the rent amount shall be more, shifting to Himfed Building shall infuse operational expediency in working apart from reducing maintenance/administrative expenditure and transactional cost. Accordingly, the Board agreed and approved the proposal. It was, however, decided that a committee of the HPPCL officers be constituted to interact with SJVNL in order to assess the cost of the fixtures and fittings, which need to be retained by the HPPCL in case of taking possession of the premises.*
>
> *The Managing Director/Director (Personnel) HPPCL was authorised to take further necessary action in this regard."*

3. It appears that the Board of Directors has taken the decision. We are not expressing any opinion on the correctness of the said decision. We leave this question open. If any person(s) is/are aggrieved, can seek appropriate remedy. In case any officer is involved here and there, it is for the concerned authority to draw action, if required.

4. In view of the above, these proceedings are dropped.

5. We place on record our gratitude for the valuable assistance rendered by Mr. Dilip Sharma, learned Amicus Curiae.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Hem Raj …Appellant.

Versus

State of Himachal Pradesh and another …Respondents.

LPA No. 374 of 2011
Decided on: 02.11.2016

Constitution of India, 1950- Article 226- Petitioner had filed original application, which was disposed of with the direction to give the appointment of T.G.T. (Arts)- petitioner was appointed in the year 1994- his past services were not counted- he filed another writ petition claiming the benefit of past services- held, that the petitioner is caught by the principle of Order 2 Rule 2 and also by the doctrine of estoppel and res-judicata – the writ Court had rightly held that reliefs cannot be granted to the petitioner, when they were not granted earlier- appeal dismissed. (Para- 2 to 7)

For the appellant: Mr. Jitender P. Ranote, Advocate, vice Mr. B.S. Thakur, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, and Mr. J.K Verma & Mr. Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to judgment and order, dated 5th May, 2011, made by the Writ Court in CWP (T) No. 8453 of 2008, titled as Hem Raj versus State of H.P. and another, whereby the writ petition filed by the appellant-writ petitioner came to be dismissed (for short "the impugned judgment").

2. The appellant-writ petitioner had invoked the jurisdiction of the H.P. State Administrative Tribunal (for short "the Tribunal") in the year 1992 by the medium of OA No. 1111 of 1992, which came to be disposed of vide order, dated 17th September, 1992. It is apt to reproduce the relevant portion of the said order herein:

> *"The averments made in the application make out a case for giving service to the applicant in consonance with the judgments of the Tribunal in case No. OA-162/90 Lalita Kumari versus State of H.P. and OA-364/87 Joginder Singh versus State of H.P. and other similar cases.*
>
> *The respondents are directed to give him the appointment as T.G.T. (Arts) within a period of two months from today if found eligible.*
>
> *In view of the above, the application is disposed of accordingly."*

3. It appears that thereafter, having found eligible, the appellant-writ petitioner was appointed afresh in the year 1994. It is apt to record herein that there was no direction to the respondents, in terms of the order (supra), for appointment of the appellant-writ petitioner in continuation of the services rendered by him in the year 1989. He accepted the said appointment.

4. In the year 2002, he filed another Original Application, being OA No. 1042 of 2002, before the Tribunal, which, on the abolition of the erstwhile Tribunal, was transferred to this Court and came to be diarized as CWP (T) No. 8453 of 2008, seeking the following reliefs amongst others:

> *"a) That the respondents may be directed to count for the services as TGT (Art) of applicant at Rani Ratna Memorial High School, Gharwasra w.e.f. 9.1.87 till he was appointed on regular basis vide office order dated 28.10.1994 for seniority, promotion as well as monitory benefits and other benefits as provided under law for which the applicant is entitled to.*
>
> *b) That the applicant be given all consequential benefits after counting for his services as TGT (Arts) at Rani Ratna Memorial High School, Gharwasra for which he is legally entitled to."*

5. The appellant-writ petitioner is caught by the principle of Order II Rule 2 of the Code of Civil Procedure (for short "CPC") and also by the doctrine of estoppel and res judicata.

6. The Writ Court has rightly held that the appellant-writ petitioner cannot seek the said reliefs again when the same were not granted to him in the earlier Original Application.

7. Having said so, the impugned judgment is legal one and well reasoned, needs no interference.

8. Accordingly, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

Sohan Lal …Appellant.

Versus

State of Himachal Pradesh …Respondent.

Criminal Appeal No.305 of 2014
Reserved on : 31.8.2016
Date of Decision: November 2, 2016

N.D.P.S. ACT, 1985- Section 20- Accused was found in possession of 3 kg. charas- he was tried and convicted by the trial Court- held in appeal that accused had admitted the presence of police party in the bus, search of the bag and recovery of charas – he claimed that bag did not belong to him but was unclaimed – independent witnesses did not support the prosecution version but that by itself is not sufficient to discard the prosecution version – testimonies of police officials can be relied upon if supported by other materials- the testimonies cannot be discarded on the ground that police officials are interested in the success of their cases- police officials consistently proved the prosecution version – there are no contradictions in their testimonies- police has no enmity with the accused - link evidence was proved - non-production of malkhana register to establish the movement of contraband from the FSL to Police Station and thereafter to Court will not make the prosecution case doubtful in absence of any prejudice- similarly, absence of reference in NCB form, sample seal and the road certificate will not render the prosecution case doubtful; when there is no discrepancy regarding the number and nature of seal or that they were tempered or broken- non-production of seal will also not make the prosecution case suspect – recovery was effected from the bag and there was no necessity to comply with Section 50 of N.D.P.S. Act- the prosecution version was proved beyond reasonable doubt- appeal dismissed. (Para-16 to 74)

Cases referred:

Deepak Kumar son of Late Shri Satveer Singh v. State of Himachal Pradesh, 2015(1) SLC 579
State of H.P. v. Kurban Khan, 2015 Cr.LJ 183
State v. Anil Kumar, Latest HLJ 2015(HP) 341
Shashi Kumar and another v. State of H.P., Latest HLJ 2015(HP) 596

Gurmeet Singh v. State of H.P., 2015(2) Him.L.R.766
Surender Kumar alias Teena and another v. State of Himachal Pradesh, 2016(1) Him L.R. (DB) 566
Mohan Lal V. State of Rajasthan, (2015) 6 SCC 222
Kulwinder Singh and another V. State of Punjab, (2015) 6 SCC 674
Dharampal Singh v. State of Punjab, (2010) 9 SCC 608
Madan Lal and another vs. State of H.P., 2003 (7) SCC 465
Dehal Singh v. State of Himachal Pradesh, (2010) 3 SCC (Cri) 1139
Gian Chand & others v. State of Haryana, (2013) 14 SCC 420
Raj Kumar v. State of Madhya Pradesh, (2014) 5 SCC 353
Dangra Jaiswal vs. State of Madhya Pradesh, (2011) 5 SCC 123
Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312
Bhajju alias Karan Singh vs. State of Madhya Pradesh, (2012) 4 SCC 327
Ramesh Harijan vs. State of Uttar Pradesh, (2012) 5 SCC 777
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 SC 217
Tahir v. State (Delhi), (1996) 3 SCC 338
Sanjeev Kumar v. State of H.P., 2016(3) Him.LR (DB) 1529
Rishi Pal v. State of Himachal Pradesh & connected matters, 2016(3) Him LR (DB) 1336
Des Raj & another v. The State of H.P. & connected matter, 2016(3) Him LR (DB) 1455
Sanju v. State of Himachal Pradesh, 2016(2) Him LR 1210
Kartik v. State of Himachal Pradesh, 2016(2) Him LR 1217
State versus N.S. God, (2013) 3 SCC 594
Dilip and another v. State of M.P., (2007) 1 SCC 450 (two Judges)
Union of India v. Shah Alam and another, (2009) 16 SCC 644 (two Judges)
State of H.P. v. Pawan Kumar, (2005) 4 SCC 350
State of Punjab v. Baldev Singh, (1999) 6 SCC 172
Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 60
State of Rajasthan v. Ratan Lal, (2009) 11 SCC 464
Union of India and another v. K.S. Subramanian, 1976 (3) SCC 677
Pyare Mohan Lal v. State of Jharkhand and others, 2010 (10) SCC 693
P. Ramchandra Rao v. State of Karnataka, 2002 (4) SCC 578

For the Appellant : Mr. Rajesh Mandhotra, Advocate.
For the Respondents : Mr. R.S. Verma, Additional Advocate General, Mr. Vikram Thakur, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Primarily, the following question of law arises for consideration in the present appeal:

As to whether this Court is obliged to follow the earlier decisions rendered by larger Bench(s) (three Judges), on identical facts, specifically laying down the principle of law, as against a different view taken subsequently by smaller Benches (two Judges) of the apex Court or not?

2. Appellant-convict Sohan Lal, hereinafter referred to as the accused, assails the judgment dated 19.6.2014/28.6.2014, passed by Special Judge, Solan, Distirct Solan, Camp at Nalagarh, Himachal Pradesh, in Sessions Trial No.13-S/7 of 2012, titled as *State of Himachal Pradesh v. Sohan Lal,* whereby he stands convicted for offence punishable under the provisions of Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs. 1,00,000/- and in default thereof, to further undergo simple imprisonment for a further period of one year.

3. It is the case of prosecution that on 7.8.2012, when SI Narain Singh, alongwith HC Om Parkash (PW-1), Constable Ram Krishan (PW-2) and other police officials, was on patrol duty. At about 10 p.m., a transport vehicle (HRTC Bus) bearing No. HP-10A-3968, which came from Rohru, was stopped for checking. Police party entered the Bus and SI Narain Singh instructed all the passengers to identify their luggage. Accused was found sitting on Seat No.17 and from the bag, so kept by him on his lap, police recovered 3 kgs of Charas, which was taken into possession vide Memo (Ex.PW-1/B) in the presence of a co-passenger Surinder Singh (PW-3), sitting on the adjoining Seat No.18, and Pramod Singh (PW-4) Conductor of the Bus. The recovered stuff was packed into a parcel and sealed with seal of impression 'M' and NCB form (Ex.PW-11/A) filled up in triplicate. Impression of the seal was taken on a piece of cloth (Ex.PW-1/A). Rukka (Ex. PW-11/C) taken by Constable Ram Krishan (PW-2), led to the registration of FIR No.156, dated 7.8.2012 (Ex.PW-10/A), for commission of offence, punishable under the provisions of Section 20 of the Act, at Police Station, Solan Sadar, District Solan, Himachal Pradesh. With the completion of proceedings on the spot, which were photographed and videographed, the case property entrusted to SHO Chaman Lal, who resealed the same with his own seal 'R' and deposited it with MHC Narender Parkash (PW-8). Kuldeep Kumar (PW-9) took the case property for analysis and deposited it at the Forensic Science Laboratory, Junga. On receipt of the report of the Chemical Examiner (Ex.PW-13/C) and 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.

4. The 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.

5. In order to establish its case, prosecution examined as many as 13 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took plea of innocence and false implication.

6. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused of the charged offence and sentenced him as aforesaid. Hence, the present appeal by the accused.

7. Assailing the judgment, learned counsel for the accused submits that – (a) in the search/recovery memo (Ex.PW-1/B), Om Parkash was introduced as a witness only to falsely implicate the accused. Such fact stands fortified from the absence of his name in Ruka (Ex.PW-11/C), wherein presence of only two independent witnesses Surinder Singh (PW-3) and Pramod Singh (PW-4) stands recorded. In support, reliance is placed on *Deepak Kumar son of Late Shri Satveer Singh v. State of Himachal Pradesh,* 2015(1) SLC 579. (b) Search Memo (Ex.PW-11/H) is illegal, as search carried out is in violation of law laid down by the apex Court in *State of Rajasthan v. Parmanand and another,* (2014) 5 SCC 345. (c) Prosecution case is rendered doubtful also by way of link evidence, for in the Malkhana Register, reference of the case property is in the shape of two bags and a sample seal, whereas recovery memo reveals recovery of only one bag, which, in any event, does not refer to the sample seal. (d) Absence of reference of NCB form and sample seal in the Road Certificate (Ex.PW-8/B) further renders the prosecution case to be doubtful. (e) Non-production of the original seal in the Court has rendered the prosecution case to be fatal. Reliance is sought on *State of H.P. v. Kurban Khan,* 2015 Cr.LJ 183; *State v. Anil Kumar,* Latest HLJ 2015(HP) 341. (f) There is no proof as to how the contraband substance, after analysis, was brought first to the Police Station and thereafter produced in Court. Absence of

such entries in the Malkhana Register renders the prosecution case to be fatal, in view of the decisions rendered by this Court in *Shashi Kumar and another v. State of H.P.,* Latest HLJ 2015(HP) 596; *Gurmeet Singh v. State of H.P.,* 2015(2) Him.L.R.766; and *Surender Kumar alias Teena and another v. State of Himachal Pradesh,* 2016(1) Him L.R. (DB) 566.

8. On the other hand Mr. R.S. Verma, learned Additional Advocate General, has supported the judgment for the reasons set out therein.

9. We have minutely gone through the testimonies of the witnesses and other incriminating material on record.

10. It is a settled proposition of law that presumption of culpable mental state, under Section 35 of the Act, arises only when prosecution has proved recovery of the contraband substance from the conscious possession of the accused. That such fact is to be proved beyond reasonable doubt is now well settled. (*Mohan Lal V. State of Rajasthan,* (2015) 6 SCC 222; and *Kulwinder Singh and another V. State of Punjab,* (2015) 6 SCC 674).

11. In *Dharampal Singh v. State of Punjab,* (2010) 9 SCC 608, the Hon'ble Supreme Court of India, held that the initial burden of proof of possession lies on the prosecution and once it is discharged, legal burden would shift on to the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence.

12. Offences under the Act, being more serious in nature higher degree of proof is required to convict an accused. It needs no emphasis that the expression "possession" is not capable of precise and completely logical definition of universal application in context of all the statutes. "Possession" is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18/20 of the Act once possession is established, the accused who claims that it was not a conscious possession has to establish it because it is within his special knowledge. Section 54 of the Act raises presumption of possession of illicit articles.

13. Act creates legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and tested on this anvil. Once possession is established, the Court can presume that the accused had culpable mental state and committed the offence.

14. In somewhat similar facts, the Hon'ble Supreme Court of India, had the occasion to consider this question in *Madan Lal and another vs. State of H.P.*, 2003 (7) SCC 465, wherein it has been held that once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. (See also: *Dehal Singh v. State of Himachal Pradesh,* (2010) 3 SCC (Cri) 1139); *Gian Chand & others v. State of Haryana*, (2013) 14 SCC 420; and *Kulwinder Singh (supra).*

15. The Apex Court in *Mohan Lal (supra)* has held that that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified,

for the intention is to exercise right over the substance or the chattel and to act as owner to the exclusion of others.

16. Now let us apply the law to the given facts. Significantly, the accused in his statement, recorded under the provisions of Section 313 of the Code of Criminal Procedure, has admitted the prosecution case, so put to him in Questions No.2 to 15, about the presence of the police party on National Highway No.22, near Saproon; stopping of HRTC Bus bearing registration No.HP-10A-3968 of Rohru Depot for checking; entering of police officials into the bus from the front and the rear gates; checking of luggage of the passengers by Sub Inspector Narain Singh; his sitting on seat No.17 of the said bus; search of bag (Pithoo) and recovery of the incriminating articles, i.e. red and green coloured micron bag (Ex.P-6), Parcel (Ex.PW-7) and Charas (Ex.P-8) in the shape of wicks and balls; arranging of electronic weighing scale and weighing of contraband substance; placing of the contraband substance in the micron bag (Ex.P-6) and thereafter in a cloth parcel, and sealing of the parcel with seal of seal impression 'M'; preparation of NCB form (Ex.PW-11/A) in triplicate; taking into possession of the incriminating articles, including his clothes (Ex.P-3 to P-5) vide Memo (Ex.PW-1/B); conduct of videography (Ex.PW-1/C-1 to Ex. PW-1/C-7) of the proceedings on the spot; preparation of Rukka (Ex.PW-11/C), registration of FIR (Ex.PW-10/A), preparation of site plan (Ex.PW-11/D), recording of statements of witnesses, taking into possession and release of the HRTC Bus; his arrest vide Memo Ex.PW-11/G and intimation given to his wife; and taking into possession of his ticket (Ex.PW-4/A). But however, the accused has denied possession of any bag from him, stating that the bag (Pithoo) was recovered from the rack of the bus.

17. Hence, he only wants the Court to believe that such recovery came to be effected not from his personal possession but from an unclaimed bag which was kept on the rack above the seat over which he was sitting.

18. In *Raj Kumar v. State of Madhya Pradesh,* (2014) 5 SCC 353, Hon'ble the Supreme Court of India, held as under:-

> "22. The accused has a duty to furnish an explanation in his statement under Section 313 Cr.P.C. regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 Cr.P.C. is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. [Vide: Ramnaresh vs. State of Chhattisgarh, (2012) 4 SCC 257; Munish Mubar vs. State of Haryana, (2012) 10 SCC 464: AIR 2013 SC 912; and Raj Kumar Singh vs. State of Rajasthan, (2013) 5 SCC 722.]
>
> 23. In the instant case, as the appellant did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court, the courts below have rightly drawn an adverse inference against him. The appellant has not denied his presence in the house on that night. When the children were left in the custody of the appellant, he was bound to explain as under what circumstances Gounjhi died.
>
> 24. In Prithipal Singh vs. State of Punjab, (2012) 1 SCC 10, this Court relying on its earlier judgment in State of W.B. vs. Mir Mohammad Omar, (2000) 8 SCC 382, held as under:
>
> > "53..... if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section

would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

(Emphasis supplied)

[Also: Neel Kumar vs. State of Haryana, (2012) 5 SCC 766; and Gian Chand vs. State of Haryana, (2013) 14 SCC 420]"

19. Independent of the aforesaid admissions, we have examined the testimonies of the prosecution witnesses.

20. Noticeably, independent witnesses, namely Surinder Singh (PW-3) and Pramod Singh (PW-4) have not supported the prosecution case. They were declared hostile and extensively cross-examined by the learned Public Prosecutor. Before we deal with their testimonies, we shall first discuss how testimony of a hostile witness is to be appreciated. The law in this regard is now well settled.

21. The apex Court in Ashok alias *Dangra Jaiswal vs. State of Madhya Pradesh*, (2011) 5 SCC 123, has held that seizure witnesses turning hostile may not be very significant by itself, as it is not an uncommon phenomenon in criminal trials, particularly in cases relating to NDPS Act.

22. Further in *Yomeshbhai Pranshankar Bhatt vs. State of Gujarat*, (2011) 6 SCC 312, the apex Court has held that evidence of a hostile witness may contain elements of truth and should not be entirely discarded. Their Lordships have held that:

"22. The learned counsel for the appellant further submitted the doctor had not given his written opinion that the deceased was fit enough to give her statement. Though orally, the doctor said so. Relying on this part of the evidence especially the evidence of the husband of the deceased, the learned counsel for the appellant submitted that even though the husband may have been declared hostile, the law relating to appreciation of evidence of hostile witnesses is not to completely discard the evidence given by them. This Court has held that even the evidence given by hostile witness may contain elements of truth.

23. This Court has held in State of U.P. vs. Chetram and others, AIR 1989 SC 1543, that merely because the witnesses have been declared hostile the entire evidence should not be brushed aside. [See para 13 at page 1548]. Similar view has been expressed by three-judge Bench of this Court in Khujji alias Surendra Tiwari vs. State of Madhya Pradesh, [AIR 1991 SC 1853]. At para 6, page 1857 of the report this Court speaking through Justice Ahmadi, as His Lordship then was, after referring to various judgments of this Court laid down that just because the witness turned hostile his entire evidence should not be washed out."

(Emphasis supplied)

23. Further in *Bhajju alias Karan Singh vs. State of Madhya Pradesh,* (2012) 4 SCC 327 the Court held that evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. It further held that:

"36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other

reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases:

(a) Koli Lakhmanbhai Chanabhai v. State of Gujarat (1999) 8 SCC 624

(b) Prithi v. State of Haryana (2010) 8 SCC 536

(c) Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1

(d) Ramkrushna v. State of Maharashtra (2007) 13 SCC 525"

(Emphasis supplied)

24. In *Ramesh Harijan vs. State of Uttar Pradesh,* (2012) 5 SCC 777 the Court held that seizure/recovery witnesses though turning hostile, but admitting their signatures/thumb impressions on recovery memo, could be relied on by prosecution and that:

"23. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide: Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

24. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008 SC 320; and Subbu Singh v. State by Public Prosecutor, (2009) 6 SCC 462. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. (See also: C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; and Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36)" (Emphasis supplied)

25. We now proceed to examine the prosecution case from the version so disclosed by the independent witnesses. Surinder Singh admits to be the passenger, sitting on seat No.18, at the time of checking of the bus by the police party. He also admits that accused was sitting as a passenger over seat No.17. He admits that the bus was searched by the police party. Only on the point of recovery, he states that police found one bag on the upper carriage of the bus, from which Charas was recovered. We do not find this version of his to be true, as we shall discuss hereinafter. He admits having signed recovery memo (Ex.PW-1/B) and parcel (Ex.P-2). He tries to explain the same by clarifying that since he was puzzled on account of illness of his child,

reluctantly he appended his signatures, but crucially he admits that the police had photographed the entire proceedings and the photographs Ex.PW-1/C-1 to Ex.PW-1/C-7 are the ones which were taken on the spot. He admits that in the photographs, accused is seen with a bag on his lap. Now significantly, this witness does not state that the police intimidated or threatened him of false implication in the case or that the documents were forged or falsely prepared. After all, luggage of all the passengers, including his, was checked. If he was puzzled, he could have refused to participate in the proceedings conducted by the police. For the first time in Court, he has narrated the factum of illness of his child. He admits recovery of Charas in the form of wicks and balls from the bag recovered by the police. This Charas kept in a micron bag was wrapped. He also did not make any complaint to any person of having signed the papers without knowing contents thereof, or his statement so recorded by the police, with which he was confronted to be unture.

26. We are of the considered view that only to help the accused, to a limited extent, he deposed contrary to the factual position. Hence, this part of his testimony can be discarded safely.

27. Pramod Singh is a Government employee. He was posted as a Conductor of the bus owned by a Public Sector Undertaking. He admits the police to have checked the bus at the relevant time. He admits that police instructed the passengers to identify their luggage. He also admits the police to have checked the luggage of the passengers. He tries to save the accused by deposing that from one unclaimed bag, which was lying on the shelf, Charas was recovered and when none claimed ownership thereof, under suspicion, since the accused was sitting immediately below such unclaimed baggage, police falsely implicated him. The witness is obviously not telling the truth. We find that the witness was cross-examined by the learned Public Prosecutor. He admits to have signed all the papers after noting contents thereof. He has studied upto 12th class and writes and reads in Hindi. He admits his signatures on the recovery memo. This was not under threat, pressure or coercion. He voluntarily signed the same. Also, he never made any complaint for unnecessary harassment of the passengers by the police. His statement (Mark-B), which he denies in Court, wherein he admits recovery of the contraband substance from the conscious possession of the accused, stands duly proved by the Investigating Officer. The witness is bound to disclose the truth, more so being a public servant. That he was associated by the police in the recovery proceedings, he does not deny. Why is it that he did not report false implication of the accused to any one? Why is it that he did not protest against false implication of an innocent person? Why is it that he immediately did not report the incident being false or fabricated, to any one of his superior officers? Why is it that he did not inform his superior officers of any unnecessary harassment caused, if any, on account of checking by the police officials? He was duty bound to do so. Under these circumstances, it would be only appropriate that action be taken against this witness, in terms of the judgment and order passed by a Coordinate Bench of this Court in Criminal Appeal No.417 of 1996, titled as *State of Himachal Pradesh v. Balak Ram.*

28. Even from the testimony of independent witnesses, it cannot be said that a case other than the one which the prosecution wants the Court to believe has emerged. It is not a case where we find two views to have emerged on record.

29. 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 can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of

his involving innocent people, in that event, no credibility can be attached to the statement of such witness.

30. 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.

31. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. [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 SC 217].

32. 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."

33. In the aforesaid background, we now proceed to examine the testimonies of police officials and the case unfurling on record.

34. Simply put, it is the case of the Investigating Officer Narinder Singh (PW-11) that on 7.8.2012, he alongwith other police officials, was on a patrol duty at Saproon (NH-22). At about 10 p.m., one bus bearing No.HP-10A-3968 was stopped for checking. Police officials entered the bus from both the gates, when he instructed the passengers to identify their luggage and keep it with them for checking. Accused, who was sitting on Seat No.17, was found having kept one *Khaki* colour "*Pithu*" (carry bag) on his lap. It was opened for checking, in the presence of the Conductor (PW-4) of the Bus and passenger (PW-3) sitting on Seat No.18. The *Pithu* contained a micron bag, from which another transparent envelope, wrapped in an adhesive tape, was found. This parcel contained black coloured substance, in the form of wicks and balls. On checking, it appeared to be Charas. As instructed, Ram Krishan (PW-2) brought the scales. When weighed, Charas was found to be 3 kgs. Entire stuff was packed in the very same manner, in which it was opened and sealed with four seals of seal impression 'M'. NCB form (Ex.PW-11/A) was filled up in triplicate and impression of seal 'M' embossed thereupon. Sample of the seal was separately taken on a piece of cloth (Ex.PW-1/A), which was signed by both the independent witnesses and Om Parkash as also the accused. Original seal was handed over to witness

Pramod Singh. Contraband substance was taken into possession vide Memo (Ex.PW-1/B). Entire proceedings were got photographed (photographs are Ex.PW-1/C-1 to C-7) and videographed (video CD is Ex.PW-1/C-8). Ram Krishan took Rukka (Ex.PW-1/C), which led to registration of the FIR (Ex.PW-10/A). Witness has testified to have recorded statements of independent witnesses Surinder Singh (Mark-A)(Ex.PW-11/E) and Pramod Singh (Mark-B)(Ex.PW-11/F). Accused was arrested vide Memo (Ex.PW-11/G) and as per his desire, information furnished to his wife over telephone. Thereafter, personal search of the accused was conducted vide Memo (Ex.PW-11/H) and certain articles taken into possession. Case property was produced before the SHO, who resealed it by affixing his own seal of impression 'R', whose signatures he has identified. Special Report (Ex.PW-2/A) so prepared was sent to the Superior Officer through Ram Krishan. He identifies the Charas parcel (Ex.P-2) and *Pithu* (Ex.P-1) to be the one which stood recovered by him, from the conscious possession of this accused. He has also identified the micron bag (Ex.P-6), *Khaki* tape (Ex.P-7) and other belongings of the accused.

35. The witness has clearly withstood the test of cross-examination. His statement is natural, clear, convincing and cogent. Suggestion put to this witness of having influenced other witnesses for appending signatures on various documents stands denied by him, so also the fact that police recovered Charas from the unclaimed bag, which was kept on the rack, above the seat and the accused having been falsely implicated.

36. We notice, police officials Om Parkash (PW-1) and Ram Krishan (PW-2) to have fully corroborated such version. Their testimonies are clear, cogent and consistent.

37. Having minutely observed the testimonies of the police officials, we do not find defence of the accused to have been probablized. Why would police officials falsely implicate the accused? There is no prior animosity. He was not the only passenger in the bus. Entire luggage, of all the passengers, was checked and recovery effected from the bag kept by him on his lap.

38. Rajinder Kumar (PW-5) testifies Ram Krishan (PW-2) to have brought the scales from his Dhaba.

39. Ram Krishan also testifies having carried the Rukka to the Police Station, which led to the registration of FIR by Hem Ram (PW-10), to which effect, even testimony of this witness is evidently clear.

40. SHO Chaman Lal (PW-13) has also testified having resealed the contraband substance with his own seal 'R', impression whereof, was taken on a piece of cloth (Ex.PW-1/A). Both Narinder Singh (PW-11) and Chaman Lal testify having filled up the NCB forms in triplicate.

41. Case property stood entrusted to Narender Parkash (PW-8), who clarifies that on 8.8.2012, one cloth parcel, having four seals of seal impression 'M' and three seals of seal impression 'R', one bag, sample seals of seals 'M' and 'R', NCB form in triplicate and one *Pithu*, containing clothes were entered in Malkhana register (Ex.PW-8/A). The parcel of Charas, containing seals 'M' and 'R', as also the NCB form were sent to the Forensic Science Laboratory, Junga through Kuldeep Kumar (PW-9), vide Road Certificate (Ex.PW-8/B). He has identified the parcel (Ex.P-2) to the one which stood deposited with them. Kuldeep Kumar (PW-5) has also deposed that the parcel handed over to him was deposited, as it is, with the Laboratory. Now significantly, both these witnesses have identified the case property, which remained with them untampered.

42. We also find that Special Report, so prepared by Narinder Singh (PW-11) came to be received in the office of Deputy Superintendent of Police by Devender Kumar (PW-7).

43. Hence, the prosecution case remains fully established, beyond reasonable doubt. It is in this backdrop, we observe that accused has failed to even probablize his defence, much less dislodge the statutory burden, so cast upon him, both under the provisions of the Act and Indian Evidence Act.

44. It is not the requirement of law that names of all the persons/witnesses, in whose presence search and seizure operations took place, must necessarily be mentioned in the Ruka. *Deepak Kumar (supra)* also does not lay down such a proposition.

45. That Om Prakash was present on the spot is evident from other ocular/documentary evidence on record. It definitely cannot be the case of the accused that prior to the filing of the challan, the Investigating Officer was already aware about the fact that independent witnesses would not support the prosecution. Hence, plea of Om Prakash being introduced as a witness only to falsely implicate the accused is farfetched.

46. Reliance upon the decisions rendered by learned Single Judge and a Coordinate Bench of this Court in *Gurmeet Singh (supra)* and *Shashi Kumar (Supra),* for the reason that malkhana register does not establish movement of the contraband substance from the Forensic Science Laboratory to the Police Station and thereafter to the Court is misconceived. Not only the decision is clearly distinguishable on facts, inasmuch as the Court found the genesis of the prosecution case to be extremely doubtful, but also the Bench subsequently took a different view in Cr.A No.201 of 2016, titled as *State of Himachal Pradesh v. Kishori Lal,* decided on 1.9.2016. Hence, earlier decisions rendered in *Sanjeev Kumar v. State of H.P.,* 2016(3) Him.LR (DB) 1529; *Rishi Pal v. State of Himachal Pradesh & connected matters,* 2016(3) Him LR (DB) 1336; *Des Raj & another v. The State of H.P. & connected matter,* 2016(3) Him LR (DB) 1455; *Sanju v. State of Himachal Pradesh,* 2016(2) Him LR 1210; and *Kartik v. State of Himachal Pradesh,* 2016(2) Him LR 1217 are also of no use to the accused.

47. It was for the accused to have established the prejudice caused to him on account of non-establishment of the movement of the contraband substance, after it came to be analyzed by the experts at the Forensic Science Laboratory. Now, once the prosecution has been able to establish the factum of recovery and seizure of the contraband substance from the conscious possession of the accused, beyond reasonable doubt, which after analysis was found to be Charas, onus to disprove the same heavily lied upon the accused, which in the instant case was not so done.

48. Police officials have deposed that on the spot two bags, i.e. one *Pithu* and one micron bag, were taken into possession. Their testimonies do not reveal such version to be false. In fact, these bags stand produced in Court. Simply because there is discrepancy in the number of bags in the Malkhana Register, that fact itself would not be sufficient enough to acquit the accused, more so when there is nothing on record to establish as to in what manner it has caused prejudice to him. Similar view stands taken by a Coordinate Bench of this Court in *Kishori Lal (supra) (*Cr.A No.201 of 2016).

49. A Coordinate Bench of this Court, by relying upon the decision rendered by the apex Court in *State versus N.S. God*, (2013) 3 SCC 594, further clarified its judgment, rendered in *Shashi Kumar (supra)* and *Gurmeet Singh (supra)*, that mere absence of entry of a particular fact in the Malkhana Register would not render the prosecution case to be fatal. Significantly, one of the Judges and author of *Surender Kumar alias Teena (supra)* was himself a party to the decision rendered in *Kishori Lal (supra).*

50. Absence of reference of NCB form as also the sample seal in the Road Certificate (Ex.PW-8/B), in no manner, renders the prosecution case to be doubtful. It has not caused any prejudice to the accused.

51. According to the accused, the bag was recovered from the rack immediately above his seat. It certainly did not belong to the co-passenger sitting on the adjoining seat. All the passengers, even according to the accused and witness Pramod Singh (PW-4), had identified their luggage. Under these circumstances, it was necessary for the accused to have explained, on the spot, that the bag did not belong to him.

52. Non-production of original seal in the Court also cannot be said to be fatal, for the police officials have fully established their case of having sealed the case property, both on the

spot and at the Police Station. There is no discrepancy about the number and nature of the seals. Also, there is no iota of evidence that they were either broken or tampered with. Report of the FSL (Ex.PW-13/C) is also evidently clear to such effect.

53. On this issue much reliance is placed on a decision rendered us in *Kurban Khan (supra)* and *Anil Kumar (supra)*, wherein it is held that non-production of original seals does render the prosecution case to be fatal. As authors of the said decisions, we ourselves clarify them to have been rendered in the given facts and circumstances, which fact, also subsequently stands clarified by another Coordinate Bench of this Court, by relying upon a judgment rendered by the apex Court in *State represented by Inspector of Police, Chennai v. N.S. Gnaneswaran,* (2013) 3 SCC 594, in *Kishori Lal (supra)* (Criminal Appeal No.201 of 2016), that the said decisions were rendered in the given facts and circumstances. Not only that, they further clarified that it was incumbent upon the accused to have established prejudice caused to him on account of non-production of the original seal(s) in the Court, particularly when otherwise there was sufficient evidence, linking the seal affixed on the sample and embossed on the documents to be the same and the case property to be the one so recovered from the conscious possession of the accused. The Court observed that "availability of other sufficient evidence renders non-production of originals seal as a technical defect, which does not vitiate trial unless prejudice is caused........". "Purpose of production of original seal in the Court is to compare it with seal affixed on parcels of contraband and sample in the Court so as to prove that the parcels produced in the Court are the same which were prepared and sealed on the spot at the time of recovery from the accused and also to ensure that parcel sent for chemical examination and received back were the same which were seized and sealed on the spot."

54. In the instant case, the contraband substance came to be recovered not from the person, but from the *Pithu* of the accused. It is a matter of record that no notice in compliance of Section 50 of the Act came to be issued to the accused. It is also a matter of record that both the person, i.e. the body of the accused as also *Pithu* were searched by the police party.

55. The Apex Court in *State of H.P. v. Sunil Kumar,* (2014) 4 SCC 780, has extensively dealt with the issue of chance recovery. It stands clarified that mere suspicion, even if it is "positive suspicion" or "grave suspicion", cannot be equated with "reason to believe", as the concepts are completely different. Only where there is "reason to believe", the Investigating Officer is duty bound to follow the procedure, so prescribed under the Act. The Court was dealing with a case where the police officials accidently or unexpectedly came across drug carried by the passenger, travelling in the bus, of which there was no prior information or suspicion with regard thereto.

56. In the instant case, undisputedly, police had no prior information of the accused either dealing with or possessing the contraband substance. The police party per chance stumbled upon the recovery of the contraband substance from the bag held by the accused.

57. While contending that there has been infraction of provisions of Section 50 of the Act, our attention is invited to the decision rendered in *Parmanand (supra)*(two Judges.

58. The said decision is squarely inapplicable in the given facts and circumstances. In the said case, the Court was dealing with a case where though two persons were arrayed as accused, but recovery of the contraband substance came to be effected from a polythene bag carried by one of them. Though police had informed the accused of their statutory right and also issued notices, but the accused from whom such recovery came to be effected, contested, of not having independently consented for being searched by the police party, as the document did not bear his signatures. While holding that there was infraction of Section 50 of the Act, the Court referred to and relied upon its earlier decisions rendered in *Dilip and another v. State of M.P.,* (2007) 1 SCC 450 (two Judges); and *Union of India v. Shah Alam and another,* (2009) 16 SCC 644 (two Judges). What also weighed with the Court was the fact that the accused stood acquitted by the High Court.

59. Now, when we peruse the decision rendered in *Shah Alam (supra)*, we find the same to have been rendered in the given facts and circumstances, which is quite evident from Para-16 of the Report. Also what weighed with the Court was the otherwise uninspiring testimonies of the police officials, which never came to be corroborated by independent witnesses, who also were not examined in Court.

60. When we peruse the decision of *Dilip (supra)*, we find that though actual recovery of the contraband substance came to be effected from the Scooter, but the person of the accused was also searched. The Court found provisions of Section 50 of the Act to have been breached. Hence, the Court specifically did not deal with the proposition that though no recovery came to be effected, from the person/body but from a place/object under conscious control and possession of the accused, and the accused was searched, failure to comply with the provisions of Section 50 of the Act, would ipso facto vitiate the trial. We find the decision to have been rendered in the given facts and circumstances and thus clearly distinguishable having no binding effect to the instant facts. Observations made in Para-16 of the Report to the following effect, are moreso obiter in nature, considering the fact that earlier decision rendered by a three-Judge Bench of the Apex Court in *State of H.P. v. Pawan Kumar,* (2005) 4 SCC 350, was never brought to their Lordships notice. Also, such observations came to be made in the backdrop of the fact that the accused originally stood acquitted and there was serious infraction of Section 42 of the Act.

> "16. In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the person of the appellant was also searched, it was obligatory on the part of PW 10 to comply with the said provisions. It was not done."

61. At this juncture, it would be appropriate to reproduce the principles laid down by a Constitution Bench (Five-Judges), of the apex Court in *State of Punjab v. Baldev Singh,* (1999) 6 SCC 172, as under:

> "57. On the basis of the reasoning and discussion above, the following conclusions arise :
>
> (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-sec. (1) of Sec. 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
>
> (2) That failure to inform the person concerned about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused.
>
> (3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Sec. 50 of the Act.
>
> (4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is

important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the Court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Sec. 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Sec. 50 have been duly observed would have to be determined by the Court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Sec. 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Sec. 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Sec. 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-sec. (1) of Sec. 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Sec. 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

(8) A presumption under Sec. 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Sec. 50. An illegal search cannot entitle the prosecution to raise a presumption under Sec. 54 of the Act.

(9) That the judgment in Pooran Mal case (supra), cannot be understood to have Lald down that an illicit article seized during a search if a person, on prior information, conducted in violation of the provisions of Sec. 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search.

(10) That the judgment in AH Mustaffa case (supra), correctly interprets and distinguishes the judgment in Pooran Mal case, and the broad observations made in Pirthi Chanel case (supra) and Jasbir Singh case (supra), are not in turn with the correct exposition of law as Lald down in Pooran Mal case."

62. The said decision came to be considered by another Constitution Bench (five-Judges) in *Vijaysinh Chandubha Jadeja v. State of Gujarat,* (2011) 1 SCC 609, wherein the Court laid the following principles:

"29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. <u>We have no hesitation in</u>

holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

"31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf." (Emphasis supplied)

63. In *Pawan Kumar (supra),* the apex Court was specifically dealing with an accused where both the accused and the bag carried by him were searched and even though no recovery was effected from the person but Charas was recovered from the bag. With these facts, the Court observed as under:

11. Section 50 of the Act prescribes the conditions under which search of a person shall be conducted. Sub-sec. (1) provides that when the empowered officer is about to search any suspected person, he shall, if the person to be searched so requires, take him to the nearest Gazetted Officer or the Magistrate for the purpose. Under sub-sec. (2) it is Lald down that if such request is made by the suspected person, the officer who is to take the search, may detain the suspect until he can be brought before such Gazetted Officer or the Magistrate. Sub-sec. (3) lays down that when the person to be searched is brought before such a Gazetted Officer or the Magistrate and such Gazetted Officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise he shall direct that the search be made.

12. On its plain reading, Sec. 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Sec. 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the N.D.P.S. Act is also recovered, the requirements of Sec. 50 of the Act are not attracted."

"14. The above quoted dictum of the Constitution bench shows that the provisions of Section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which he may be carrying."

"27. Coming to the merits of the appeal, the high Court allowed the appeal on the finding that the report of the Chemical Examiner had to be excluded and that there was non compliance of Section 50 of the Act. The learned Judges of this Court, who heard the appeal earlier, have recorded a unanimous opinion that the report of the chemical Examiner was admissible in evidence and could not be excluded. In view of the discussion made earlier, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag, which was being carried by the accused. The High Court did not examine the testimony of the witnesses and other

> evidence on merits. Accordingly, the matter has to be remitted back to the High court for a fresh hearing of the appeal." (Emphasis supplied)

64. The said decision came to be reiterated by another three-Judge Bench of the apex Court in *State of Rajasthan v. Ratan Lal,* (2009) 11 SCC 464.

65. Apart from the fact that the decision rendered in *Pawan Kumar (supra)* is squarely applicable to the given facts, there is yet another reason for us to follow the same and that being the law of binding precedents. The apex Court in *Union of India and another v. K.S. Subramanian,* 1976 (3) SCC 677, also observed as under:

> "12. We do not think that the difficulty before the High Court could be resolved by it by following what it considered to be the view of a Division Bench of this Court in two cases any by merely quoting the views expressed by large benches of this Court and then observing that these were insufficient for deciding the point before the High Court. It is true that, in each of the cases cited before the High Court, observations of this Court occur in a context different from that of the case before us. But, we do not think that the High Court acted correctly in skirting the views expressed by larger benches of this Court in the manner in which it had done this. The proper course for a High Court, in such a case, is to try to find out and follow the opinions expressed by larger benches of this Court in preference to those expressed by smaller benches of the Court. That is the practice followed by this Court itself. The practice has now crystallized into a rule of law declared by this Court. If, however, the High Court was of opinion that the views expressed by larger benches of this Court were not applicable to the facts of the instant case it should have said so giving reasons supporting its point of view." (Emphasis supplied)

66. The principle stands reiterated by a three-Judge Bench of the apex Court in *Pyare Mohan Lal v. State of Jharkhand and others,* 2010 (10) SCC 693, as under:

> "24. In view of the above, the law can be summarized to state that in case there is a conflict between two or more judgments of this Court, the judgment of the larger Bench is to be followed......."

67. Further, the Constitution Bench (five-Judge) of the Apex Court in *P. Ramchandra Rao v. State of Karnataka,* 2002 (4) SCC 578, has observed that:

> "........Even where necessities or jurisdiction , if any were found therefore, there could not have been scope for such liberties being taken to transgress the doctrine of administration of justice and what is permissible even under such circumstances being only to have had the matter referred to for reconsideration by a Larger Bench of this Court and not to deviate by any other means......"

> [Also : *Pyare Mohan Lal (supra); Union of India v. Raghubir Singh, AIR 1989 SC 1933; N S Giri v. Corporation of City of Mangalore*, AIR 1999 SC 1958; *Director of Settlement, AP v. M.R. Apparao,* AIR 2002 SC 1598; *Hyder Consulting (UK) Ltd. V. Governor, State of Orissa and others,* (2015) 2 SCC 189]

68. Hence, we are bound by the decisions rendered by three Hon'ble Judges of the Apex Court in *Pawan Kumar (supra)* & *Ratan Lal (supra)*, and not *Parmanand (supra), Shah Alam (supra) & Dilip (supra),* rendered by two Hon'ble Judges of the same Court.

69. Hence, the contention that the search is illegal or that there has been violation of mandatory provisions of Section 50 of the Act is untenable in law.

70. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

71. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

72. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed.

73. We have noticed that the Courts below are often faced with the dilemma of dealing with different/various decisions rendered by this Court. As such, we direct the Registrar General of this Court to immediately send a copy of this judgment to every Judicial Officer of the State as also the Director, H.P. Judicial Academy, for appraisal, compliance and necessary action.

74. A copy of this judgment be also sent to the accused.

75. Assistance rendered by Mr. Rajesh Mandhotra, learned Legal Aid Counsel, is highly appreciable.

Appeal stands disposed of, so also pending application(s), if any.

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

State of H.P. .....Appellant.

Versus

Rajesh Kumar @ Bati .....Respondent.

Cr. Appeal No. 311 of 2008
Decided on: 2nd November, 2016.

Indian Penal Code, 1860- Section 324, 325 and 341 read with Section 34- Informant along with P was attending the marriage - when they were coming out of the hotel, 5-6 boys who were drunk started abusing them – P inquired as to why they were abusing on which they starting beating P- informant tried to rescue P on which he was beaten - R was identified at the spot- R was convicted while other accused were acquitted- an appeal was preferred, which was allowed- held, that medical evidence proved that informant had sustained grievous injuries – mere fact that independent witnesses had not supported the prosecution version is not sufficient to discard the same- PW-3 had supported the prosecution version, which was duly corroborated by his previous statement – the recovery memo of weapon of offence was also proved - Appellate Court had wrongly acquitted the accused- appeal allowed – judgment of Appellate Court set aside and that of the trial Court restored. (Para-10 to 20)

For the Respondent: Mr. R.S Thakur, Additional Advocate General.
For the Respondent: Mr. Surender Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned judgment of 26.11.2007 rendered by the learned Additional Sessions Judge, Mandi, District Mandi, H.P. in

Criminal Appeal No. 30/2003, whereby the learned Additional Sessions Judge while reversing the findings of conviction recorded qua the respondent herein by the learned Additional Chief Judicial Magistrate, Sundernagar, District Mandi, acquitted him for the offences charged.

2. The brief facts of the case are that on 24.7.1996 the complainant Suresh Kumar alongwith Pal @ Dharam Singh were attending marriage at Sundernagar. In the evening they went to the hotel of Ram Singh situated at Bhojpur for dinner. When both of them came out of the hotel, 5-6 boys, who were drunk started abusing them and when Pal asked them as to why they are abusing them, the aforesaid 5-6 boys started beating Pal. When Suresh Kumar intervened and tried to rescue his friend Pal, they started beating Suresh Kumar. His friend Pal ran away. The boys aforesaid were beating Suresh kumar with a grip, broken bottle and knife on his head, face and shoulder. Suresh Kumar could identify only Rajesh Kumar @ Bati as one of the assailants as he was already known to him. The complainant also escaped himself from the assailants and ran away to his house situated at village Dhaneshari. Som Krishan, brother of the complainant took him to SDH, Sunderngar for medical treatment. On 25.7.1996 the Medical Officer informed the police on telephone that injured Suresh Kumar had been assaulted and was admitted in the hospital. ASI Suram Singh alongwith C Amar Singh went to SDH Sunderngar where he recorded statement of Suresh Kumar under section 154 Cr.P.C. FIR stands registered against the accused. On completion of all codal formalities and on conclusion of the investigation into the offence allegedly committed by Rajesh Kumar @ Batti (accused/respondent herein), Gagan and Surinder Kumar @ Sidhu challan was prepared and filed in the Court.

3. The accused Rajesh Kumar @ Batti, Gagan and Surinder Kumar @ Sidhu stood charged by the learned trial Court for theirs committing offences punishable under Sections 324, 325, 341 readwith Section 34 I.P.C to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which they claimed false implication. However they did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of conviction against the respondent herein for offences punishable under Section 325, 341 readwith Section 34 of IPC. Remaining accused stand acquitted by the learned trial Court.

6. In an appeal preferred therefrom by the respondent herein before the learned Additional Sessions Judge, Mandi, the latter Court while allowing the appeal preferred therebefore by the respondent herein reversed the findings of the conviction recorded qua the respondent herein by the learned trial Court.

7. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Appellate Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

8. The learned counsel appearing for the respondent has with considerable force and vigor contended qua the findings of acquittal recorded by the learned Appellate Court standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

9. This Court with the able assistance of the learned counsel for the parties has with studied care and incision, evaluated the entire evidence on record.

10. PW-3 Suresh Kumar (injured/complainant) had lodged an apposite report qua the occurrence before the police station concerned comprised in Ex. PW-3/A wherein he named Bati @ Rajesh Kumar to be one of the assailants in the assault perpetrated on his person. He received

injuries as stand reflected in MLC comprised in Mark-Y. A recital occurring in Mark Y reflects qua the Doctor, who prepared it referring the complainant for examination to the Radiologist.

11. PW-7 Dr. S.K Malhotra on a reference made to him by the Doctor who prepared Mark Y subjected the complainant to X-Ray examination, in sequel whereto X-Ray films comprised in Ex.PW-7/A to PW-7/C stood prepared, on discernment whereof he rendered his opinion comprised in Ex.PW-7/D holding a communication qua occurrence of fracture of left side frontal bone of skull of the complainant/injured. The Doctor who prepared MLC (Mark Y) on receiving the report of the Radiologist pronounced therein an opinion qua injury No.3 reflected in Mark Y being grievous.

12. The learned Appellate Court while reversing the findings of conviction recorded qua the respondent herein by the learned trial Court had assigned a reason, qua with PW-4 (Kashmir Singh) and PW-5 (Ram Singh) independent witnesses to the ill-fated occurrence not supporting the prosecution case also with PW-1 (Som Krishan) a witness to recovery memo Ext.PA whereunder grip allegedly wielded by the accused for inflicting injuries on the person of victim/complainant stood recovered, omitting to lend corroboration to the recitals occurring in the relevant memo, hence it standing prodded to record findings of acquittal qua the respondent herein.

13. The learned Appellate Court had concluded of with Dr. V.K Kapil who had prepared MLC Mark Y in sequel to his subjecting the complainant to medical examination not stepping into the witness box rendered the enunciations occurring therein to stand unproved. For all the reasons assigned hereinafter the reasons as stand propounded by the learned appellate Court are extremely feeble in legal vigor whereupon this Court is constrained to reverse the findings of acquittal recorded qua the respondent herein.

14. True it is that the independent witnesses to the occurrence omit to lend vigor to the prosecution case. However the mere factum of independent witnesses to the occurrence who testified as PWs 4 and 5 not supporting the prosecution version would not constrain this Court to omit to revere the testimony of the complainant who deposed as PW-3 unless his testification if read in its entirety displays qua his propagating therein a version ridden with falsity besides with a vice of his improving as well as embellishing upon his previous statement recorded in writing. A close and circumspect reading of the testification of PW-3 occurring both in his examination-in-chief also in his cross-examination discloses qua his in tandem with his previous statement comprised in Ex.PW-3/A making echoings therein qua the respondent herein whom he proceeded to identify in Court being a participant in the ill-fated occurrence. He also identified grip which stood recovered by the investigating Officer under memo Ex. PA.

15. The witnesses to recovery memos (Ex. PA and PB) who testified as PW-1 and PW-2 in their respective testifications unequivocally deposed qua grip standing taken into possession by the police on its standing produced at the Police Station by accused Rajesh @ Batti. The aforesaid unrebutted testifications of PW-1 and PW-2, the witnesses to the recovery memo Ext.PA whereunder grip stood produced by accused Rajesh before the Investigating Officer concerned, naturally hence hold visible loud unveilings of thereupon the efficacy of its recovery under the memo aforesaid holding vigor besides immense formidability also the effect of the aforesaid inference drawn by this Court is qua omission of PW-1 and PW-2 to lend succor to the prosecution case and the effect of theirs reneging from their pervious statements recorded in writing standing omnibusly subsumed besides the factum of independent witnesses not supporting the prosecution case also wanes and gets scuttled. Since the counsel for the respondent herein did not subject PW-1 and PW-2 witnesses to the relevant recovery memo to an efficacious cross-examination for thereupon his concerting to project qua grip recovered under memo Ex.PA sanding not produced by him before the police rather it prior to its recovery in the manner reflected in Ext.PA being available in the police station concerned. Consequently, omission of the aforesaid concert by the learned defence counsel to thereupon tear the efficacy of Ex. PA fosters an inference of the accused Rajesh at the relevant time wielding grip recovered under Memo Ext.PA also the factum of his producing it before the Investigating Officer concerned

being free from any taint of the investigating Officer concerned contriving the recitals occurring in Ex.PA.

16. The learned appellate Court while discounting the vigor of the prosecution case had unnecessarily emphasized upon the imperative requirement of independent witnesses to the ill-fated occurrence supporting the prosecution case whereas theirs not supporting it, it concluded of the prosecution failing to prove the charge against the respondent herein. However, the aforesaid reason as stands assigned by the learned appellate Court is for reasons afore-stated per se flimsy besides weak. Conspicuously, with proven efficacious recovery of grip recovered under memo Ext.PA concomitantly bespeaking the factum of its user upon the victim by the accused/respondent herein.

17. Be that as it may with the complainant deposing in tandem with his previous statement recorded in writing wherein he named the accused/respondent herein to be one of the assailants who perpetrated an assault upon him, in sequel whereto he suffered grievous injuries though was sufficient for the learned Additional Sessions Judge to proceed to affirm the findings of conviction rendered against the respondent herein by the learned trial Court yet he for specious reasons discounted its effect also his verdict for reasons ascribed herein-after suffers from an inherent fallacy. Since the learned defence counsel while holding the complainant to cross-examination had put suggestions to him holding portrayals therein qua availability of the complainant at the relevant site of occurrence also when the learned defence counsel while holding PW-3 to cross-examination put suggestions to him wherewithin echoings are held qua the respondent herein also being available at the relevant site of occurrence yet his concerting to proclaim therein qua there occurring no scuffle thereat inter-se him with the complainant, suggestions whereof obviously personify qua the defence acquiescing to the factum of the accused/respondent herein at the relevant time being available at the relevant site of occurrence. In aftermath, the effect of the defence hence acquiescing to the presence of the accused herein at the relevant time at the site of occurrence when read in conjunction with the proven efficacious recovery of the relevant weapon of offence under memo Ex.PA by the Investigating Officer on its standing produced before him by the accused concerned also when PW-3 in his previous statement recorded in writing wherein he has named the accused/respondent herein to be one of the assailants has testified in consonance therewith, consistent testimony whereof of PW-3 qua the aforesaid facet remaining un-concerted to be shred of its efficacy by the defence, is of its therein holding a visible imminent display qua the defence conceding to the testification of PW-3 occurring in his examination-in-chief wherein he makes an imputation qua accused Rajesh Kumar perpetrating an assault upon him.

18. The learned appellate Court had discounted the vigor of Mark Y merely on the score of the Doctor who prepared it remaining un-examined by the prosecution. The aforesaid reason as stands propounded by the learned Additional Sessions Judge while recording an order of acquittal, is permeated with a legal frailty, significantly when PW-7 to whom a reference was made by the Doctor who prepared mark Y to hold the victim to X-Ray examination, in sequel whereto Ex.PW-7/A to PW-7/C stood prepared wherewithin pronouncements are held qua the victim suffering fracture of left side frontal bone of skull, injury whereof stands opined by him to be grievous in nature also the Doctor who prepared Mark Y on receiving the opinion prepared by PW-7 comprised in Ex.PW-7/D, opining qua the relevant injury being grievous in nature, was hence a sufficient portrayal of the injuries sustained by the victim in sequel to his standing assaulted by the accused being grievous in nature, without any insistence being made upon the doctor who prepared the apposite MLC standing examined for his hence proving it. Consequently the insistence made by the learned Additional Sessions Judge qua Mark-Y which stands prepared by the Doctor concerned standing proven by the latter for hence sustaining the prosecution case of the complainant sustaining grievous injuries, is ridden with gross absurdity besides perversity.

19. For the reasons which have been recorded hereinabove, this Court holds that the learned appellate 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 it suffers from a perversity or absurdity of mis-appreciation and non appreciation of the evidence on record.

20. In view of the above, the impugned judgment is set aside. The conviction and sentence imposed upon the accused/respondent herein by the learned trial Court is maintained and affirmed. The pronouncement of this Court be put into execution with utmost promptitude. The records be sent back.

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

Surinder Singh ...Appellant.

Versus

New India Assurance Company Ltd. and another ...Respondents.

FAO No.: 297 of 2009.
Date of Decision : 02/11/2016

Workmen Compensation Act, 1923- Section 4- Claimant was engaged as driver – he sustained 40% disability when the truck being driven by him met with an accident – the claim petition was dismissed by Workmen Compensation Commissioner- held, that the claimant had sustained injuries in an accident - disability certificate shows 40% disability of right ankle due to which he would not be able to work as driver – disability certificate was prepared after five years of the incident – the Doctor who issued the MLC was also not examined – the claim petition was rightly dismissed, in these circumstances- appeal dismissed. (Para- 3)

For the Appellant:	Mr. Nimish Gupta, Advocate.
For the respondents:	Mr. B.M.Chauhan, Advocate, forrespondent No.1.
	Mr. Vikas Rathore, vice counsel for respondent No.2.

The following judgment of the Court was delivered:

<u>Sureshwar Thakur, *Judge (Oral)*</u>

The instant appeal stands directed against the order of the learned Commissioner Workmen Compensation, Chamba, District Chamba, pronounced in 15/Compen/06 whereby the claim for compensation preferred therebefore by the claimant for his standing afflicted with 40% permanent disability in sequel to his suffering injuries during the course of his driving truck bearing No. HP-48-2827, truck whereof met with an accident near Tunnuhati while his standing engaged thereupon as a driver by respondent No.2, stood dismissed by the learned Commissioner.

2. This Court while hearing the learned counsel for the parties has framed for adjudication the following extracted substantial question of law:

> "Whether the learned Commissioner has erred in coming to the conclusion that the petitioner/appellant has failed to prove that the disability has been caused because of the accident."

3. Uncontrovertedly, the claimant/workman during the course of his performing employment as a driver in truck No. HP-48-2827 suffered injuries on his person in sequel to the truck aforesaid suffering an accident at Tunnuhati. In sequel to his sustaining injuries the apposite MLC stood prepared by the doctor concerned. The factum of the ill-fated occurrence also the factum of the claimant/workman in sequel thereto suffering injuries ear-marked in the apposite claim petition, stand acquiesced by the contesting respondents in their reply furnished to the claim petition. However, thereupon it is unbefitting to conclude, of disability certificate

comprised in Ext.PW-2/A, which stood prepared belatedly since the ill fated occurrence wherewithin pronouncements are held qua the claimant/workman standing entailed with 40% disability of right ankle whereupon he stands precluded to henceforth perform the avocation of a driver which hitherto he was performing, holding any vigour, for on anvil thereof assessing compensation qua the claimant, conspicuously when reiteratedly it stands prepared with gross in-proximity occurring vis.a.vis. the ill fated occurrence. The pleaded acquiescence of the contesting respondents qua the factum of the appellant suffering injuries on his person in the ill fated occurrence, cannot sustain the reflections occurring in Ext.PW-2/A especially when it stood prepared besides issued with an inordinate procrastinated delay occurring since the ill-fated occurrence. Even if the preparation of Ext.PW-2/A has occurred with gross improximity vis.a.vis. the ill-fated occurrence, yet the claim of the appellant would not thereupon stand ousted unless evidence stood adduced before the Commissioner in portrayal of the initial injury suffered by the claimant/workman in the ill fated occurrence ultimately sequelling the entailment upon him of a 40% disability of his right ankle, disability whereof stands pronounced in Ext.PW-2/A. However, the claimant workman has not adduced before the learned Commissioner the aforesaid relevant best evidence qua the initial injury suffered by him in the ill fated occurrence which occurred five years prior to the issuance of Ext.PW-2/A ultimately holding a nexus with the entailment upon him of a 40% disability of his right ankle, disability whereof stands pronounced in Ext.PW-2/A. Leaving aside the aforesaid lapse on the part of the claimant/workman, he has aggravated his omission to discharge the onus of proving the prime factum of a nexus occurring vis.a.vis. the initial injury sustained by him in the ill fated occurrence with the pronouncements occurring in Ext.PW-2/A prepared on five years elapsing therefrom, by his even failing to examine the doctor who initially issued the apposite MLC. Also the apposite MLC has remained unexhibited, whereform it is apt to conclude qua the revelations occurring therein remaining unsubstantiated wherefrom the ensuing sequel is qua the pleaded acquiescence if any of the employer of the claimant/workman qua the latter sustaining injuries in the ill fated occurrence holding no communication qua the injured workman also thereat suffering fracture of his right ankle, fracture whereof stands pronounced in the MLC which exists on record especially with its remaining unexhibited wherefrom it is apt to conclude of it remaining unproven by the doctor who issued it whereupon any reliance upon it is unwarranted. Consequently, the pleaded acquiescence if any of the employer of the claimant/workman qua the latter suffering injuries in the ill fated occurrence is not construable to hold the effect of it also proving the unexhibited MLC which exists on record and which stood prepared in prompt sequel to the ill fated occurrence. It is also apt to conclude qua the pronouncements occurring in Ext.PW-2/A not holding any co-relatability or nexus with the pleaded acquiescence of the employer of the injured/ workman qua his also suffering those injuries in the ill fated occurrence nor also it can be concluded of the injured claimant at the initial stage suffering any fracture of his right ankle besides its ultimately begetting the disability pronounced in Ext.PW-2/A. I find no merit in the appeal, which is accordingly dismissed. The substantial question of law is answered against the appellant. No costs.

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

Oriental Insurance Company .....Appellant

Versus

Shri Ram Prashad & Anr. ......Respondents.

FAO No. 336 of 2009
Decided on: 3.11.2016

Workmen Compensation Act, 1923- Section 4- Deceased died during the course of the duties- a claim petition was filed, which was allowed – held, that Workmen Compensation Commissioner had taken the wages of the deceased as Rs.7,000/- - the employer did not file the wages register

to prove the exact income – insurance cover was not adduced in the evidence – however, the penalty reduced from 25% to 5% of the compensation amount- appeal partly allowed.

(Para- 2 to 5)

For the Appellant: Ms.Shilpa Sood, Advocate.
For the Respondents: Ms. Tim Saran, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The respondent No. 1 being the dependent of deceased Pratap Sharma, on occurrence of demise of the latter during the course of his employment under his employer, preferred a petition for compensation against the relevant employee wherein he impleaded the appellant herein as a respondent. It is not controverted qua the demise of deceased occurring during the course of his employment under his employer nor also it is in dispute qua the employer of the deceased workman at the relevant time holding an insurance cover from the appellant herein covering the relevant liability towards compensation arising from occurrence of demise of workman/workmen during the course of his/their performing employment under his/their employer.

2. The learned counsel appearing on behalf of the appellant Insurance Company has contended qua the quantification by learned Commissioner of the deceased workman drawing wages in the sum of Rs.7000/- per mensem is not borne out from the evidence on record. She submits that the employer had in his apposite reply furnished to the claim petition made an espousal therein of the deceased workman drawing wages quantified at a rate of Rs.5000/- per mensem, amount whereof stands contended to be the relevant sum of money whereto the relevant statutory principles were enjoined to be applied for arriving at the compensation amount payable to the father of the deceased workman whereas the learned Commissioner in his impugned award depending upon the relevant testifications adduced in support of the claim petition wherewithin bespeakings occur of the deceased workman drawing from his employment under his employer wages quantified at a rate of Rs.7000/- per mensem his hence committed an illegality. However, the aforesaid submission is unacceptable to this Court as the mere occurrence of the aforesaid factum in the pleadings of the appellant herein unless testified would not hold any probative worth nor would it constrain this Court to on anvil thereof reverse the findings recorded by the learned Commissioner qua the deceased workman drawing wages quantified at a rate of Rs.7000/- per mensem. Also the employer has omitted to adduce the relevant register of wages maintained by him personifying his defraying to the deceased workman wages quantified at a rate of Rs.5000/- per mensem whereas it constituted the best evidence for dispelling the testification of the claimant qua his deceased son drawing wages quantified at a rate of Rs.7000/- per mensem from his employment as a driller under respondent No.1, omission whereof renders the testification of the claimant qua the facet aforesaid to be credible also reliance thereupon being warranted. Consequently, this Court holds qua the learned Commissioner not moving astray while relying upon the testifications of AW-1 and AW-2 qua the aforesaid factum.

3. The learned counsel for the appellant contends qua the fastening in the impugned order of liability of interest upon the appellant not warranting its standing countenanced by this Court. The best evidence to succor her submission was constituted in the relevant insurance cover executed inter se respondent No.1 with the appellant herein. However, the aforesaid insurance cover holding manifestations therein qua the liability of interest qua the compensation amount assessed under the Act being unfastenable upon the appellant remained un-adduced in evidence whereupon this Court is constrained to conclude of the relevant liability of interest fastened upon the appellant herein by the learned Commissioner not warranting any interference. Nonetheless, for want of the appellant not discharging within the time mandated

therein the relevant liability fastened upon it, the learned Commissioner had quantified the relevant penalty imposable upon it @ 25% of the compensation amount. The aforesaid portion of the award hence fastening an exorbitant liability of penalty upon the insurer for want of its within the time mandated therein discharging the apposite liability fastened upon it in the impugned award warrants interference.

4. Consequently, the delay, if any, on the part of the appellant to discharge the apposite liability fastened upon it under the impugned award shall entail upon the insurer, liability of penalty at the rate 5% of the compensation amount.

5. In view of the above, the present appeal stands partly allowed. Impugned order/award is to the extent aforestated modified. All pending applications stand disposed of accordingly.

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

Bakhtawar Singh ....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 295 of 2015.
Decided on : 3/11/2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 230 grams charas – he was tried and convicted by the trial Court- held in appeal that independent witness was not associated, although witnesses were available- the charas was found to be in the form of sticks and one ball in FSL but was found in the form of sticks in the Court- the prosecution version is doubtful, in these circumstances- appeal allowed- accused acquitted. (Para-9 to 13)

For the Appellant: Mr. Sanjeev K. Thakur, Advocate.
For the Respondent: Mr. R.S.Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge, Oral

The instant appeal is directed against the judgement rendered on 30.5.2015 recorded by the learned Special Judge, Ghumarwin, District Bilaspur, Himachal Pradesh, Camp at Bilaspur, in Sessions trial No. 11/3 of 2013, whereby the appellant stands convicted and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.25,000/- and in default to undergo simple imprisonment for six months for commission of an offence punishable under Section 20(b) (ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. The prosecution story, in brief, is that Lakvir Singh, Inspector alongwith police party were present near Kali Mata Temple on patrolling duty on 18.4.2013 in an official vehicle. At about 1.15 p.m. the accused came from the opposite side wearing a purple coloured T-shirt and a black pant. On seeing the police party he turned back and tried to flee away. On suspicion, the accused was chased by the police party and was nabbed. On inquiry the accused disclosed his name as Bakhtawar Singh. The personal search of the accused was conducted. From the right pocket of the pant, a plastic envelop was recovered. On being opened, it was found to be containing a black coloured substance in stick shapes. Inspector Lakhvir Singh had tested the said substance by burning a small piece and it was found to be charas. Memo regarding identification of charas was prepared. Thereafter the case property was taken into

possession and after completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Charge stood put to the accused by the learned trial Court for his committing offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 7 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He chose to lead evidence in defence and examined three witnesses in defence.

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

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

7. On the other hand, the learned Additional Advocate General, has, with considerable force and vigour, contended that the findings of conviction, recorded by the Court below, standing based on a mature and balanced appreciation of evidence on record and hence theirs not necessitating interference rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has with studied care and incision, evaluated the entire evidence on record.

9. Charas weighing 230 grams stood purportedly recovered from the conscious and exclusive possession of the accused under memo Ext.PW-2/B. A perusal of the aforesaid memo whereunder charas stood recovered unveils of its recovery standing effectuated from the pocket of the pants worn by the accused. The learned trial Court on traversing the evidence on record had concluded of the prosecution successfully substantiating the trite factum aforesaid. The conclusion aforesaid formed by the learned trial Court stood anvilled upon the factum of the prosecution witnesses deposing in tandem unbereft of any inconsistency qua the preparation of recovery memo Ext.PW-2/B whereunder recovery of charas stood effectuated in the manner delineated therein, occurring at the site of occurrence divulged therein. However, the learned counsel appearing for the appellant has submitted with force that the recitals disclosing therein qua the preparation of Ext.PW-2/B occurring at the site of occurrence standing belied by the factum of (i) a communication occurring in the testimony comprised in the cross-examination of PW-2 qua a temple existing in close proximity to the site of occurrence, temple whereof stands testified by him to be manned by its priest Raja Ram who is echoed therein to remain present thereat till 6.00 in the evening whereas the relevant occurrence taking place at 1.15 p.m warranted his association in the relevant proceedings whereas his standing omitted to be associated thereat renders suspect the preparation of Ext.PW-2/A. (ii) With occurrence of a communication in the deposition comprised in the cross-examination of PW-2 qua the accused after his standing nabbed and searched his standing taken to his house besides his also voicing therein qua the Investigating Officer also holding the search of his house likewise rendering suspect the factum of recovery of the relevant item of contraband in the manner reflected in the relevant memo aforesaid.

10. Even though there is no imperative necessity for the Investigating Officer to associate independent witnesses in the relevant proceedings also non association of independent witnesses by the Investigating Officer in the relevant proceedings would not scuttle the vigour of the prosecution version rather conspicuously, when the testifications of official witnesses omit to

unravel any occurrence therein of any blatant interse or intra se contradictions, the factum of non solicitation of independent witnesses by the Investigating Officer in the apposite proceedings despite their availability would not assume any paramount significance. However, when a police official PW-2 has in his testimony made an unequivocal articulation qua the accused after standing nabbed at the relevant site of occurrence his standing accosted by the Investigating Officer to his house besides his also testifying qua the house of the accused also standing subjected to search, significantly when thereupon the testifications of official witnesses stand stained with a vice of intra se contradiction, it was a peremptory obligation cast upon the investigating officer concerned to for belying the efficacy of intra se contradictions occurring in the testifications of official witnesses qua the facet aforesaid, to hence associate independent witnesses in the relevant proceedings which purportedly occurred at the site mentioned in the relevant memo whereat the accused stood subjected to a search whereupon the vigour of the prosecution case would stand enhanced. Moreover, the aforesaid articulation made by PW-2 in his cross-examination did for dispelling, the factum qua the effectuation of recovery of the relevant item of contraband from the conscious and exclusive possession of the accused in the manner reflected in the relevant memo not hence occurring at the relevant site of occurrence, warrant the association by the Investigating Officer of independent witnesses in the relevant proceedings, especially when for reasons aforesaid they were available in close proximity thereof. However, he omitted to do so. The prosecution witnesses consistently in their testifications denied the factum of DW-1 owner of a Dhaba adjoining the relevant site of occurrence not holding his commercial establishment in proximity to the site of occurrence whereupon it is submitted by the learned Additional Advocate General of his association in the relevant proceedings being unsolicitable rendering hence his non association in the relevant proceedings to be insignificant. Also he contends qua with the prosecution witnesses consistently denying the suggestion put to them of Tarsem Singh and Dina Nath taking tea at the Dhaba of Sodhi Ram similarly rendered their non association in the apposite proceedings to be irrelevant. However, Sodhi Ram and Dina Nath stepped into witness box as defence witnesses. They in their respective testifications deposed with intra se corroboration qua the relevant factum qua effectuation of recovery of the relevant item of contraband pronounced in the relevant memo not occurring in proximity to the Dhaba of DW-1 contrarily they proceeded to consistently pronounces in their depositions qua theirs witnessing the police officials to accost the accused to his house. The aforesaid testifications unraveled by defence witnesses acquire a virtue of veracity also their testimonies are undiscardable given their relevant testifications remaining unrepulsed during the course of an inexorable cross-examination to which they stood subjected to besides when the testifications of defence witnesses stand on a pedestal coequal to the testifications of prosecution witnesses whereupon conspicuously when their relevant propagations for reasons aforesaid acquire sinew in sequel thereto the depositions of defence witnesses warrant imputation of credence thereto preeminently when PW-2 in his cross-examination has also supported the aforesaid factum wherefrom imperatively the ensuing sequel is of a pervasive doubt seeping the prosecution version qua recovery of the relevant item of contraband standing effectuated in the manner propagated in the relevant memo. Significantly also given the evident availability of the aforesaid witnesses in proximity to the relevant site of occurrence when stands unbelied by the prosecution rendered hence imperative their association in the relevant proceedings whereas theirs standing unassociated in the relevant proceedings spurs an inference of the prosecution failing to dispel the factum of the relevant seizure occurring at a place other than pronounced in the relevant memo. The prosecution case would stand on a solemn pedestal only when the Investigating Officer concerned had associated in the relevant proceedings the priest of the temple who as deposed by PW-2 was available at the relevant time in proximity to the relevant site of occurrence. However, with the priest of the temple located in close proximity to the site of occurrence remaining unassociated by the Investigating Officer concerned in the relevant proceedings begets an inference qua the Investigating Officer hence concerting to smother the truth of the prosecution version. Also therefrom an inference arises qua his concealing besides camouflaging the factum of effectuation of recovery of the relevant item of contraband not occurring at the relevant site of occurrence rather its recovery occurring elsewhere whereupon the

propagation made by the prosecution qua its recovery standing effectuated in the manner spelt in the relevant memo loosing its vigour and credibility. The learned trial Court while relying upon the depositions of the prosecution witnesses has omitted to appreciate the import of the aforesaid testifications. Consequently its discarding the import of the aforesaid echoings occurring in the testification of PW-2 besides in the testifications of defence witnesses has sequelled its drawing erroneous findings qua the accused.

11. Also a perusal of the report of FSL concerned comprised in Ext.PW-4/D reveals of its standing detected to be in the form of sticks and one ball. However, when the relevant case property stood produced in Court for its standing shown to PW-1 theirs occurs a testification of it being only in the form of sticks. Consequently, when PW-1 to whom the case property stood shown in Court has omitted to testify in tandem with the manifestations occurring in the report of the FSL concerned comprised in Ext.PW-4/D prods an inference qua the case property as produced in Court not constituting the one whereupon an opinion stood rendered by the FSL nor it can be concluded of its constituting the relevant case property which stood purportedly recovered under memo Ext.PW-2/B from the alleged conscious and exclusive possession of the accused. Consequently, reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court merit interference.

12. In view of above discussion, the appeal is allowed and the impugned judgment rendered by the learned Special Judge, Ghumarwin, is set aside. The appellant/accused is acquitted of the offence charged. The fine amount, if any, deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

13. The Registry is directed to send the record forthwith, prepare forthwith in conformity with the judgment the release warrants of the accused and send the same to the Superintendent of the jail concerned.

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BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.

Smt. Deepika Vashisht daughter of Dharam Dutt and another. .....Revisionists/Defendants.
Vs.
Rakesh Singh son of late Sh Des Raj and another .....Non-revisionists/Plaintiffs.

Civil Revision No. 3 of 2016.
Order reserved on: 22.9.2016.
Date of Order: November 3,2016.

Code of Civil Procedure, 1908- Order 23 Rule 1- Plaintiff filed a civil suit for seeking injunction – parties were directed to maintain status quo – defendants filed an application for initiating criminal proceedings for filing false affidavit, which was dismissed- a petition was filed before High Court and High Court directed to trial Court to consider and decide the application in accordance with law- plaintiff sought withdrawal of the suit- permission was granted and the suit and application were dismissed- held in revision that the allegations were made that plaintiff had filed a false affidavit – the plaintiff had a right to withdraw the civil suit unconditionally – all miscellaneous applications except the counter-claim will become infructuous on dismissal of suit- the order of the trial Court is not perverse- revision dismissed. (Para- 10 to 13)

Cases referred:

M/s Hulas Raj Vs. K.B.Bass, AIR 1968 SC 111
Masjid Kacha Tank Nahan Vs. Tuffail Mohammed, AIR 1991 SC 455
Indore Municipality Vs. K.N.Palsikar, AIR 1969 SC 580
P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao, AIR 1995 SC 1357

Gurdial Singh Vs. Raj Kumar Aneja, AIR 2002 SC 1003

For revisionists: Mr. Tara Singh Chauhan, Advocate.
For Non-revisionists. Mr. Rahul Mahajan, Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present revision petition is filed under Section 151 of Code of Civil Procedure 1908 against order dated 29.9.2015 passed by learned Civil Judge Junior Division Court No.1 Una HP in civil suit No. 232 of 2014 whereby civil suit filed by plaintiffs was dismissed as withdrawn unconditionally under order XXIII rule I code of civil procedure 1908 and consequently application filed under section 151 CPC by defendants was also dismissed by learned Trial Court.

BRIEF FACTS OF CASE:

2. Rakesh Singh and another plaintiffs filed suit for permanent injunction restraining defendants from raising any sort of construction over suit land. In alternative relief of mandatory injunction also sought. It is pleaded that co-defendant No.1 is co-sharer in suit land and co-defendant No.2 is stranger to the suit land and co-defendant No.1 has no right to change existing nature of suit land by way of raising construction over suit land. It is further pleaded that co-defendant No.1 is daughter-in-law of co-defendant No.2. It is further pleaded that defendants are threatening to raise construction over suit land forcibly. It is further pleaded that plaintiffs have requested the defendants not to raise construction over suit land but defendants did not accept the request of plaintiffs. Prayer for decree of suit as mentioned in relief clause of plaint sought.

3. Per contra written statement filed on behalf of defendants pleaded therein that plaintiffs have no cause of action to file suit and plaintiffs have suppressed the material facts from Court. It is further pleaded that co-defendant No.1 is in separate possession of suit land. It is further pleaded that plaintiffs did not file correct site plan. It is further pleaded that plaintiffs lavelled false allegation against defendants. Prayer for dismissal of suit sought.

4. During the pendency of civil suit plaintiffs also filed application under Order XXXIX rules 1 and 2 code of civil procedure 1908 for grant of ad interim injunction. Learned Trial Court granted ad interim injunction on dated 18.9.2014 and directed the parties to maintain status quo qua raising construction causing interference in any manner over suit land. Learned Trial Court further directed that compliance of order XXXIX Rule 3 CPC be effected and thereafter show cause notice be issued to revisionists as to why order be not made absolute till disposal of civil suit.

5. Defendants filed response to application under order XXXIX rules 1 and 2 code of civil procedure 1908 and also filed application under section 151 code of civil procedure for initiating legal proceedings against plaintiffs for filing false affidavit in judicial proceedings. On dated 15.1.2015 learned Trial Court held that it is not expedient in the larger interest of justice to initiate any criminal proceedings against plaintiffs for few omissions and learned Trial Court restrained itself from passing any order under section 151 code of civil procedure 1908 and disposed of the application filed under section 151 CPC by defendants.

6. Feeling aggrieved against order passed by learned Trial Court dated 15.1.2015 upon application filed by defendants under section 151 code of civil procedure 1908 defendants filed CMPMO No. 80 of 2015 before Hon'ble High Court of HP and the same was disposed of on 23.7.2015. Hon'ble High Court of HP vide order dated 23.7.2015 quashed order and directed learned Trial Court to consider and decide application filed under section 151 CPC by defendants afresh in accordance with law. Hon'ble High Court of HP also directed parties to appear before learned Trial Court on 3.9.2015. Thereafter parties appeared before learned Trial Court and

thereafter learned Trial Court fixed application filed under section 151 CPC by defendants for consideration. On 29.9.2015 learned Advocate appearing on behalf of plaintiffs sought permission of Court to withdraw civil suit under order XXIII rule 1 CPC unconditionally. Learned Advocate appearing on behalf of defendants submitted that although civil suit filed by plaintiffs be permitted to be withdrawn unconditionally but application filed under section 151 CPC by defendants in civil suit be kept pending for order. Learned Trial Court did not agree with the submission of learned Advocate appearing on behalf of defendants. Learned Trial Court held that if civil suit is withdrawn unconditionally under order XXIII rule I CPC then pending applications filed in civil suit would automatically be deemed to be dismissed. Thereafter learned Trial Court dismissed the application filed under section 151 CPC by defendants.

7. Feeling aggrieved against the order dated 29.9.2015 whereby learned Trial Court dismissed application of defendants filed under section 151 CPC in civil suit defendants filed present revision petition.

8. Court heard learned Advocate appearing on behalf of revisionists and learned Advocate appearing on behalf of non-revisionists and also perused entire record carefully.

9. Following points arise for determination in present revision petition:

1. Whether revision petition filed by revisionists is liable to be accepted as mentioned in memorandum of grounds of revision petition?.
2. Relief.

Findings upon point No.1 with reasons:

10. Submission of learned Advocate appearing on behalf of revisionists that non-revisionists filed false affidavit in judicial proceedings and learned Trial Court has committed grave illegality by way of not initiating legal proceeding against non-revisionists for filing false affidavit in judicial proceedings and on this ground revision petition be accepted is rejected being devoid of any force for reasons hereinafter mentioned. The allegations against non-revisionists are that non-revisionists have committed offence of perjury by way of filing false affidavit in judicial proceedings. It is well settled law that whenever any false affidavit is filed in judicial proceedings then criminal complaint for perjury can be filed by concerned Judicial Officer only before competent authority of law. It is proved on record in present case that before passing order upon application filed under section 151 CPC on merits in civil suit plaintiffs have withdrawn civil suit under order XXIII rule 1 CPC unconditionally.

11. It is well settled law that right of withdrawal of suit unconditionally under order XXIII rule 1 CPC is unfettered right of plaintiffs. It is well settled law that defendants cannot insist that plaintiffs must be compelled to proceed with suit. Party which has initiated judicial proceedings is entitled to withdraw judicial proceedings at any stage of case unconditionally. It is well settled law that counter claim filed by defendants would be proceeded despite withdrawal of suit by plaintiffs under order VIII rule 6-D of CPC vide amendment in CPC w.e.f. 1.12.1977. It is well settled law that when main civil suit is withdrawn unconditionally under order XXIII rule 1 of code of civil procedure 1908 by plaintiffs then all miscellaneous applications filed in civil suit either by plaintiffs or defendants automatically becomes infructuous except counter claim filed by defendants under order VIII rule 6-A code of civil procedure 1908 as per provision of order VIII rule 6-D vide amendment w.e.f. 1.2.1977. Defendants did not file any counter claim under order VIII rule 6-A in the present suit. See AIR 1968 SC 111 title M/s Hulas Raj Vs. K.B.Bass.

12. It is well settled law that in revision petition High Court cannot set aside the order of learned Trial Court unless order of learned Trial Court is perverse ipso facto. See AIR 1991 SC 455 title Masjid Kacha Tank Nahan Vs. Tuffail Mohammed. See AIR 1969 SC 580 title Indore Municipality Vs. K.N.Palsikar. See AIR 1995 SC 1357 title P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao. See AIR 2002 SC 1003 title Gurdial Singh Vs. Raj Kumar Aneja. In view of above stated facts and case law cited supra it is held that order of learned Trial Court is not perverse nor illegal. Point No.1 is answered in negative.

Point No.2 (Relief).

13. In view of findings on point No.1 revision petition is dismissed. Parties are left to bear their own costs. File of learned Trial Court along with certify copy of order be sent back forthwith. Revision petition is disposed of. Pending application(s) if any also disposed of.

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

Himachal Pradesh General Industries Corporation Ltd. ….Appellant.
Versus
M/s Hari Singh Harpal Singh … Respondent.

RSA No. 320 of 2008.
Reserved on: 28.10.2016.
Decided on: 03.11.2016.

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit for recovery pleading that contract for transportation of rectified spirit was awarded to it – some amount remained unpaid – hence, the suit was filed for recovery – the defendant pleaded that defective spirit was supplied and the amount was adjusted against the losses caused by the plaintiff – the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- it was contended in second appeal that the suit was not maintainable as the plaintiff had failed to plead that partnership was registered- held, that no objection was taken regarding maintainability- it was specifically asserted in the plaint that plaintiff was a partnership concern – registration of the partnership firm was proved- the plea that suit was barred by limitation was also not established- appeal dismissed. (Para- 14 to 18)

For the appellant. : Mr. Hemant Vaid, Advocate.
For the respondent : Mr. Satya Vrat Sharma, Advocate for the respondent.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge.

By way of this second appeal, the appellant/defendant has challenged the judgment and decree passed by the Court of learned Senior Sub Judge, Shimla in Civil Case No. 182/1 of 1997, dated 27.09.2001, vide which said Court decreed the suit of respondent-plaintiff for recovery of Rs. 1,52,464.80/- alongwith interest as well as judgment and decree passed by the Court of learned Additional District Judge, Shimla in Civil Appeal No. 13-S/13 of 2007 dated 25.03.2008 vide which learned Appellate Court while dismissing the appeal filed by the present appellant upheld the judgment and decree passed by the learned trial Court.

2. Brief facts necessary for the adjudication of this case are that respondent/plaintiff (hereinafter referred to as 'plaintiff') filed a suit for recovery of amount of Rs. 1,52,464.80/- with interest on the grounds that the plaintiff which was a partnership concern was awarded contract for transportation of Rectified Spirit fort for the year 1993-94 from various Distilleries to the Country Liquor Bottling Plant, Mehatpur, District Una, H.P by the defendant for which an amount of Rs. 50,000/- was deposited by the plaintiff towards security which was refundable. As per the plaintiff, it transported alcohol/Rectified Spirit from various distilleries to Bottling Plant at Mehatpur during the year 1994 and submitted its bills/G.Rs to the General Manager of the Country Liquor Bottling Plant of the defendant, a part of which remained unpaid. Further as per the plaintiff, the outstanding amount was claimed by it vide notice dated 01.03.1995 and payment of the same was delayed by the defendant on one pretext or the other and despite assurance no payment was made. In these circumstances, plaintiff filed suit for

recovery of an amount of Rs. 1,52,464.80/- which included outstanding amount alongwith interest as well as refund of security deposit and earnest money.

3. The claim of the plaintiff was contested by the defendant interalia on the ground that plaintiff had failed to comply with clause 6 of the contract and had supplied defective spirit to the defendant Country Liquor Bottling Plant, Mehatpur which was unfit for human consumption. As per the defendant, the amounts which were due from them to plaintiff were adjusted against the losses which were caused by the plaintiff to the defendant and on these bases, the claim of the plaintiff was refuted.

4. In replication, the stand so taken by the defendant was denied by the plaintiff. It was stated therein by the plaintiff that one tanker bearing No. HR-01-2991 belonging to the plaintiff loaded with the rectified spirit met with an accident and defendant was reimbursed by the Oriental Insurance Company for the loss caused to it on account of said accident. On these bases, it was stated by the plaintiff that the defendant/Corporation could not withhold the payment of the plaintiff on the said pretext as it had already recovered the insured amount from the insurance company. Rest of the averments of the written statement were also not admitted in the replication by the plaintiff.

5. Before proceeding further, it is pertinent to mention here that paragraph 5 of the plaint, contained contents with regard to cause of action and the same is being reproduced as under:-

> *"5. That the cause of action arose to the plaintiff against the defendant on 3.6.94, 22.7.94 and 1.3.95 onwards on each date of demand within the jurisdiction of this court where also the defendant works for gain and hence this court is competent to try this suit."*

6. The reply to the said paragraph of the plaint as it find mention in the written statement is reproduced as under:-

> *"Calls for no reply."*

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

> *"1. Whether the plaintiff is entitled for the recovery of the suit amount as alleged? OPP.*
>
> *2. Whether the suit is within limitation? OPP.*
>
> *3. Relief."*

8. On the basis of evidence led by the parties both ocular as well as documentary in support of their respective cases, the issues so framed were answered by the learned trial Court in the following manner:-

> *"Issue No.1 : Yes.*
>
> *Issue No. 2 : Yes.*
>
> *Relief :Suit decreed as per operative part of the Judgment."*

9. Learned trial Court vide its judgment and decree dated 27.09.2001 decreed the suit of the plaintiff for recovery of Rs. 1,52,464.80/- alongwith interest at the rate of 6% per annum. Learned trial Court held that plaintiff had proved on record that it had sent bills to the defendant/Corporation and receipt of same was not denied by the defendant. Learned trial Court also took note of the fact that as per the contention of the defendant, the bills in question were withheld as the plaintiff firm had not complied with terms and conditions laid down in Clause 6 of the contract/agreement entered into between the plaintiff and defendant. Learned trial Court also took note of the fact that DW-1 Shri J.K. Lakhanpaul stated that plaintiff had agreed to get adjusted the loss suffered by the defendant on account of accident of the tanker out of the security amount of Rs. 50,000/-. It was held by the learned trial Court that neither defendant examined anyone from the Excise Department to either certify or prove that spirit which was

transported by the plaintiff firm was not fit for human consumption nor it was controverted by the defendant that it (defendant) had received the claim on account of loss suffered by it from the Insurance Company. It was further held by the learned trial Court that no Counter Claim was filed by the defendant to claim any damages or losses allegedly suffered by it due to accident of the tanker. On these bases, it was held by the learned trial Court that defendant had failed to substantiate its contention that the plaintiff had violated the terms and conditions of the agreement. It was further held by the learned trial Court that even if plaintiff had violated the terms of the agreement then also the proper course for the defendant was not to withhold the outstanding payment, security amount and earnest money but right course was to file a suit for recovery of damages allegedly suffered by it. On these bases, learned trial Court allowed the suit for recovery so filed by the plaintiff alongwith interest @ 6% per annum. On the issue of limitation, it was held by the learned trial Court that during the course of arguments it was not explained on behalf of defendant/Corporation as to how the suit was not within limitation. It further held that in the written statement no such objection was raised that the suit was time barred. It was accordingly held by the learned trial Court that the suit was within limitation.

10. In appeal, learned Appellate Court while upholding the judgment and decree passed by the learned trial Court, dismissed the appeal filed by the present appellant against the judgment and decree of the learned trial Court. It was held by the learned Appellate Court that defendant had not disputed that a sum of Rs. 50,000/- was received as security and a sum of Rs. 10,000/- as earnest money by it from the plaintiff. Learned Appellate Court further held that it was also not disputed that plaintiff had submitted bills for an amount of Rs. 39,120/- on account of transportation of spirit which bills were not paid by the defendant on the ground that plaintiff caused loss to it and therefore, it had adjusted the loss against the amount of security etc. It was further held by the learned Appellate Court that the onus to prove loss caused to defendant by the plaintiff was upon the defendant and defendant had failed to prove the same. Learned Appellate Court held that the factum of 16,000/- litres of spirit having been spilled in the accident was not in dispute. It further held that it was contemplated in clause 9 of the agreement Ext. DW1/A that transit insurance of rectified spirit was to be arranged by the defendant, which meant that it was agreed that if any loss is caused to the spirit during the transit, plaintiff shall not be liable to pay for the same and that defendant would get itself indemnified by the Insurance Company. Learned Appellate Court further held that contention of the defendant that the spirit was found unfit for human consumption could not be accepted because if that was the case, then there was nothing on record to suggest as to what happened to the spirit and where had the said spirit gone and whether or not it was destroyed. It further held that it was not so stated that the defendant has handed over the same to the plaintiff. On these bases, it was held by the learned Appellate Court that no loss on account of alleged contamination of spirit was proved and as the defendant had failed to prove any loss caused to it by the plaintiff, it was not justified in realizing the same out of security amount, earnest money and payment of bills which were due to the plaintiff. On these bases, learned Appellate Court while upholding the judgment and decree passed by the learned trial Court, dismissed the appeal of the defendant.

11. Feeling aggrieved by the findings so returned by both the learned Courts below, defendant has filed the present appeal.

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

13. This appeal was admitted on following substantial questions of law on 28.07.2008:

> *"1. Whether is the effect of the absence of the pleading in the plaint regarding the respondent/plaintiff firm having been registered and whether the court will have the right to exercise the jurisdiction in the matter in the absence of such pleading in the plaint and whether in such circumstances the suit was required to be dismissed?*

2. Whether in the facts and circumstances of the case the suit of the respondent/plaintiff was barred by time?”

14. I will deal with both these questions separately.

Question No. 1:-

“1. Whether is the effect of the absence of the pleading in the plaint regarding the respondent/plaintiff firm having been registered and whether the court will have the right to exercise the jurisdiction in the matter in the absence of such pleading in the plaint and whether in such circumstances the suit was required to be dismissed?”

15. Copy of partnership deed dated 01.04.1993 is on record as Ext. PW1/A. Certificate of Registration of the said partnership firm under Section 58(1) of the Indian Partnership Act dated 08.08.1996 is on record as PW1/B. There is no objection taken in the written statement to the effect that plaint filed was not maintainable it its present form. No issue was framed with regard to maintainability of the suit on the ground on which substantial question No. 1 has been framed. There was definite averment in the plaint that the plaintiff was a partnership concern and memo of parties demonstrated that the suit was filed in the name of partnership concern through its partner Harpal Singh. Not only this, the factum of a contract having been entered into between the defendant and plaintiff firm has also not been disputed by the defendant. Accordingly, in my considered view, there is no merit in the contention which has been raised by the appellant in the present second appeal by way of substantial question No. 1 especially when it is a matter of record that the plaintiff firm was a registered concern and as such, it had the locus to file and maintain the case and that the trial Court was having both pecuniary and territorial jurisdiction to adjudicate upon the same. There is no averment made in the written statement that the suit filed was not maintainable on the ground that trial court had not jurisdiction to try the same. Not only this, it is a matter of record that partnership firm is a duly registered firm and same stood registered before the suit was filed by the partnership firm. Therefore also, not only the suit was maintainable on behalf of partnership firm but the learned trial Court was having the jurisdiction in the matter to adjudicate upon the same on merit. The substantial question of law is answered accordingly.

Question No. 2:-

“2. Whether in the facts and circumstances of the case the suit of the respondent/plaintiff was barred by time?”

16. As I have already mentioned above with regard to accrual of cause of action, the plaintiff had stated about the same in paragraph 5 of the plaint which is being reproduced as under:-

> *“5. That the cause of action arose to the plaintiff against the defendant on 3.6.94, 22.7.94 and 1.3.95 onwards on each date of demand within the jurisdiction of this court where also the defendant works for gain and hence this court is competent to try this suit.”*

17. The reply to the said paragraph of the plaint as it find mention in the written statement is reproduced as under:-

“Calls for no reply.”

18. While deciding Issue No. 2 it was held by the learned trial Court that at the time of arguments it was not explained as to how the suit was not within limitation and in the written statement there was no such objection that the suit was time barred. In my considered view, the findings so returned by the learned trial Court cannot be faulted with. This Court is not oblivious to the fact that the question of limitation can be raised at any stage but then there has to be some foundation laid by a party who is challenging the maintainability of a suit on the basis of limitation in the written statement. Coming to the facts of this case, as I have already mentioned above, the factum of plaint/suit being within limitation has been admitted in the written

statement by the defendant. Even during the course of arguments, learned counsel for the appellant could not point out as to how the suit was barred by limitation when it stood admitted in the written statement that cause of action accrued in favour of plaintiff 3.6.94, 22.7.94 and 1.3.95 onwards. Even from the evidence which has been led by the defendant both ocular as well as documentary it could not be substantiated by the learned counsel for the appellant that the suit filed by the plaintiff was barred by limitation. Therefore, in my considered view, it cannot be said that in the facts and circumstances of the case, suit of the plaintiff was barred by time. The substantial question of law is answered accordingly.

In view of the discussion held above, I do not find any merit in the present appeal and the same is dismissed with costs, so also pending miscellaneous application(s), if any.

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

Karam Chand .....Petitioner.
Versus
Prem Sagar Marwah .....Respondent.

CMPMO No.289 of 2016.
Date of decision: 03.11.2016.

Code of Civil Procedure, 1908- Order 17 Rule 1- Five adjournments were granted to the petitioner – he could not produce the evidence on the date fixed as his mother fell ill – his evidence was closed by the order of the Court- held, that time and place of illness cannot be predicted – adjournment was sought on the ground of unavoidable reason – the Court should have been more compassionate - the fact that five adjournments had already been granted should not have been the sole ground to decline the adjournment – petition allowed- the order set aside on the payment of cost of Rs. 5,000/-. (Para-3 to 8)

For the Petitioner : Mr.G.R.Palsra, Advocate.
For the Respondent : Mr.Dheeraj Vashisht, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This petition under Article 227 of the Constitution of India is directed against the order passed by the learned Civil Judge (Senior Division), Kullu, District Kullu, on 30.06.2016 (for short 'impugned order') whereby the evidence of the petitioner came to be closed by order of the Court.

2. It is not in dispute that the petitioner has already been granted as many as five opportunities. However, his explanation for not leading evidence on the date fixed was that his mother, who is more than 100 years old, was seriously ill and as such he stayed at Mandi to look after her and was, therefore, unable to appear before the Court.

3. A perusal of the order passed by the learned Court below would go to show that the version put-forth by the petitioner for not leading his evidence was not even doubted by the Court, yet his evidence was closed only on the ground that as many as five opportunities had already been granted to him to lead his evidence and despite this he had not led his evidence even though the order had been made subject to cost of Rs. 1,000/-.

4. To say the least, the order passed by the learned trial Court is clearly unsustainable. The learned trial Court has erred in not taking into consideration that no one has the volition in the matter of falling ill. The time and place of illness cannot be predicted.

Admittedly, the petitioner has sought adjournment only on the ground of unavoidable reason. The same ought to have been dealt with more compassion and the mere fact that the petitioner had already been granted five opportunities to lead his evidence could not have been the sole ground to reject the application, more particularly, when the Court itself did not disbelieve the ground of illness set up by the petitioner.

5. It has to be remembered that the Judiciary is respected not only on account of its powers to legalize justice on technical grounds, but because of it being capable of removing injustice and is expected to do so.

6. Having said so, the impugned order passed by the learned Court below cannot withstand judicial scrutiny and is accordingly set aside.

7. However, since the respondent has been dragged un-necessarily and otherwise in an avoidable litigation, he is required to be compensated by the petitioner. Though, the petition has been allowed, however, the same shall be subject to cost of Rs. 5,000/- which shall be paid by the petitioner to the respondent on or before the next date of hearing.

8. The parties through their counsel(s) are directed to appear before the learned trial Court on **21.11.2016** on which date the Court would fix a date for recording the entire evidence of the petitioner and shall also provide all necessary assistance for summoning the witnesses proposed to be examined. It is made clear that no further opportunity under any circumstance shall be provided to the petitioner for this purpose.

9. The petition is allowed in the aforesaid terms. Pending application, if any, also stands disposed of.

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

State of H.P. ….Appellant.

Versus

Sandeep Kumar …..Respondent.

Cr.Revision No.38 of 2010

Decided on: 3.11.2016

Indian Penal Code, 1860- Section 376- Prosecutrix was grazing her goats in a jungle- juvenile came and raped her – he was tried and acquitted by Juvenile Justice Board- held in appeal that the prosecutrix had stated that she had no knowledge about the identity of the person – eye witness did not corroborate the testimony of the prosecutrix- in these circumstances, juvenile was rightly acquitted – revision dismissed. (Para-9 to 11)

For the Appellant: Mr.R.S.Thakur, Additional Advocate General.

For the Respondent: Mr.Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant revision petition stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 05.10.2009, by the learned Principal Magistrate, Juvenile Justice Board, Una, District Una, H.P. in Criminal Inquiry No. 10/03 whereupon he announced an order of acquittal qua the respondent herein for his allegedly committing an offence under Section 376 of the Indian Penal Code.

2. Briefly stated the case of the prosecution is that on 16.5.2003, at about 4.00 p.m. the prosecutrix PW-1 (name not disclosed) was grazing her goats in the jungle near her house. In the meanwhile, Sandeep @ Gollu (hereinafter referred to as the juvenile) came there and caught hold of her arm. The prosecutrix PW-1 tried to raise hue and cry, however, the juvenile gagged her mouth and took her to nearby bushes and opened the string of her Salwar and forcibly committed rape on her. The juvenile was seen by BImla Devi PW-5, the grand mother of the prosecutrix PW-1 while leaving the spot. On inquiry, the prosecutrix disclosed the incident to her grand mother, Bimla Devi PW-5. Bimla Devi took her to house. The father of the prosecutrix namely Parvesh Kumar had gone to Pathankot. Parvesh Kumar PW-2 came late in the night as such the prosecutrix PW-1 as well as her grand mother Bimla Devi PW-5 disclosed the incident to him in the next morning whereafter, Parvesh Kumar PW-2 took her to hospital at Nurpur, however, the doctor asked them to report the matter to the police. Thereafter, Parvesh Kumar PW-2 alongwith prosecutrix PW-1 rushed to P.S.Nurpur where the prosecutrix PW-1 lodged FIR Ex.PW-1/A against the juvenile. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the respondent challan was prepared and filed in the Board.

3. Notice of accusation stood put by the learned Principal Magistrate, Juvenile Justice Board, Una to the respondent for his committing an offence punishable under Section 376 of I.P.C, to which he pleaded not guilty and claimed inquiry.

4. In order to prove its case, the prosecution examined 11 witnesses. On closure of prosecution evidence, the statement of the respondent under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence and claimed false implication. He did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned Principal Magistrate, Juvenile Justice Board, Una returned findings of acquittal in favour of the juvenile/respondent herein.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Principal Magistrate, Juvenile Justice Board, Una standing not based on a proper appreciation by him of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigor contended qua the findings of acquittal recorded by the learned Principal Magistrate, Juvenile Justice Board, standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The prosecutrix by cogent evidence comprised in Ex. PW-4/A stands provenly subjected to forcible sexual intercourse. However, the embodiments occurring in Ex. PW-4/A would not constrain this Court to reverse the findings of acquittal recorded by the learned Principal Magistrate, Juvenile Justice Board qua the respondent herein unless evidence of immense probative sinew emanates qua the respondent herein provenly holding the relevant inculpatory role. Contrarily, the factum of the respondent purportedly holding any inculpatory role in the ill fated occurrence stands negated by the prosecutrix who in her testification has made an unequivocal deposition therein qua hers holding no knowledge qua the identity of the respondent herein, rather she testifies qua hers acquiring knowledge qua his name and identify from revelations made to her by Smt. Bimla Devi, who however, has omitted to corroborate the aforesaid factum testified by the prosecutrix by hers deposing qua hers not being aware of the name of the respondent nor hers recognizing any person except her son. The factum of the prosecution hence failing to establish the identity of the respondent herein gets fortifyingly

established by the prosecutrix testifying qua hers not recognizing the respondent on the date of occurrence. In sequel thereof, the preeminent conclusion is of the prosecution version qua inculpation of the respondent in the alleged offence being wholly surmisal besides arising from concoction and invention on the part of the Investigating Officer concerned.

10. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned Principal Magistrate, Juvenile Justice Board, Una not suffering from any perversity and absurdity nor it can be said that the learned Principal Magistrate, Juvenile Justice Board, Una in recording findings of acquittal has committed any legal misdemeanor, in as much, as, his mis-appreciating the evidence on record or his omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned Principal Magistrate, Juvenile Justice Board merit any interference.

14. In view of the above discussion, I find no merit in this petition, which is accordingly dismissed and the judgment of the learned Principal Magistrate, Juvenile Justice Board, Una, District Una, H.P. is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

State of Himachal Pradesh ……Appellant.
Versus
Devi Lal …….Respondent.

Cr. Appeal No. 453 of 2011
Date of decision: November 03, 2016.

Indian Penal code, 1860- Section 409, 420, 467, 46 and 471- PW-7 had invested a sum of Rs. 40,000/- for a period of three years in TD Account and entrusted this amount to the accused who was posted as Branch Post Manager (BPM)- PW-7 produced the pass-book before PW-1 who found on verification that pass-book was issued against vague and fictitious amount- no opening form was filed nor any receipt was issued – the accused was tried and acquitted by the Trial Court- held in appeal that PW-7 had not supported the prosecution version regarding entrustment of money to the accused in the month of July, 2002- he did not support the prosecution version that pass-book was handed over by the accused to him- the specimen handwriting was obtained during the investigation and not during the trial – therefore, the same is not admissible – the Trial Court had rightly acquitted the accused- appeal dismissed.

(Para-9 to 14)

Case referred:

State of Himachal Pradesh vs. Laje Ram and ors., 2011(2) Him. L.R (DB) 597

For the appellant Mr. Virender Verma, Addl. AG.
For the respondent Mr. Ramakant Sharma, Sr. Advocate with Ms. Anita Dogra, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

The prosecution is aggrieved by the judgment dated 4.6.2011 passed by learned Judicial Magistrate, First Class, Court No. 2, Nalagarh, District Solan in Criminal Case No. 10/2 of 2009/04, whereby the respondent (hereinafter referred to as the accused) has been acquitted of

the charge framed against him under Sections 409, 420, 467, 468 and 471 of the Indian Penal Code.

2. The record reveals that a case under Sections 409, 420, 467, 468 and 471 of the Indian Penal Code was registered against the accused in Police Station Ramshahar, District Solan vide FIR No. 62/2003 on 8.9.2003 with the allegation that in the month of July, 2002, one Devi Ram (PW-7) has invested a sum of Rs. 40,000/- for a period of three years in TD account and entrusted this amount to the accused, who at the relevant time, was Branch Post Master (BPM) at Post Office Mitian. On being requested time and again, the accused made over one TD Pass book of MSY Account in January, 2003 stamped with date and seal dated 26.1.2003 to PW-7 Devi Ram. In the pass-book, there were entries qua deposit of Rs. 40,000/-. PW-7 Devi Ram allegedly produced the said pass-book on 26/27.8.2002 before the complainant PW-1 Rupinder Singh, Inspector Post Offices, who had come to Branch Post Office, Mitian for inspection. PW-1 Rupinder Singh on verification of the record had found the pass-book having been issued against vague and fictitious account No. 555243. The date of deposit was manually written as 26/27.8.2002. No opening form i.e. 3 T.D. account was filled in nor any SB-26 receipt issued. No entries were found to be made in T.D. Journal and DO Account regarding the deposit of Rs. 40,000/-. Subsequently, the sum of Rs. 40,000/- plus Rs. 4,000/- as interest was credited by the accused into UCR on 11.7.2003. PW-1 Rupinder Singh after checking the records found that the accused had issued a fictitious pass-book and misappropriated the government money and thereby cheated Postal Department. He allegedly used the forged and fictitious pass-book as genuine document. Therefore, application Ext. PW-1/B was made by PW-1 Rupinder Singh to the police of Police Station Ramshahar, District Solan for registration of the case against the accused. Consequently, FIR Ext. PW-9/B came to be registered against the accused.

3. The I.O. PW-9 Surinder Pal, the then SHO Police Station Ramshahar, has conducted the investigation in the case. The reports Ext. PW-2/A and PW-2/B were taken into possession in the presence of the witnesses vide seizure memo Ext. PW-2/C. The appointment letter Ext. PA and declaration form Ext. PB in respect of accused were also taken into possession vide seizure memo Ext. PW-2/D. The B.O. account Ext. PC to PF were also taken into possession vide seizure memo Ext. PW-2/E. The forged pass-book Ext. PG and TD journal Ext. PH were also taken into possession vide seizure memo Ext. PW-2/F. The receipt Ext. PW-4/A was taken into possession in the presence of the witnesses vide seizure memo Ext. PW-4/B. The receipt Ext. PW-1/A was also taken into possession vide seizure memo Ext. PW-5/A. The specimen signatures and hand writing of the accused were also taken during the investigation of the case. Admitted signatures, hand writing and question documents sent for examination to State Forensic Science Laboratory, Junga were found to be in the hands of the same person vide report Ext. PW-9/A. The reasons in support of the report are Ext. PW-11/A. The statements of the witnesses associated by the Investigating Officer were also recorded under Section 161 Cr.P.C.

4. On perusal of the report under Section 173 Cr.P.C. filed against the accused and the documents annexed therewith as well as finding a prima-facie case having been made out against the accused under Sections 409, 420, 467, 468 and 471 of the Indian Penal Code, charge against him was framed accordingly.

5. The prosecution in order to sustain the charge against the accused has examined 11 witnesses in all. The material prosecution witnesses are the complainant Rupinder Singh (PW-1), PW-2 Naresh Sood, PW-7 Devi Ram and I.O. PW-9 Surinder Pal. Learned trial Magistrate, on appreciation of the evidence available on record, has arrived at a conclusion that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. He has, therefore, been acquitted of the charge as pointed out at the outset.

6. The legality and validity of the impugned judgment has been questioned by the respondent-State on the grounds, *inter alia* that the prosecution evidence has been appreciated in a slipshod and perfunctory manner. As a result thereof, the findings recorded are based on hypothesis, surmises and conjectures. The testimony of the material prosecution witnesses has been discarded for untenable reasons. No reason has been assigned while discarding the

prosecution evidence. The entrustment of Rs. 40,000/- during the year 2002-03 to accused for deposit in the Post Office stands satisfactorily proved from the oral as well as documentary evidence available on record. Such evidence, however, is stated to be erroneously ignored since the accused had received this amount from PW-7 Devi Ram, therefore, it is for this reason he had deposited the same together with interest in the Post Office. Irrespective of such evidence, the findings that no case against the accused is made out, are stated to be highly illegal and erroneous.

7. Learned Addl. Advocate General, while taking us through the evidence available on record has vehemently argued that the testimony of PW-7 Devi Ram as well as that of the complainant PW-1 Rupinder Singh, supported by documentary evidence i.e. the reports Ext. PW-2/A and PW-2/B and also the pass-book Ext. PG leave no manner of doubt that the accused has misappropriated a sum of Rs. 40,000/- invested by PW-7 Devi Ram for three years in TD account for depositing the same with the accused, who at the relevant time was working as Branch Post Master (BPM), Mitian. According to Mr. Verma, the entrustment of Rs. 40,000/- with the accused stands satisfactorily explained and as he has forged the record and also issued fictitious pass-book, therefore, there was ample evidence warranting his conviction in the instant case.

8. On the other hand, Mr. Ramakant Sharma, Sr. Advocate, while inviting our attention to the statement of PW-7 Devi Ram, has pointed out that the entrustment of Rs. 40,000/- with the accused in July, 2002 is not at all proved. PW-7 Devi Ram has expressed his ignorance that this amount was deposited by him with the accused in July, 2002 rather as per his version, this amount was most probably deposited by him on 11.7.2003. The pass-book Ext. PG was also not handed over to him by the accused and rather received through bus. It has, therefore, been urged that the testimony of PW-7 Devi Ram demolishes the entire prosecution case and as such, no findings of conviction can be recorded against him.

9. What constitutes an offence punishable under Sections 409, 420, 467, 468 and 471 of the Indian Penal Code has been discussed in detail by learned trial Magistrate in the impugned judgment. That part of the judgment reads as follows:

> "25. To hold a person guilty u/s 409 of IPC, Prosecution has to establish that accused was either a Public Servant, a Banker, a merchant, or broker or Attorney, or agent. Further, it has to be established by the prosecution that he was enthused with the property in question with any domain over it. Lastly, prosecution has to establish that he committed criminal breach of trust with respect to the amount so entrusted. To make out a case for criminal breach of trust, it has to be proved that there was a entrustment of property or a domain over property. It must be proved that there was dishonest misappropriation or conversion by a person to his own use of that property or that there was dishonest use or disposal of that property in violation of any direction of law prescribing the mode in which such trust was to be discharged, or of any legal contract expressed or implied, which he has made touching the discharge of such trust, or that he willfully suffered any other person to do so. To hold a person guilty under Section 420 of IPC, Prosecution has to establish that 1) That there should be fraudulent or dishonest inducement of a person by deceiving him, 2) that the person so deceived should be induced to deliver any property to any person or to consent that person shall retain any property, 3) the person so deceived should be intentionally induced to do so or omit to do anything, 4) the act for omission should be one which causes or is likely to cause damage or harm to the person induced and the person induced to deliver the property or valuable security. To establish a case under 467 of IPC prosecution has to prove that document in question was a forgery; that the accused forged if and that document is one of the kinds mentioned in the section. For proving a case under section 468 of IPC apart from forgery it has to be established that in forging accused intended that it shall be used for the purpose of cheating. In order to

prove a case under section 471 of IPC the prosecution require to prove that there must be a fraudulent or dishonest user of a document as genuine and the knowledge or reasonable belief on the part of the person using the document that it is a forged one."

10. Admittedly, the accused at the relevant time was serving as Branch Post Master (BPM) at Mitian. His appointment letter is Ext. PA and the declaration form, he filled in, is Ext. PB. The prosecution case that PW-7 Devi Ram has deposited a sum of Rs. 40,000/- with the accused in the month of July, 2002 is not at all proved beyond all reasonable doubt for the reason that said Sh. Devi Ram himself, while in the witness-box as PW-7, did not support the prosecution case qua this aspect the of the matter at all and rather expressed his ignorance qua date etc. as to when this amount was deposited by him with the accused. If coming to his cross-examination, the amount in question was stated to be deposited by him with the accused about 2 ½ years ago. Since he was examined on 20.4.2006, therefore, if his testimony is believed to be true, the amount in question was deposited somewhere in the end of year 2003 or beginning of the year 2004. In his cross-examination, he further tells us that he did not recollect the date and month when such deposit was made by him, however, as per his version, most probably the amount in question was deposited by him on 11.7.2003.

11. Now, if coming to the issuance of pass-book Ext. PG by the accused, this aspect of the matter is also not at all proved beyond all reasonable doubt because the testimony of PW-7 Devi Ram reveals that the pass-book was not handed over to him by the accused on the same date when he had made the deposit of Rs. 40,000/- with him. The same, according to him, was sent to him by someone and he expressed his inability to disclose the identity of that person who had sent the pass-book to him. He has denied the issuance of receipt Ext. PW-1/A by the official of the Postal Department to whom he had handed over the pass-book Ext. PG. According to him, he did not hand over any document to the police during the investigation of the case nor he was interrogated. He expressed his ignorance as to who had prepared the pass-book Ext. PG and also that pass-book Ext. PG is the same which was handed over by him to the police.

12. True it is that the complainant PW-1 Rupinder Singh, while in the witness-box, has supported the prosecution case qua entrustment of Rs. 40,000/- by PW-7 Devi Ram to the accused in the month of January, 2002 and while in the witness-box has also deposed that the accused failed to account for this amount in the records of the Post Office and thereby not only cheated the Postal Department and rather caused wrongful loss to the department and wrongful gain for himself. He further tells us that the pass-book Ext. PG was produced before him by PW-7 Devi Ram and on enquiry, the same was found to be not genuine and rather forged and fictitious. The record produced by PW-2 Naresh Sood was also pressed into service in order to substantiate this part of the prosecution case. However, when PW-7 Devi Ram himself has not supported the prosecution case qua entrustment of a sum of Rs. 40,000/- to the accused in the month of July, 2002, nor that the pass-book Ext. PG was handed over to him by the accused, such evidence as has come on record by way of the testimony of PW-1 Rupinder Singh and PW-2 Naresh Sood, is hardly of no help to the prosecution case. The report Ext. PW-2/A does not pertain to the present case. If coming to the report Ext. PW-2/B, in view of the statement of PW-7 Devi Ram on the basis thereof also, it cannot be said that a sum of Rs. 40,000/- was deposited by PW-7 Devi Ram with the accused in the month of July, 2002.

13. As per the scientific investigation got conducted during the investigation of the case, the pass-book Ext. PG is in the hands of the accused. We can make a reference here to the report Ext. PW-9/A qua this aspect of the matter and also the reasoning Ext. PW-11/A in support thereof given by Mr. Visheshwar Sharma, Asstt. Director, Regional Forensic Science Laboratory, Dharamshala (PW-11). However, such evidence is hardly of any help to the prosecution case for the reason that the specimen hand writing of the accused was obtained during the investigation of the case and not during the course of trial of the accused. As a matter of fact, in order to place reliance on the report of the hand writing expert, the specimen hand writing of the accused as well as questioned documents are required to be obtained during the course of proceedings in the

case before the trial Court and not during the investigation of the case. Learned trial Magistrate, while placing reliance on the judgment of this Court in ***State of Himachal Pradesh vs. Laje Ram and ors., 2011(2) Him. L.R (DB) 597,*** has rightly discarded such evidence as has come on record by way of testimony of PW-11 Visheshwar Sharma and also the report Ext. PW-9/A as well as the reasons in support thereof Ext. PW-11/A.

14. Therefore, in view of the re-appraisal of the evidence available on record and for the reasons stated hereinabove, it would not be improper to conclude that the prosecution has miserably failed to prove its case against the accused beyond all reasonable doubt. The accused has, therefore, rightly been acquitted of the charge framed against him.

15. Consequently, the judgment under challenge, being legally and factually sustainable, is hereby affirmed. In view of what has been stated hereinabove, this appeal fails and the same is accordingly dismissed. Personal and surety bonds are cancelled/discharged.

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

Des Raj @ Raj Kumar ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Cr. Appeal No.: 81 of 2016.
Date of Decision: 04.11.2016.

Indian Penal Code, 1860- Section 324 and 506- **Protection of Children from Sexual Offences Act, 2012-** Section 4-The prosecutrix went for grinding maize along with her brother – accused came and gave money to the brother of the prosecutrix to bring some sweets from the shop - when he refused, the accused slapped him on which brother of the accused went to the shop while crying -the accused bolted the door of the Gharat and raped the prosecutrix – the accused threatened to do away with the life of the prosecutrix – the accused was tried and convicted by the trial Court- held in appeal that the prosecutrix was proved to be aged 13 years at the time of incident – prosecutrix and her parents had not supported the prosecution version – her statement was recorded under Section 164 Cr.P.C in which she had narrated the incident – the medical evidence also supported the prosecution version – the prosecution case was proved beyond reasonable doubt and the accused was rightly convicted- appeal dismissed. (Para-9 to 12)

For the Appellant: Mr.Sat Parkash, Advocate vice Mr.Naveen K.Bhardwaj, Advocate.
For the respondent: Mr.R.S.Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal is directed against the judgement rendered on 30.12.2015 by the learned Special Judge, Chamba, District Chamba, Himachal Pradesh in Sessions Trial No.30 of 2015, whereby the appellant stands convicted and sentenced to undergo imprisonment in the following manner:-

Sr.No.	Section	Sentence imposed.
1.	342 IPC	The appellant/accused was sentenced to undergo simple imprisonment for one year and to pay a fine of Rs.1000/- and in default of payment of fine, the convict was to undergo further imprisonment for one month;
2.	506 IPC	The appellant/accused was sentenced to undergo simple

		imprisonment for a period of two years and to pay a fine of Rs.2000/- and in default of payment of fine, the convict was to undergo further imprisonment for two months; and
3.	Section 4 of the Protection of Children from Sexual Offences Act, 2012.	The appellant/accused was sentenced to undergo simple imprisonment for a period of seven years and to pay a fine of Rs.5000/- and in default of payment of fine, the convict was to undergo further imprisonment for six months.

All the sentences were ordered to be run concurrently.

2. The prosecution story, in brief, is that on 24.3.2015, the victim along with her parents reported the matter to the police that on 23.3.2015 at about 10 AM, she went to Shakti Nallah for grinding maize grain along with her brother Sunil Kumar aged 5 years. The victim went to the Gharat of Shri Firozu where one person named Singh R/o village Saloga was grinding his maize grain. Thereafter, the maize grain of the victim was poured in the Gharat for grinding. After some time, accused also came there and gave money to her brother for bringing some sweet from the shop. When the brother of the victim refused, he slapped him and thereafter her brother went to the shop while weeping. Then accused bolted the door of the Gharat and forcibly put off the Pajami as also his Pants and thereafter committed wrong act with her (sexual intercourse). It was 12 noon when the victim cried, accused gagged her month with his hand. Thereafter, accused tried to give her money not to disclose the incident. When she refused to take money, then the accused threatened her to do away with her life in case she discloses the incident to any one. It is further story of the prosecution that thereafter the accused went to the Gharat of one Mussadi. When the victim was weeping, one Deep son of Shri Chatter Singh R/o village Kathla came there and asked her as to why she was weeping. Then she narrated the incident to him. Thereafter, she went to her house with the flour and narrated the incident to her uncle and aunt. The victim again came with her uncle and aunt towards Shakti Nallah where her parents met them. However, due to night, they returned to their house and only then the matter was reported to the police on the next day and showed their willingness for medical examination of the victim. On this complaint, FIR came to be registered against the accused. Case was investigated. Victim as well as accused were got medically examined. Sttement of victim was also got recorded before the learned Judicial Magistrate 1st Class, Chamba and on completion of investigation, challan was prepared for the aforesaid offences against the accused.

3. On completion of investigation into the offences allegedly committed by the accused a report under Section 173 Cr.P.C. stood prepared and filed in the competent Court.

4. The accused-appellant herein stood charged for his allegedly committing offences punishable under Sections 342, 376, 506 of the Indian Penal Code and Section 3(a) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012. The accused-appellant pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 17 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure stood recorded wherein he pleaded innocence and claimed false implication. He did not adduce any evidence in defence.

6. The accused-appellant stands aggrieved by the judgment of conviction recorded by the learned trial Court. The learned counsel appearing for the appellant, has concerted to vigorously contend before this Court qua the findings of conviction, recorded by the learned trial Court, standing not anvilled on a proper appreciation by it of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction being reversed by this Court, in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General appearing for the State has with considerable force and vigour contended qua the findings of conviction recorded by the Court below being based on a mature and balanced appreciation of evidence on record and theirs not necessitating any 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. Ext.PW-13/A and Ext.PW-13/B respectively constitute the birth certificate and an abstract of the Parivar Register of the prosecutrix wherewithin a display occurs qua the prosecutrix at the relevant time holding an age of 13 years. Consequently, consent, if any, meted by her to the penal misdemeanors perpetrated upon her by the accused holds no vigour.

10. The learned counsel for the appellant has contended of with the prosecutrix besides her parents not supporting the prosecution case, it was grossly inapt for the learned trial Court to record an order of conviction upon the accused/appellant herein. True it is that qua the prosecutrix besides her parents omitting to support the prosecution case yet the aforesaid factum cannot override the testification of PW-16 who recorded her statement made before him under Section 164 Cr.P.C., statement whereof stands comprised in Ext.PW-16/A wherein the prosecutrix has explicitly inculpated the accused/appellant. The vigour of the testification of PW-16 besides of the reflections occurring in Ext.PW-16/B would stand belittled only when the defence had emphatically established qua the recitals occurring in Ext.PW-16/B not emanating from a pure volition of the prosecutrix arising from the factum of her standing pressurized by the Investigating Officer concerned to record it before the Magistrate concerned. However, a close reading of the deposition of PW-16 unveils qua the recording of Ext.PW-16/B by him being free from any stain of it not emanating from the pure volition of the prosecutrix besides it unveils of the prosecutrix in recording it her standing bereft of any exertion upon her of any duress by the Investigating Officer. The aforesaid testification of PW-16 occurring in his examination-in-chief has remained uneroded of its sinew even when he faced the ordeal of a rigorous cross-examination. Consequently, the recitals occurring in Ext.PW-16/B acquire probative worth of immense sinew whereupon efficacy of the deposition of the prosecutrix besides of the deposition of her parents stands benumbed. It appears qua in the prosecutrix reneging from the recitals embodied in the relevant F.I.R. while hers testifying in Court also in her parents not lending sustenance to the prosecution version theirs standing prodded by extraneous considerations whereupon their testifications do not hold any sway nor their testifications countervail the taintfree deposition of PW-16 wherebefore whom Ext.PW-16/B evidently stood volitionally recorded by the prosecutrix, corollary whereof is qua no conclusion other than qua the prosecution hence succeeding in proving the charge stands generated.

11. The further reason for this Court to conclude of the recitals occurring in Ext.PW-16/B holding a paramount virtue of truth ensues from the factum of the relevant MLC prepared qua the prosecutrix comprised in Ext.PW-8/A making vivid unfoldments of the prosecutrix standing subjected to forcible sexual intercourse. Apart therefrom, the report of the FSL concerned comprised in Ext.PX makes a loud communication therein of human semen standing detected in Ext.1a, the Pajami of the prosecutrix, also it pronounces qua human semen standing detected in Ext.3a, the underwear worn by the accused. However, though there occurs no pronouncement therein qua human semen borne thereon being relatable to the accused, yet any omission qua the aforesaid pronouncement therein would not negate the factum of Ext.1a whereon it occurs not at the relevant time not standing worn by the prosecutrix or of Ext.3a not belonging to the accused unless there occurred visible display in cogent evidence qua the exhibits aforesaid not respectively standing worn by the aforesaid. An inference qua the aforesaid pronouncements standing blunted would spur on the defence concerting to assail the efficacy of the relevant recovery memos whereunder they stood recovered. However, the aforesaid concert remained un-assayed by the defence whereupon obviously the relevant best evidence for benumbing the aforesaid inferences is amiss. Consequently, the existence of human semen

thereon is to stand concluded to belong to the accused thereupon it is apt to conclude of the accused at the relevant time perpetrating forcible sexual intercourse upon the prosecutrix.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

13. In view of the above, there is no merit in this appeal which is accordingly dismissed. The judgment impugned before this Court stands maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

Cr.A. No. 408 of 2014 with
Cr.A. No. 507 of 2015
Judgments reserved on: 21.10.2016
Date of decision: 4th November, 2016

Cr.A. No. 408 of 2014

Gaurav Rana …Appellant
Versus
State of Himachal Pradesh …Respondent

Cr.A. No. 507 of 2015

Rajesh Singh …Appellant
Versus
State of Himachal Pradesh …Respondent

Indian Penal Code, 1860- Section 302 and 392 read with Section 34- An information was received that a woman had been stabbed by some unknown persons – dead body of woman was found – her husband reported that two persons had injured the woman and had stolen the cash lying in the cash box – the accused were arrested- recoveries were effected on the basis of disclosure statements made by them- the accused were tried and convicted by the trial Court- held in appeal that the evidence of the witnesses cannot be discarded on the ground that they are related to each other, if their testimonies are found to be truthful and reliable - the presence of the accused was established by the statements of the witnesses- all the witnesses to the incident are not to be examined – mere failure to conduct test identification parade will not result in the acquittal- minor discrepancies need not be given undue importance- the accused had given beatings to PW-6 and had snatched his mobile – mobile was sold to PW-21- testimony of hostile witness cannot be discarded on the ground that he has turned hostile – the prosecution case was proved beyond reasonable doubt and the accused were rightly convicted- appeal dismissed.
(Para-59 to 94)

Cases referred:

U.P. vs. Krishna Gopal and Anr, 1988 4 SCC 302
State of Punjab Vs. Jagir Singh, 1974 3 SCC 277.
Shivaji Sahebrao Bobade & Anr. Vs. State of Maharashtra, 1973 2 SCC 793
Appabhai and Anr. Vs. State of Gujarat, 1988 Supp1 SCC 241
Lakhwinder Singh and Ors. Vs. State of Punjab AIR 2003 Supreme Court 2577
Ravi alias Ravichandran vs. State represented by Inspector of Police, (2007) 15 Supreme Court Cases 372
OMA @ Omparkash & Anr. Vs. State of Tamil Nadu, 2013 (3) SCC 440

Motilal Yadav Vs. State of Bihar, (2015) 2 SCC 647
C.Muniappan and Others Vs. State of Tamil Nadu, 2010 9 SCC 567

For the Appellants : Mr. Y.P.S. Dhaulta, Advocate for the appellant In Cr. Appeal No. 408 of 2014 and Mr. Chander Sekhar Sharma, Advocate, for the appellant in Cr. A. No. 507 of 2015.

For the Respondent : Mr. Vikram Thakur, Deputy Advocate General with Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

These appeals are directed against the judgment of conviction and sentence passed by the learned Additional Sessions Judge-II, Una, District Una, in Session Trial No. 30/2011, whereby the appellants have been convicted and sentenced to undergo imprisonment for life and to pay fine Rs.10,000/- each under Section 302 of the Indian Penal Code (for short 'Code') and in default of payment to further undergo rigorous imprisonment for a period of one year. They are further sentenced to undergo rigorous imprisonment for a period of five years and pay fine Rs.3000/- each under Section 392 of the Code and in default to further undergo simple imprisonment for six months. All the sentences shall run concurrently and the period of detention undergone has been ordered to be set of under Section 428 Cr.P.C.

2. The prosecution story, in brief, is that on 26.4.2011, at about 11:30 p.m., Pardhan of Gram Panchyat, Bathri telephonically informed the police that a woman had been stabbed by some unknown persons who came on motorcycle and after stabbing the lady had fled away towards Punjab side. On the basis of this information rapat Ex.PW2/A entered in Police Station, Haroli and SI/SHO Shakti Singh Pathania (PW48) alongwith ASI Ashok Kumar, PSI Nishant Kumar, C. Deepak Kumar and HHG Piare Lal proceeded to the spot in the government vehicle No. HP-20C-0507 and visited the spot. They found a woman stained with blood and injuries on her stomach and other parts of the body lying on the bed box in the verandah of sweet shop of Chaman Lal (PW1) by that time the woman had already died. Chaman Lal, husband of deceased got his statement Ex.PW1/A recorded under Section 154 Cr.P.C. to the effect that he is running a shop of halwai in bus stand, Bathri for the last 12-13 years and he used to sleep in the shop daily during the night. On 26.4.2011, at around 9:30 p.m. his wife (deceased) had come to the shop for providing dinner to him and after taking dinner he had gone to answer the call of nature at the distance of about 100 meters from the shop and while he was washing his hands at a distance of about 50 meters from the shop, he heard the cries of his wife Swarni Devi and he rushed to the shop where he saw two boys coming out of the shop who then fled away on motorcycle towards Garhshankar side. He went inside the shop and found his wife lying in blood stained condition and the Galla (chest) of the shop was opened and on checking it was found that Rs. 2000/- to Rs.2500/- were missing from the Galla. Thereafter, his Babhi Bholi Devi came on the spot and they both put Swarni Devi on the bed box but she had died. Lateron, the villagers and Pardhan of lower panchayat also came to the spot. On the statement of complainant case under Sections 392, 302 read with 34 of the Code was registered vide FIR Ex. PW33/A at Police Station, Haroli. SHO Shakti Singh Pathania conducted the investigation of the case on 27.4.2011. Ashok Kumar Videographer (PW13) visited the spot and conducted the videography of the spot. Site plan was prepared by the I.O. Ex.PW48/B on the identification of the witnesses. The blood stained leaves, ball pen, one coin of 50 paise and currency note of Rs.10/- were found and put in plastic container and were taken into possession vide memo Ex.PW2/A. Control sample of concrete was lifted from the spot and put in plastic contained vide memo Ex.PW2/B. The blood was lifted from the shop and verandah and taken into possession vide memo Ex.PW2/C. The wooden box (galla) was taken into possession vide Ex.PW2/D. Specimen of the seal Ex.PW2/E was taken on piece of cloth and seal after use was handed over to witness Satish Kumar (PW2).

Dead body was examined through LC. Ramana (PW26) and form Nos. 25, 35 A & B Ex.PW4/A and application for postmortem Ex.PW25/A was prepared. The postmortem was conducted by PW29 Dr. Sanjay Mankotia, which reveal that deceased died due to hemorrhagic shock subsequent to multiple wounds and duration between death and postmortem was within 18 hours. The probable duration between injury and death was few minutes to an hour. The doctor had preserved the viscera in a jar and blood sample and clothes for chemical examination were separately packed in a parcel and handed over to the police and the doctor had issued PMR Ex.PW29/A. The doctor on receipt of FSL report Ex.PW29/B has given final opinion Ex.PW29/C. HC Vipan Kumar (PW32) on 27.4.2011 had received viscera, clothes of deceased from LC Ramana Devi and entered the same at Sl. No. 575/11 of Malkhana register. He further received case property from the I.O. and entered at Sl. No. 576/11 of Malkhana register.

3. On this very day i.e. 26.4.2011, information had been received that in lower Bathri two boys who were on motorcycle had caused injuries to one person with sharp edged weapon and had snatched Rs.400/- and one mobile. On receipt of such information ASI Prem Chand (PW44) had been deputed for investigation of the case FIR No. 91/2011, dated 27.4.2011, registered under Section 392, 326, 323 read with 34 of the code at Police Station, Haroli. SI Prem Chand visited the spot and recorded the statement of Rajnish and thereafter the mobile phone was put under observation for tracking its location and on 12.5.2011 location of the mobile was found in the village Samundra, District Hoshiarpur and the Mobile was found to have been issued in the name of Amrit Pal, resident of Chak Guru, District Hoshiarpur. Regarding the investigation of this fact, team comprising police officials HC Suresh Kumar (PW23), HC Sanjay (Pw20) were sent to village Samundra and during investigation Amrit Pal revealed that mobile phone being used for Sim No. 98035-91723 had been purchased by him from the appellant Gaurav Rana for Rs. 200/- and after minor repair, Amrit Pal had further sold the mobile to Jagtar Singh for Rs. 400/-. During investigation, it was found that both the appellants – Gaurav Rana and Rajesh were in judicial lock-up in Punjab as they were involved in FIR No. 34/2011, dated 27.4.2011, registered under Section 394/34 IPC, registered in P.S. Nurpur Bedi. Production warrants of both the appellants were obtained from the Court and on 20.5.2011, both the appellants were produced before the Court and police remand was obtained. During police custody, the appellant Rajesh on 20.5.2011 made disclosure statement Ex.PW14/A and appellant Gaurav Rana made disclosure statement Ex.PW14/B in presence of witnesses Jaswant Singh and C. Ram Gopal and on 21.5.2011 appellant Gaurav Rana got recovered Capri and T-shirt from his house at Samundra which were packed in a cloth parcel Ex.PW15/A and sealed with three seals of 'J' and sample of seal 'J' was handed over to witness Vijay Singh. On the same day appellant-Rajesh got recovered from his house a lower (Pyjama) of blue colour and T-shirt black in colour which were kept in a parcel Ex.PW20/B after sealing the same and taking into possession vide memo Ex.PW20/A. On 26/27.4.2011, the appellants after committing the murder and causing injuries to a person at lower Bathri had stayed in the hotel named Oasis, Garhshankar and had paid Rs.1000/- for staying their. On 23.5.2011, Rs.1000/- paid by the appellants to the waiter was got recovered and taken into possession vide Ex.PW16/A. The medical examination of both the appellants was got conducted and their blood on FTA cards was handed over to MHC. Articles recovered from the appellants and other case property had been deposited with MHC.

4. On 31.5.2011, an application was moved to SDJM, Anandpur Sahib for taking case property and custody of the appellants and on 5.6.2011 MHC Nurpur Bedi handed over motorcycle without number, one Kritch sealed with seal impression DS and photocopy of register No. 19, which had been taken in possession vide memo Ex.PW24/A. On the same day, ASI Darshan Singh produced copy of Zimini order dated 17.5.2011, photocopy of sketch of Kritch, Photocopies of disclosure statements, recovery memo of motorcycle and photocopies of MLCs of both the appellants which had been taken into possession vide Ex.PW24/B.

5. The appellants on 21.5.2011 had led the police party to the place of occurrence and had identified the place where they committed crime and memo Ex.PW4/B as per disclosure statement was prepared.

6. Statements of the witnesses under Section 161 Cr.P.C. was recorded and finally on receipt of the chemical reports Ex.PW48/J to Ex.PW48/L challan was prepared and presented in the Court of learned Judicial Magistrate Ist Class, Una on 23.8.2011 and copy of the challan was supplied to the appellants and committed the case to the Court of learned Sessions Judge, Una vide order dated 13.9.2011 and the learned Sessions Judge, Una, thereafter vide order dated 20.9.2011 assigned the case for trial to the Court of learned Additional Sessions Judge-II, Una. The charges were framed and the appellants were made to stand trial for the commission of offence under Sections 392, 302 read with 34 IPC, in which trial appellants were eventually convicted as aforesaid.

7. The prosecution in order to prove its case examined as many as 49 witnesses and closed its evidence on 4.3.2013. Thereafter, the appellants were examined under Section 313 Cr.P.C. in which they pleaded innocence and claimed to be falsely implicated. As per them, they have not committed any murder and robbery. The appellants in defence examined one witness Varinder Singh DW1 and closed the evidence.

8. Learned counsel for the appellants S/Shri Chander Sekhar Sharma and Y.P.S. Dhaulta have vehemently argued that the instant case is a case of no evidence where the so-called eye witnesses i.e. PW1, PW3, PW5 and PW39 are none other then the close relatives of the deceased, whereas no independent witness has been examined in the case. That part, they have vehemently argued that once it is the admitted case of the prosecution that the appellants were unknown persons, then it was imperative upon the prosecution to have conducted an identification parade and in absence thereof the entire trial stand vitiated. It is further argued that apart from their being material inconsistency in the statements of the witnesses examined by the prosecution, they have been marked improvement and padding in the prosecution case on the basis of which conviction cannot be sustained. Lastly, it is vehemently argued that the prosecution has failed to establish the presence of the appellants at the scene of the crime and this fact in itself is sufficient to acquit the appellants.

9. On the other hand, Shri Vikram Thakur, Deputy Advocate General assisted by Shri J.S. Guleria, Assistant Advocate General, vehemently argued that the identification parade is not *sine qua non* can definitely for convicting a person, more particularly, when the prosecution has led clear, cogent and convincing evidence to establish not only the identity of the appellants but their acts of committing crime, which has been duly proved in the statement of PW1, PW3, PW5 and PW39 and there is no reason whey the statements should be discarded only on the ground that they were related to deceased, especially, when their credibility remains intact. It is further argued that in such scenario there is no necessity to have examined independent witnesses. Before appreciating the rival contentions of the parties, it would be necessary to advert to the evidence led by the prosecution.

10. PW1 Chaman Lal, husband of the deceased, who lodged the FIR, in question, stated that on 26.4.2011 at about 9:30 p.m. his wife came to shop with dinner and after taking dinner he had gone to answer the call of nature at a distance of 100 meter. While he was washing his hands at a distance of about 50 meters from the shop, he heard cries of his wife and accordingly rushed to the shop and found two boys one of whom was tall and other of medium height running out of his shop, who went towards Garhshankar side on a black motorcycle. He raised hue and cry upon which Bholi, Raghnandan, Leela Devi came on the spot and later on the Pardhan Suman Devi also came there. He identified the appellants in the Court as being the same who had fled away on the motorcycle. He further stated that he found Rs.2000/- to Rs.2500/- missing from the Galla and claimed that the appellants had murdered his wife. Up-Pardhan had informed the police and he had reported the matter to the police vide Ex.PW1/A. The police recovered various items like ball pen, blood stained leaves, coin of 50 paisa and blood stained concrete pieces from the spot. He further deposed that on 21.5.2011, the police had brought the appellants to his shop and appellants had identified the shop. He also stated that body of his wife has been taken to the hospital for postmortem and he identified the clothes of his wife Ex.P1 to Ex.P6. During cross-examination, he stated that his house is at a distance of about half kilometer

from the shop and admitted that thresher was working in nearby field at the distance of 40 meters. He further stated that he had chased the boys up to 10 meters. He denied that the appellants were seen by him for the first time on 21.5.2011. He did not dispute that there was no street light, however, there was a light in the shop.

11. PW3 Rajinder Kaur alias Bholi identified the appellants in the Court and stated that she had seen two boys aged about 20-22 years and 25-26 years respectively. She claimed that the younger boy was wearing green colour T-shirt and small pant whereas the other boy was wearing black colour T-shirt and blue lower. She on hearing the cries of Swarna Devi had rushed to the shop alongwith Leela Devi, the appellants had fled away on the motorcycle towards Garhshankar side and the taller boy was possessing black colour type article. They found Swarna Devi in an injured condition on the floor as she had sustained injuries on her abdomen and arms. The appellants, as per information given by PW1 Chaman Lal, had taken away money from the cash box. During examination, she had stated that except khokha of vegetable of Piare Lal, no other shop was opened at the time of occurrence. She denied that she had not visited the shop or that she had not seen the appellants on the spot.

12. PW5 Master Jaswinder, the Court after being convinced that this witness was mature enough to give statement, recorded his statement on 21.1.2012. This witness has stated that on 26.4.2011, he alongwith his younger sister was sitting in the shop of his father at Bathri. At about 10:30 p.m, the appellants, whom he identified in the Court came on the motorcycle. They went towards Garhshankar side and thereafter came back. His uncle Chaman Lal left his shop to answer the call of nature, however, his wife Swarna Devi remain in the shop. The appellants purchased a bottle of soda from Smt. Swarna Devi and gave her Rs.500/- currency note. She went inside the shop to give balance to the appellants, in the meanwhile, the taller appellant went inside the shop and other remain outside the shop. When Swarna Devi was giving balance amount to the appellant the taller boy got hold of the wooden cash box and Smt. Swarna Devi tried to snatch the same, thereafter taller appellant stabbed Swarna Devi with some sharp edged object and thereafter both the appellants fled away on the black motorcycle. Smt. Swarna Devi had been crying and this witness claimed to have seen the entire incident from his shop and raised noise and call his father. He further stated that the motorcycle was without number and he had seen the occurrence as there was electricity bulb in his shop and also in the shop of Chaman Lal. During cross-examination, he denied that he had been directed by Bholi Devi to give the statement in the Court. He also denied that there was no witness to the scene of the crime and he was deposing falsely.

13. PW 39 Smt. Leela Devi stated that on 26.4.2011, she alongwith her Devrani Rajinder Kaur were returning to their house after threshing wheat around 10:30-11:00 p.m. While they were near the Panchayat ghar, they have heard noise from the shop of Chaman Lal. The cries were of Swarna Devi (deceased). They went to shop and found two boys coming out of the shop out of whom one was of medium height and while the other one was tall in stature. The medium stature boy had worn green T-shirt and capri (half pant) while the other boy had worn the blue lower and black T-shirt. The taller boy was having black colour weapon in his hand. She further stated that Chaman Lal had gone to answer the call of the nature and was washing his hands near the well. Chaman Lal had raised noise and they had found Swarna Devi in the floor of the shop and blood was spreading on the spot and because of the attack Swarna Devi had become unconscious. She was lifted and laid on the wooden bed. She further stated that appellants had parked the motorcycle near the kokha and had fled away towards the Garhshankar side on a motorcycle, which was without number and black in colour. She claimed that Swarna Devi received injuries on the chest, arm and stomach. The articles were lying here and there in the shop and the Galla (wooden chest) was empty. The appellants had fled away after taking the money from the Galla by attacking Swarna Devi with some weapon. She identified both the appellants in the Court and stated that they were the same who attacked/murdered Swarna Devi in the shop and had taken money from the Galla. She further deposed that she had seen the kritch which the taller appellant in stature was having in his hand. During cross-examination, she stated that she and her Devrani were carrying bags of 40-40 kgs each at that time and all the

lights of the Panchayat ghar, shops and houses were on. She claimed to be at a distance of about 50 meter from the Panchayat ghar and 100 meter away from the shop when they heard noise. She denied that the shop of Chaman Lal was not visible from the Panchayat ghar and voluntarily stated that at that time they were near the Panchayat ghar. She denied the suggestion that she alongwith her Devrani had not visited the shop or not seen the appellants who eventually fled from the spot. She further denied that she had identified appellants in the Court at the instance of the police.

14. PW2 Satish Kumar, ex Pardhan stated that he had been associated in the investigation and on 27.4.2011 he alongwith Sansar Chand had visited the shop of PW1 where the police had taken into possession ball pen, blood stained leaves, coin of 50 paise, currency note of Rs.10/-, concrete etc. These articles were put in a plastic container and thereafter taken into possession vide Ex.PW2/A which bore his signature. Similarly, the police had also taken into possession concrete and tar coal vide memo Ex.PW2/B and likewise the stain of blood lying on the spot vide Ex.PW2/C. The police also took into possession currency note and coin from the cash box amounting to Rs. 123.50 paise and wrapped in cloth parcel vide memo Ex.PW2/D. However, this witness denied that the seal had been given to him by the police and thereafter this witness was declared hostile. In cross-examination by the defence counsel, the witness denied that seal 'P' was affixed by the police on the parcels and claimed that all the recovery memos were prepared on 27.4.2011. He further stated that Rs.10/- currency note and 50 paise coin were recovered by the police out of which the currency note was recovered near the electric pole near the shop of the complainant whereas 50 paise coin was recovered in front of khokha on the road about 10 meters away from the shop of the complainant. He admitted that there are many shops in the market and people frequently visit there as it was main Bathri-Garhshankar road. However, he denied the suggestion of appellants that no recovery had been effected nor any memo have been prepared and that his signature has been obtained on a blank paper.

15. PW4 Balbir Singh, Up-Pardhan was at the relevant time in village Bathri and stated that about 10:30 p.m. he had heard noise of cries from the shop of Chaman Lal. When he reached there he found Chaman Lal, Bholi Devi, Leela Devi and many other persons were present at the spot. He saw Swarna Devi in an injured condition and clothes were blood stained. She was kept on wooden kot and he touched the body and found that she was dead. Chaman Lal had told him that two boys had killed his wife and had thereafter fled away on the motor cycle. He informed the police on telephone about the occurrence and on reaching the spot had prepared the inquest report Ex.PW4/A, which was signed by him and by Chaman Lal. Police took the dead body for postmortem to R.H., Una and he alongwith Chaman Lal and other family members accompanied the police. Subsequently on 21.5.2011, the police brought the appellants, who were present in the Court and had stopped vehicle at a distance of 50 meters from the shop and thereafter the appellants had identified the spot and narrated the entire exercise made by them while committing the offence. They also identified the place where the motorcycle was parked by them. Memo Ex.PW4/B was prepared by the Investigating Officer which bore his signature and also the signatures of Sansar Chand and the appellants and one police official also signed the memo. In cross-examination, this witness stated that there are many shops in the abadi in and around the place of occurrence. There were 4-5 halwai shops, three confectionary shops, two barber shops, two clothes shops and two mechanic shops, however, at the time of occurrence none of the shop was opened except the shop of Chaman Lal. He did not dispute that Panchayat ghar is towards western side from the rain shelter, however, it is denied that shop of Chaman Lal is not visible from panchyat ghar. He further reiterated that police had prepared the site plan at the spot on the basis of the information given by the appellants.

16. PW6 Jarnail Singh is the person who claimed to have been attacked by the appellants on 26.4.2011 while he was walking at village Keluan near Bathri. He stated that at about 8:30 p.m. he had gone inside the shop to recharge his mobile alongwith Rajnish, Pawan and one another boy and while going back to their quarter two boys i.e. appellants present before the Court came on their motorcycle and hit him with the motorcycle and thereafter inflicted injuries with the sharp edged weapon on his right arm, back and chest duly shown to the Court

below, the appellants had abused him and asked him to give whatever he had. Thereafter the appellants had taken away his mobile bearing No. 98160-63345 and Rs. 400/- and because of the injuries this witness had become unconscious. When he regained the conscious, he was in the hospital at Una and thereafter got registered FIR. During cross-examination, he denied that due to darkness he had failed to recognize the appellants and rather voluntarily stated that he identified them with the help of the light of the motorcycle. He further stated that appellants were not got identified by the police and were identified by him in the Court.

17. PW7 Swaran Singh stated that Sim Card No. 98160-63345 was in the name of his mother and he had given the same to Jarnail Singh who had come to Una for service. During cross-examination, he stated that the same had been purchased by him from M/s Rana General Store, Durana.

18. PW8 Sansar Chand has proved recovered memo Ex.PW2/A, PW2/D and identified Galla Ex.P1, Ball Pen Ex.P7, currency note of Rs.10/- Ex.P8, coin 50 paise Ex.P9, bandage pieces Ex.P10, concrete Ex.P11, leaves Ex.P12, concrete Ex.P13, bandage Ex.P14, currency notes of Rs.20, Ex.P15 and P16 and articles Ex.P1 to Ex.P7 which had been taken into possession by the police. In cross-examination, he did not dispute that there were many shops in and around the area and even buses halt there at night. However, it is denied that pilgrims stayed during the night.

19. PW9 HC Rajesh Kumar stated that on 22.9.2011 case property, in case, FIR No. 91/2011, dated 27.4.2011 of Police Station, Haroli was deposited with him by HHG Dilbagh Singh vide R.C. No. 284/2011 alongwith packet containing mobile, keypad and two sim cards. The parcels were sealed with seals M & J and entered in Malkhana register at Sl. No. 3204/11. During cross-examination, he denied the suggestion that no parcel had been deposited with him and he had been deposing falsely.

20. PW 10 Amrit Pal Singh is running mobile repair shop in the name and style of M/s Jaskaran Telecom at village, Samundra, Garhshankar. He deposed that in the year 2011 the appellant Gaurav Rana present before the Court had come to his shop saying that he is in need of money and wanted to sell mobile model Nokia 1202, which he checked and purchased for Rs.200/-. He thereafter changed the key pad and put in sim card of Aircel bearing No. 98035-91723, which was a demo sim. He later on sold the mobile phone to Jagtar Singh for Rs.400/- and he had handed over the mobile phone to the police Ex.P18, keypad Ex. P19 and sim card Ex.P20. During cross-examination, he admitted that he did not give any receipt for the purchase of the mobile and however, he denied the suggestion that the appellant Gaurav had not visited and stated that he had sold the mobile after replacing its keypad but had not issued any receipt of sale while selling the same to the Jagtar Singh.

21. PW11 HC Surjeet Singh had stated that on 17.5.2011, he alongwith ASI Darshan Singh remained associated in investigation of case FIR No. 34/11, registered against the appellants under Section 394 IPC at Police Station Nurpur Bedi. Appellant Gaurav Rana in his presence had made a disclosure statement Ex.P24/E before ASI Darshan Singh of P.P. Kalma to the effect that on 26.4.2011 during night he alongwith appellant Rajesh at lower Bathri had injured one person with Kritch and snatched Rs.400/- and a mobile and thereafter murdered a woman with Kritch and snatched Rs.2500/- from the Galla (chest) at a shop at Bathri. He alongwith Nasib Singh Lambardar and Sarpanch Harket Singh had put signatures on the memo Ex.PW24/F and later on Gaurav Rana had got recovered the Kritch and Rs.20,600/-, which were taken into possession vide Ex.PW24/F. Rough sketch of Kritch Ex.PW24/D was prepared. The motorcycle used for the commission of the crime was recovered vide memo Ex.PW24/G. During cross-examination, he stated that he had joined investigation on 17.5.2011 and denied that at that time appellants were in custody. He also denied that no statement had been given by the appellant Gaurav Rana on the basis no recovery had been effected. He also denied that no recovery of currency notes had been effected at the instance of the disclosure statement of appellant Gaurav Rana.

22. PW12 Suman Kumari is Pardhan of Gram Panchayat Bathri and has stated that the shop had been given to Chaman Lal without rent as he was a poor person and in the shop on 26.4.2011 his wife was murdered. During cross-examination, she denied that there was no shop in the Sarai.

23. PW 13 HC Ashok Kumar deposed that he on 27.4.2011 on the directions of the superior officers had conducted photography of the spot at village Bathri. He found dead body lying in the verandah of the shop and there was blood lying outside the shop, on the road and on the leaves. He further stated that there were Rs.10/- note, 50 paise coin and ball pen lying outside the shop. He photographed these articles and handed over the CD to I.O. in a sealed condition with seal 'R'.

24 PW14 Jaswant Singh ex-Pardhan of Gram Panchayat Bhadiaran, deposed that on 20.5.2011 appellant Rajesh had disclosed to the police in his presence and in presence of C. Ram Gopal that on 26.4.2011, he alongwith Gaurav Rana during the night had murdered a woman with Kritch (Dagger) and identified such place and the place where they parked the motorcycle. He also disclosed that he can get recovered his T-shirt and lower from his house, which he had been wearing at the time of murder. Disclosure statement of the appellant Gaurav Rana was Ex.PW14/A. During cross-examination, he denied that the statement of the appellants had already been recorded by the police and he had only put his signatures. He admitted that the appellants had disclosed to the police that they could identify the place of murder, however, this witness was confronted with the memo Ex.PW14/A and Ex.PW14/B, wherein, this fact has not been mentioned. He further denied that neither any statement was made by the appellants nor he was present with the police on the said date.

25. PW15 Vijay Singh deposed that the clothes had been recovered at the instance of the mother of appellant Gaurav Rana and he was also present there. He was declared hostile and during cross-examination conducted by the learned P.P., he admitted that he had put his signature on memo Ex.PW15/A after going through the contents. Appellant Gaurav Rana had taken the police party to his house and got recovered his Capri and T-shirt from his house. These clothes were put in a parcel and sealed with seal 'J' and sample of seal had been taken separately. He further admitted that sample of seal Ex.PW15/B had been taken on a piece of cloth, which bore his signature and memo Ex.PW15/A had been signed by him, the appellant and another witness. He also admitted that the clothes shown to him were the same which had been taken in possession by the police from the house of appellant Gaurav Rana. During cross-examination by the learned defence counsel, he had stated that police had called him after taking into possession recovered clothes. He denied that he had put his signature on memo and other documents at the instance of the police and further denied that the seal had not been affixed in his presence.

26. PW16 Omkar Sharma is the Manager of Oasis Hotel and Restaurant, who has stated that he comes to the hotel at 8:00 a.m. and returns to his house around 10:30 p.m., however, during night one waiter Mukesh remain in the hotel and the details of the visitors who visit hotel after his duty, are entered in the register by the waiter. On 26.4.2011, he had left the hotel around 11:00 p.m. and in the morning the waiter had disclosed that two boys had stayed in the hotel during night and he charged Rs.1000/- from them, which the waiter handed over to him. As per waiter, these boys had left the hotel without getting their names entered in the register in the morning. The amount of Rs. 1000/- was handed over to the police vide Ex.PW16/A. During cross-examination, he stated that the appellants were not known to him, therefore, he cannot say that there were the appellants who had stayed in the hotel.

27. PW17 Mukesh Kumar is waiter in hotel Oasis and stated that on 26.4.2011 at around 12:00 midnight two boys came to the hotel and demanded room for stay. He opened the room and charged Rs.1000/-. He further deposed that these boys came on motorcycle and assured him to make entry in the register in the morning, however, in the morning both the boys had fled away without making entry in the register. He also stated that on the arrival of Manager, he handed over Rs.1000/- to him. On 23.5.2011, police came to the hotel and he had identified

the boys, who had been staying in the hotel in the night of 26/27.4.2011. He produced Rs.1000/- notes to the police, which were taken into possession vide Ex.PW16/A. He also identified the appellants before the Court. During cross-examination, he denied that without consent of the Manager he had no authority to allow anybody to stay in the hotel during night hours. He further denied that the appellants had not stayed in the hotel.

28. PW18 C. Jasbir Singh stated that on 30.4.2011, he had received five parcels, two samples of seals and one docket containing viscera, clothes, sealed with Una mortuary seal from MHC Vipan Kumar and other parcels sealed with seal 'P' alongwith sample seal, which were containing blood stained leaves, blood stained crushed stones, Rs.10 note and 50 paise coin and deposited the same at FSL, Junga. On 27.6.2011, he again carried three parcels sealed with seals T, J, DS, CHC, Haroli, 2 FTA cards, one parcel containing lower and T-shirt and one containing Kritch sealed with seal DS alongwith seal sample to FSL, Junga and deposited the same there on 28.6.2011.

29. PW19 C. Deepak Kumar had joined investigation on 27.4.2011 and as per his statement at about 1:25 a.m., I.O. Shakti Singh recorded statement of Chaman Lal which he had carried to P.S., Haroli on the basis of which FIR had been registered. On 5.7.2011 he had gone to Junga for collecting result and handed over the same to MHC on 7.7.2011.

30. PW20 HC Sanjay Kumar alongwith HC Naresh Kumar, HC Dharam Pal, C.Deepak Kumar and C. Ram Gopal remained associated in the investigation of the present case with SHO Shakti Singh of P.S., Haroli. The appellants during police custody had taken the police party to the spot at village, Bathri in Chaman Lal Sweet Shop and got identified the places from where they had snatched the money from the wife of Chaman Lal and stabbed her to death. They had also identified the place where they had parked the motorcycle. Regarding this memo Ex.PW4/B had been prepared which bore his signatures, as well as of Balbir Singh and the appellants. On the same day, the appellants took the police party to village Dhamai where PW Balbir Singh of village Dhamai was associated in the investigation and appellant Rajesh had led the police party to his house where his mother was present. The appellant from the room where iron petty (box) was lying over which, one brief case of black colour was kept and from the brief case, the appellant had taken out one lower suit (Pyjama) over which there were two cuts on right side of leg. He also got recovered T-shirt of black colour over which Amar Icon mark was written. Above said T-shirt and lower were packed in cloth parcel and parcel was sealed with seal T and seal after use was given to Balbir Singh and parcel had been taken in possession vide memo Ex.PW20/A. The sample of seal Ex.PW20/B had been retained. He has also identified T-shirt Ex.P35 and one lower Ex.P36 in the Court which had been recovered at the instance of appellant Rajesh from his house. During cross-examination, he has denied that they had called ward panch Balbir after recovery and nothing was recovered at the instance of appellant Rajesh.

31. PW21 Jagtar Singh has stated that he had purchased one old mobile Nokia 1202 from the shop of Amrit Pal Singh (PW10) for a consideration of Rs.400/- in the fifth or sixth month of 2011. After about 15-20 days of purchase of mobile, police had come to his shop where he was working and police had taken said mobile from him. He had inserted sim No. 94655-53283 in the mobile. During cross-examination, he has admitted that there is no specific identification on mobile Ex.P18.

32. PW22 ASI Prem Chand had produced Kritch in the Court which was deposited with him in Malkhana of P.S. Anandpur Sahib by SHO, P.S. Nurpur Bedi. He had already produced Kritch before learned SDJM, Anandpur Sahib as well as before learned JMIC (I), Una. During cross-examination, he has admitted that Kritch Ex.K1 had not been recovered in his presence by the I.O.

33. PW23 is HC Naresh Kumar. He has stated that he remained associated with the investigation of this case with SI Shakti Singh. As per his statement, on 21.5.2011 they had gone to village Samundra with both the appellants. The witness Vijay Kumar had also been associated and appellant Gaurav Rana took them to his house where his brother was present. Appellant

from his room got recovered T-shirt Ex.P23 and Capri Ex.P24 from small trunk which was lying on big iron box (petty). T-shirt, Capri which the appellant was wearing at the time of occurrence, had been taken in possession vide memo Ex.PW15/A. Clothes had been packed in a cloth parcel and parcel had been sealed with three seals of impression J and sample of seal Ex.PW15/B had been taken on a piece of cloth. On 12.5.2011 he alongwith HC Sanjay Kumar and other police officials as per orders of Superintendent of Police, Una had gone to village Samundra in connection with investigation of case FIR No. 91/2011. One Amrit Pal, son of Ajmer Singh who was running mobile shop was associated in the investigation. On the basis of call details as the mobile was under observation and mobile had been snatched from Jarnail Singh, the mobile had been sold to Amrit Pal by appellant Gaurav and after repair he further sold that mobile to Jagtar Singh. On the same day, Jagtar had produced mobile and sim which were put in cloth parcel and sealed with three seals of J and taken in possession vide memo Ex.PW23/B. During cross-examination, he has denied that they had purchased new mobile and other articles from the shop of Amrit Pal and no recovery of mobile had been made from Jagtar Singh. He has denied that parcel had been sealed in the police station. He has denied that no recovery had been effected at the instance of appellant Gaurav Rana.

34. PW24 SI Nishant Bhardwaj had also visited the spot alongwith SI Shakti Singh. In the shop of Chaman Lal dead body of Swarni was lying on the wooden cot and blood had been on the floor. The articles in the shop were scattered here and there. The I.O. got the spot videographed from HC Ashok Kumar and prepared site plan and took in possession articles for evidence. I.O. had filled in 25, 35(a)(b) forms and deputed ASI Ashok Kumar and L.C. Ramana for taking the dead body of Swarni for postmortem to D.H., Una. On 5.6.2011 he alongwith I.O. and other police officials had visited P.S., Nurpur Bedi (Punjab) where they had shown order dated 31.5.2011 of SDM, Anandpur Sahib, to MHC Balbir Singh, MHC had produced case property of case FIR No. 34/2011 dated 27.4.2011 which was required in the present case. The case property including one motorcycle pulsar of black colour and cloth parcel sealed with seal DS stated to be containing Kritch (sharp edged weapon) had been taken in possession. They had also procured copy of Malkhana register No. 19 of P.s. Nurpur Bedi bearing Mad No. 202 dated 17.5.2011. The motorcycle, parcel and abstract of Malkhana register had been taken in possession vide memo Ex.PW24/A by the I.O. Copy of order of learned SDJM, Anandpur Sahib had been given to MHC Balbir Singh of Nurpur Bedi. On the same day, he alongwith the I.O. and other police officials with the case property had gone to P.P. Kalma where ASI Darshan Singh had produced record of case FIR No. 34/2011 dated 27.4.2011 under Section 394 IPC registered at P.S. Nurpur Bedi including copy of disclosure statement of appellant Gaurav Rana, copy of memo regarding Kritch and cash Rs.20,600/-, copy of memo of motorcycle pulsar of black colour, copy of sketch of Kritch, zimini No. 16, dated 17.5.2011, two applications moved to Medical Officer, PHC Singhpur for medical examination of appellants, which were taken in possession by the I.O. vide memo Ex.PW24/B. copy of Malkhana register is Ex.PW24/C, copy of sketch of kritch is Ex.Pw24/D, copy of disclosure statement of appellant Gaurav Rana is Ex.PW24/E, copy of recovery memo of kritch and cash is Ex.PW24/F, copy of recovery memo of motorcycle is Ex.PW24/G, copies of applications moved to Medical Officer, PHC, Singhpur are Ex.PW24/I, copy of order issued by learned SDJM, Anandpur Sahib is Ex.PW24/J. During cross-examination, he had admitted that at the time of taking in possession copies of above documents, appellants were not present.

35. PW25 ASI Ashok Kumar had got conducted postmortem of the dead body of Swarna Devi and after postmortem, dead body had been handed over to Chaman Lal vide memo Ex.PW25/B in the presence of L.C. Ramna Devi and Balbir Singh. He had obtained postmortem report and handed over the same to I.O.

36. PW26 L.C. Ramna Devi had been deputed to village Bathri from where she and ASI Ashok Kumar had been deputed for D.H., Una for getting the postmortem of Swarni conducted through doctor. After postmortem, the doctor had handed over to her one parcel containing viscera, parcel containing clothes of deceased, one parcel of ornaments, one seal sample, one envelope sealed with Una mortuary seal and she had handed over all these articles to MHC.

37. PW27 HHC Dharam Pal on 4.6.2011 had been deputed to FSL, Junga. He accordingly collected envelop containing FSL report No. 670B-SFSL, PHY-88/2011 and had handed over envelope to MHC on 5.6.2011.

38. PW28 is HHC Jagtar Singh who on 5.8.2011 had been deputed to collect FSL report from Junga and he collected report No. 1025/A, SFSL, B10-149/2011 contained in a sealed envelope which he had deposited with MHC on 6.8.2011.

39. Postmortem of the deceased had been conducted by PW29 Dr. Sanjay Mankotia on 27.4.2011 on the application Ex.PW25/A moved by the police. At the time of postmortem, he had noticed;

(1) sharp edged wound on right breast 3cm x 2cm with deep tissues and fat visible 4cm below right nipple and 3cm deep.

(2) sharp edged wound below right breast 4cm deep in between 7th and 8th ribs.

(3) sharp edged wound on the joining right axilla and iliac crest 4cm x 2cm penetrating in abdominal cavity 4cm deep mid way between this line. Right plurae and lung punctured at leviel of 7th and 8th ribs.

As per his opinion, the deceased had died due to hemorrhagic shock subsequent to multiple wounds. The probable duration between death and postmortem was within 18 hours and duration between injury and death was few minutes to an hour. The doctor had preserved viscera in a jar, blood sample and clothes, brazier, dupatta, pranda for chemical examination in separate parcels sealed with Una mortuary seal and handed over the parcels to the police and issued report Ex.PW29/A. On 19.9.2011, SHO P.S., Haroli had moved application Ex.Pw29/D and produced one parcel sealed with FSL seals. There were two signatures on both sides of the parcel and parcel had been opened and Kritch Ex.K had been found in it. The injuries observed on the person of deceased Swarni Devi were possible with the kritch and injuries present on the dead body were sufficient to cause her death. Kritch Ex.K1 had been sealed with Una mortuary seal and returned to the police with sample seal Ex.PW29/E. During cross-examination, he has admitted that there was no blood on the kritch when it was shown to him by the police.

40. PW30 Dr. Shingara Singh is Medical Officer, posted at PHC, Basdehra and on 22.5.2011 the police had moved application Ex.PW30/A for medical examination and collection of blood samples on FTA cards for DNA profiling of appellants Gaurav and Rajesh. He has firstly conducted medical examination of appellant Gaurav Rana at about 12:40 p.m. and on examination there was healed scar mark curved over base of left hand forefinger. His blood sample in FTA cards was collected, sealed and sample was sealed for further investigation at FSL, Junga. The parcel was sealed with hospital seal. He had taken seal sample on FTA form Ex.PW30/B. On the same day, he had also conducted medical examination of appellant Rajesh and had noticed infected wound on his left thigh just above knee joint. The wound was already stitched and as stated by the appellant. He had got the wound stitched on 26.4.2011 from some private practitioner. He had issued MLCs of appellant Rajesh Ex.PW30/C and that of appellant Gaurav Ex.PW30/D. The blood sample of appellant Rajesh had been taken on FTA cards and sealed with hospital seal for further investigation at FSL, Junga. He had filled in FTA form Ex.PW30/E of appellant Rajesh and obtained his right and left thumb impressions and signatures.

41. PW31 Surinder Pal Singh is Patwari posted in Patwar circle, Bathri. On 16.8.2011 on application Ex.PW31/A, the Tehsildar had given orders of demarcation of T-shop of Chaman Lal and accordingly he had conducted demarcation of shop in the presence of police and shop had been identified by the police. He had prepared Tatima Ex.PW31/B and copy of Jamabandi Ex.PW31/C. On 17.8.2011 report had been produced before the police after counter signatures of Kanungo and report is Ex.PW31/D which is in his hand and bears his signatures. The shop of Chaman Lal had been found on Khasra No. 2397.

42. PW32 HC Vipan Kumar is MHC and he had received case property from LHC Ramana Devi on 27.4.2011 containing viscera, clothes, ornaments alongwith sample seals. On the same day, he had also received four parcels from SI/SHO Shakti Singh and he had entered all the articles at Sl. No. 576/2011 of Malkhana register. On 21.5.2011, SHO Shakti Singh had deposited one parcel sealed with three seals of impression J and he had entered the same at Sl. No. 574/2011 of Malkhana register. On 22.5.2011, he had received an envelope sealed with two seals of CHC, Haroli stated to be containing blood samples on FTA cards of appellant Gaurav Rana and another envelope sealed with two seals of CHC, Haroli containing blood sample on FTA cards of appellant Rajesh and he had entered the same at Sl. No. 598/2011 of Malkhana register. On 23.5.2011 he had received one unsealed envelope containing 10 notes of 100 denomination each and entry has been made by him at Sl. No. 600/2011. On 5.6.2011 he had also received one parcel from SHO Shakti Singh containing kritch sealed with seal DS and entered the same at Sl. No. 608/2011 of Malkhana register. On 30.4.2011, articles mentioned at Sl. Nos. 575/2011 and 576/2011 had been sent to FSL, Junga through C.Jasbir Singh. On 27.6.2011 articles mentioned at Sl. No. 594/2011, 598/2011 and 608/2011 had been sent to FSL, Junga through C.Jagtar Singh. On 5.6.2011 HHC Dharam Singh had brought one parcel sealed with two seals of FSL, Junga alongwith result which he had entered in Malkhana register and handed over the same to I.O.

43. PW33 Baldev Ram had got entered FIR Ex.PW33/A on the basis of statement of Chaman Lal Ex.PW1/A and made endorsement Ex.PW33/B on reverse of Ex.PW1/A and thereafter the file had been sent to the spot through C.Deepak Kumar. On receipt of file and expert opinion he had prepared supplementary challan. During cross-examination, he has denied that FIR was registered later on at the instance of I.O. and he has wrongly prepared supplementary challan.

44. PW34 is Dr. Vivek Sehajpal, Assistant Director (DNA), FSL, Junga. He has stated that in the present case, he had received nine parcels for DNA analysis in sealed condition vide R.C. No. 135/2011 dated 30.4.2011, R.C. No. 189/2011 dated 27.6.2011. He had carried DNA profiling of the exhibits and had given opinion as report No. 670/D/SFSL /DNA-52/2011 and 1025B/SFSL/DNA-89/11 Ex.PW34/A (nine sheets).

45. PW35 C/ Gurbax had only collected SFSL report in FIR No. 90/2011 on 28.6.2011. PW36 Naseeb Chand is Nambardar of village Ajampur. On 17.5.2011 in his presence and in the presence of Harket Singh appellant Gaurav Rana had made disclosure statement that on 26.4.2011 in the area of Himachal Pradesh in lower Bathri, he alongwith appellant Rajesh had inflicted injuries on pedestrian and snatched Rs.400/- and mobile and thereby, they had murdered one woman at village, Bathri and taken away Rs.2500/-. Copy of disclosure statement is Ex.PW24/E. Appellant Gaurav had also made disclosure statement that he had kept kritch and Rs. 2500/- in his house and accordingly, led the police party to his house and got recovered currency notes and kritch from the trunk which were taken in possession vide memo Ex.PW24/F. As per his version, copy of sketch of kritch is Ex.PW24/D. During cross-examination, he has stated that signatures of appellants were not taken in his presence. He has denied that no disclosure statement had been made by appellant Gaurav in his presence nor any recovery had been effected.

46. PW37 Balbir Singh has stated that on 21.5.2011 he remained associated with the police in this case and nothing was recovered in his presence at the instance of appellants. He was declared hostile and during cross-examination by learned P.P. he has admitted that on 21.5.2011 he and HC Sanjay had joined investigation but has denied that appellant Rajesh had taken the police party to his house and recovery of lower and T-shirt had been effected. He has admitted that seal sample Ex.PW20/B bore his signatures.

47. PW38 Navjeet is Nodal Officer, AIR Cell, Shimla. On 12.5.2011 on the request of Superintendent of Police, Una, he had provided call details of mobile No. 98035-91723 bearing IMEI No. 351529041336850 through e-mail to Superintendent of Police, Una copy of which is Ex.PW38/B and call details are Ex.PW38/B and IMEI No. is encircled red in Ex.PW38/B. During

cross-examination, he has stated that as per record, mobile No. 9803591723 belongs to Amrit Pal Singh son of Ram Lal.

48. PW40 HC Balbir Chand of P.S. Nurpur Bedi has stated that on 5.6.2011 on the directions of learned SDJM, Anandpur Sahib, he had produced one parcel containing kritch sealed with seal DS and motorcycle pulsar without number to SHO, Shakti Singh of P.S. Haroli which had been taken in possession vide memo Ex.PW24/A and memo bears his signatures as producer. He has brought original Malkhana register and Ex.PW24/C abstract of Malkhana register is correct as per original record. During cross-examination, he has denied that articles mentioned by him in examination-in-chief were not in his possession and he had not produced kritch and motorcycle to SHO, P.S. Haroli.

49. HC Balbir Singh (PW41) of P.P. Daulatpur has stated that on 23.5.2011 he had gone to Garhshankar alongwith SHO Mukesh Kumar had produced Rs. 1000/- who is working as waiter in hotel Oasis and currency notes had been put in an envelope and taken in possession vide memo Ex.PW16A. He had translated memos Ex.PW24/E, Ex.PW24/F, Ex.PW24/A which were in Punjabi and translation of the same is Ex.PW41/A to Ex.PW41/C which is true version of memos which are in Punjabi.

50. PW42 is C. Rajesh Kumar and he has proved rapats Ex.PW42/A to Ex.PW42/C from the original record and as per him, rapat Nos. PW42/A to Ex.PW42/C had been entered at the instance of SI Shakti Singh. During cross-examination, he has denied that rapats had been written later on.

51. PW43 is Megha Kanwar, Criminal Ahlmad of Court of learned JMIC-I, Una and she had produced challan pertaining to FIR No. 91/2011 of P.S. Haroli.

52. PW44 ASI Prem Lal is I.O. of P.S. Haroli and he had conducted investigation in case FIR No. 91/2011 dated 27.4.2011 registered under Section 392, 323, 326 read with 34 IPC. Information of murder at Bathri had been received and accordingly, rapat Ex.PW17/A had been entered which is lying in case file No. RBT-22-11-12/11 of the Court of learned JMIC-I, Una. He alongwith SI Shakti Singh, PSI Nishant, ASI Ashok Kumar and other police officials had visited the spot. He had received information that two boys were also assaulted by the appellants at Bathu village and he accordingly alongwith C. Ashok Kumar had been deputed to verify the facts at Bathu. He had recorded statement of Rajnish son of Prakaram Singh Ex.Pw1/A lying in the file of lower court and statement had been sent to P.S., Haroli through C. Ashok Kumar on the basis of which case had been registered against the appellants. He recorded statements of the witnesses and procured production warrants of the appellants on 23.5.2011 and they had produced the appellants before learned JMIC, Court No. 2, Una on 25.5.2011. During police custody, appellants had identified the place of occurrence and injured. During cross-examination, he has admitted that no investigation in case FIR No. 90/2011 had been conducted by him. He has denied that in case No. 91/2011 false investigation had been conducted by him.

53 PW45 HC Shakti Nandan on 14.9.2011 had received kritch sealed with seal of FSL, Junga from C. Yash Pal in P.S. Haroli and entered the same at Sl. No. 608/2011 of Malkhana register. Kritch had been given to SHO on 19.9.2011 for taking opinion of the doctor and on the same day, kritch bearing Una mortuary seal had been received by him alongwith sample seal from the SHO. On 22.9.2011 parcel of kritch had been sent through C.Jagtar to P.S. Nurpur Bedi and entry to this effect had been made at Sl. No. 608/2011.

54. PW46 C. Yash Pal on 12.9.2011 had gone to FSL, Junga for collecting result of case FIR No. 90/2011 and had brought kritch alongwith FSL report and deposited the same with MHC. The parcel was bearing FSL seals.

55. PW47 Devinder Verma is Nodal Officer of Bharti Airtel, Kasumpati, Shimla. He has stated that on the request of police he had emailed billing address of Mobile No. 98160-63345, copy of which is Ex.PW47/A. During cross-examination, he has stated that sim No. 98160-63345 had been issued in the name of Rekha Devi.

56. PW48 SI Shakti Singh Pathania is an Investigating Officer, who conducted investigation in this case. He stated that on 26.4.2011 at about 11:20 p.m. Pardhan, Gram Panchayat, Bathri telephonically informed at Police Station, Haroli that at Bathri bus stand in a tea stall two persons had stabbed woman in the shop and fled away towards Punjab on motorcycle. Regarding this rapat No. 37-A Ex.PW42/A had been entered. He thereafter alongwith PSI Nishant Sharma, ASI Ashok Kumar, ASI Prem Lal, C. Ashok Kumar, C. Deep Kumar and HHG Piare Lal proceeded to the spot in a government vehicle. On reaching spot, a dead body of woman, namely, Swarna Devi lying on wooden bench (takhtposh) and other local people were present there. The dead body was stained with blood and there were injuries on the stomach, arm and other parts of the body. During this period, he received one more information that at village Bathri two persons who were riding motorcycle had inflicted injuries to one person and snatched his money and mobile etc. and fled away. On this information, ASI Prem Lal alongwith C.Ashok Kumar were deputed to visit the spot to verify the facts. Thereafter, PW1 Chaman Lal got recorded his statement Ex.PW1/A under Section 154 Cr.P.C. On the basis of a statement, he prepared a Rukka and sent the same to the Police Station, Haroli through C. Deepak Kumar, on the basis of which FIR Ex.PW33/A under Sections 392, 302 read with Section 34 IPC had been registered. In the meanwhile, photographer HC Ashok Kumar and LHC Ramana reached on the spot and videography of this spot was conducted and CD Ex.P.22 was prepared, which was handed over to him after sealing the same with three seals of impression R. Specimen of impression was taken on separate piece of cloth Ex.PW48/A. The site plan Ex.PW48/B of the spot as per identification of complainant and witnesses was prepared. Dead body of the deceased was examined through LHC Ramana and local lady/witnesses and filled up form 25:35 A & B and form 25:39 (inquest report) Ex.PW4/A, which was signed by Chaman Lal and Balbir Singh. He then prepared application Ex.PW25/A for the postmortem of deceased Swarna Devi and sent the dead body alongwith inquest report and connected documents through ASI Ashok Kumar and LHC Ramana Devi to R.H., Una. After postmortem ASI Ashok Kumar handed over the report Ex.PW29/A to him. One ball pen, coin of 50 paise, currency note of Rs.10/- and blood stained leaves were found on the spot which were put in a plastic container and sealed with three seals of seal impression P and taken into possession vide memo Ex.PW2/A. The control sample of concrete was lifted from the spot and put in a plastic container and seal with three seals of seal impression P and was taken into possession vide memo Ex.PW2/B. Thereafter the blood was also lifted from inside the shop and verandah with the help of cotton bandage and put in a plastic container which was put in a cloth parcel and sealed with three seals of impression P and taken into possession vide memo Ex.PW2/C. Wooden box lying inside the shop, which was stated to be containing Rs. 2000/- to Rs.2500/- was checked and one currency note was found of Rs.20/-, one note of Rs.5/- and coins, total amount Rs. 123.50 and remaining amount had been allegedly taken away by the appellants. This amount was put in same wooden cash box and sealed with seal impression of P and taken into possession vide memo Ex.PW2/D. Specimen seal was taken on a piece of cloth Ex.PW2/F. Vide said memos, parcel and sample seals were signed by the witnesses, namely, Satish Kumar and Sansar Chand and the seal after use was handed over to PW Satish Kumar. The statements of PWs were also recorded and after conducting the investigation on the spot as well as in the area. He came back to the police station. Case property was handed over to MHC. The mobile phone, which was stated to be snatched by the appellants in case FIR No. 91/2011 was put on observation for tracking the location of mobile No. 98160-63345. On 12.5.2011, the mobile location was found in village Samundra, District Hoshiarpur in Aircel Sim No. 98035-91723, which was found to have been issued in the name of Amrit Pal, resident of Chack Guru, District Hoshiarpur. Regarding the investigation of this fact, a team comprising of police officials HC Naresh and HC Sanjay was sent to village Samundra and during investigation, it was revealed that the mobile phone being used for Sim No. 98035-91723 had been purchased by Amrit Pal from the repair shop. However, he again stated that he purchased the above said mobile from appellant Gaurav Rana, which has been taken into possession in case FIR No. 91/2011. During investigation, it was also found that appellants Gaurav and Rajesh were in judicial lock-up in Punjab. Production warrants of the accused were obtained from the Court and on 19.5.2011 both the appellants were arrested and produced before the Court on 20.5.2011 and their police

remand was obtained. On 20.5.2011, while in police custody, the appellant Rajesh made disclosure statement Ex.PW14/A, whereas appellant Gaurav made disclosure statement Ex.PW14/B in the present of witnesses Jaswant Singh and C. Ram Gopal and also on 21.5.2011 appellant Gaurav Rana got recovered Capri (short pant) and T-shirt from his house at Samundra, which were packed in a parcel of cloth and parcel was sealed with three seals of J and sample of specimen J Ex.PW15/B was retained on a piece of cloth and seal after use was handed over to witness Vijay Singh and these articles were taken into possession vide memo Ex.PW15/A. On the same day, at village Dhamai accused Rajesh got recovered from his house a lower (pajama) of blue colour and T-shirt and specimen of seal Ex.PW20/B was retained on a piece of cloth and taken into possession vide memo Ex.PW20/A. Seal after use was handed over to the witness Balbir Singh. The witnesses had also put their signatures on the memo. After investigation, the case property was handed over to MHC. On 22.5.2011, medical examination of both the appellants were conducted and the blood on FTA card was taken and two FTA cards, two envelopes were handed over to MHC. On 23.5.2011, at hotel Oasis in Punjab near Garhshankar, Rs.1000/-, which the appellants had given to waiter Mukesh were recovered and taken into possession vide memo Ex.PW16/A in the presence of witnesses. On 31.5.2011, application was moved to SDJM, Anandpur Sahib for taking case property in custody. On 5.6.2011, MHC Nurpur Bedi handed over motor cycle without number (Pulsar), one kritch sealed with seal impression DS, photocopy of register No. 19, which had been taken into possession vide memo Ex.PW24/A. On the same day, in P.P. Kalma, ASI Darshan Singh produced copy of Zimini order dated 17.5.2011, photocopy of sketch of kritch, photocopy of disclosure statement, photocopies of recovery memo of motorcycle, kritch, photocopies of MLC of both the accused which were taken into possession vide memo Ex. PW24/B in the presence of the witnesses. Earlier to this, on 21.5.2011, both the accused had led the police party to the places of occurrence and they identified the place where they had committed the crime and memo Ex.PW4/B as per disclosure statements had been prepared. Statements of the witnesses were recorded as per their version. Photocopy of FIR No. 91/2011 is Ex.PW48/C, application for medical is Ext. PW48/D, MLC of Jarnail Singh is Ext.PW48/D and call detail is Ex.PW48/F. Statements of witnesses Satish, Vijay and Balbir Ex.PW48/G to I, were recorded under Section 161 Cr.P.C., as per their version and nothing had been added or omitted from the statements. On receiving FSL report Ex. PW48/J to L, the challan was prepared by him and presented in the Court. Prior to this on 19.9.2011 weapon had been shown to M.O. concerned for taking his opinion and final opinion of doctor had been taken. The supplementary challan had been prepared by SI Baldev Ram. He had seen kritch Ex.K1 and case property Ex.P1 to P34, which were same. He further testified that both the appellants in the case were present in the Court on that date. In cross-examination, he had admitted that near the alleged place of occurrence, there is abadi and shops and towards the north west in front there is a Panchayat ghar and passage go in front of the panchayat ghar as well as in the back side of the Panchayat ghar. He also admitted that in the night, shops were closed, however, self stated that the alleged shop was open and one khokha was also open. He stated that the phone had been received at 11:20 p.m. was of Pardhan and he could not tell the name of the Pardhan. He voluntarily stated that rapat No. 37 has been entered on the basis of such information. Dead body of Swarna Devi was lying at taktposh in the verandah of the shop which had been placed by the husband and other relatives of the deceased. He had recorded the statements of persons about the identification of the assailants. He denied the suggestion that the currency note and other articles had not been sealed on the spot and such seal had not been handed over to anyone. He further denied that the statement of Chaman Lal, Rajinder Kaur, Jaswinder Singh were recorded lateron to give correct shape to the occurrence. He further denied that Mobile No. 98160-63345 is common and voluntarily stated that the phone was identified on the basis of IMEI number. He denied that the appellants had not made any disclosure statements or that the same had been recorded by using pressure on them. He stated that he had visited Samundra and Dhamai alongwith appellants and witnesses and had gone there in government vehicle as well as in private vehicle though he does not remember the number of such vehicle. He could not recollect the name of the witnesses who claimed that he had offered his personal search to the witnesses. He denied that Capri and T-shirt had not been recovered and also suggests that

the appellants Gaurav Rana had not got effected recovery of Capri and T-shirt. Similar, suggestions regarding Pajama and T-shirt by appellant Rajesh was denied and it is also denied that no parcel had been prepared at the spot and sealed. It is further denied that recovery memo Ex.PW16/A had been prepared falsely. It was also denied that no identification of the place of occurrence had been made by the appellant and that he had recorded the statement of the witnesses at his own. Lastly, it was denied that since the accused had been arrested in Punjab, therefore, they had been falsely implicated in the present case.

57. PW49 ASI Darshan Singh deposed that he had remained posted as at In-charge, P.P. Kalman, Police Station Nurpur Bedi from 2010-2011 and on 26.4.2011 had received file for investigation in case FIR No. 34/2011, registered under Section 394 IPC at Police Station Nurpur Bedi. Both the appellants were arrested by SHO on 26.5.2011 and on 17.5.2011 file had been handed over to him. That the accused had been interrogated on 18.5.2011 when appellant Gaurav Rana made disclosure statement Ex.PW24/E about the injuries inflicted to a person at Bathri with kritch and snatched a mobile and currency notes of Rs. 400/- on 26.4.2011 and murdered a lady at Bathri in shop with kritch and snatched Rs. 2500/- from the cash box in the same night. The statement had been given in the presence of witness Karam Chand, Lambardar and Harket Singh and HC Surjeet Singh. On 17.5.2011, the appellant Gaurav Rana had got recovered kritch and currency notes of Rs. 20,600/- from his house and on the basis of the statement appellant Rajesh, currency notes of Rs. 19,400/- alongwith mobile phone had been recovered from his house at village Dhamai, Police Station Nawansahar. The motorcycle used in the commission of the crime, which was without number had also been recovered from traffic staff Nawansahar. On 5.6.2011, he handed over the photocopies of memos Ex.PW24/e, PW24/F, PW24/G, PW24/H, PW24/I and sketch of kritch Ex.PW24/D to SHO, P.S. Haroli, which had been taken into possession vide memo Ex.PW24/B, which was duly signed by him. After seeing the kritch, Ex.K1, he claimed that he had deposited the same with MHC. In cross-examination, he denied the suggestions that the accused had not given any statement that he had procured their signatures on various memos by pressurizing them. He further denied that no witness was present on the spot or no recovery was effected at the instance of the appellants. He claimed to have gone to the village of the accused in government vehicle and its No. PB-12L-5231, the kritch was sealed with seal DS. He denied that the memo had been prepared in the police post and clarified that though he had called the local witnesses of the villages of appellants but nobody had turned up.

58. Learned Court thereafter recorded the statement of accused under Section 313 Cr.P.C. and thereafter examined one witness Varinder Singh DW1 who had stated that he was an agriculturist and for this purpose he kept tractor and threshing machine. In 2011, he had started threshing work of wheat from 15th April and work remained in progress for about one month. The appellants were known to him and had been engaged for threshing of wheat and this work remained in force continuously for 24 hours. The appellants had worked with him continuously for a period of one month for threshing of the wheat and they never remained absent during that period and they had also not availed any leave during that period. In cross-examination, he admitted that he did know the name of the father of accused Gaurav. He admitted that the labour take rest.. He further denied that threshing work start late in Himachal. He further denied that in the year, 2011, the threshing work had started late. He feigned ignorance that appellants had stabbed one boy on 26.4.2011. Similarly, he feigned ignorance about the accused having stabbed one lady in the same night at around 10:00 p.m. and snatching money from the owner of the shop at Bathri. He voluntarily stated that the appellants were with him on that day for threshing the wheat. He did not know that the appellants had been arrested by the Punjab Police on 27.4.2011 and recovery had been effected at their instance.

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

59. Having dealt with the evidence led on record by the parties, its now time to consider and evaluate the arguments of either side. As observed earlier learned counsel for the

appellants have vehemently argued that the instant case is a classical example, which is bereft of any evidence to connect the appellants with the alleged crime. PW1, PW3, PW5 and PW-39 are the close relatives of the deceased whereas no independent witness has been examined in this case.

60. Before proceeding to consider the submissions made by the appellants, it has to be remembered that the cardinal principal of criminal jurisprudence is that guilt of the accused must be proved beyond reasonable doubts. However, the burden on the prosecution is only to establish his case beyond reasonable doubt and not all doubts. In this context, it is apt to reproduce the following observations made by Hon'ble Supreme Court in State of ***U.P. vs. Krishna Gopal and Anr, 1988 4 SCC 302:***-

> "25. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.
>
> 26. The concept of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately on the trained intutions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice."

61. It is clearly settled that the rule regarding the benefit of doubt does not warrant acquittal of accused by resorting to surmises, conjectures and fanciful considerations as held by Hon'ble Supreme Court in ***State of Punjab*** *Vs**. Jagir Singh, 1974 3 SCC 277***.

62. Earlier to that, Hon'ble Supreme Court in ***Shivaji Sahebrao Bobade & Anr.*** Vs. ***State of Maharashtra, 1973 2 SCC 793*** had observed that excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma and only reasonable doubts belong to the accused. It is apt to reproduce the following observations:-

> "The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community."

63. As regards the contentions of the appellants that the prosecution has only examined the interested witnesses, who were none other than the close relatives of the deceased, identical contentions have been considered by the Hon'ble Supreme Court in Criminal Case No. 1482 of 2013, ***Yogesh Singh*** Vs. ***Mahabeer Singh & Ors***., decided on 20.10.2016 wherein the Hon'ble Supreme Court observed as under:-

"24. On the issue of appreciation of evidence of interested witnesses, Dalip Singh vs. State of Punjab, 1953 AIR (SC) 364, is one of the earliest cases on the point. In that case, it was held as follows:-

> "A Witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the

witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge alongwith the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

25. Similarly, in Piara Singh and Ors. Vs. State of Punjab, 1977 AIR (SC) 2274, this Court held:-

"It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is not bar in the Court relying on the said evidence."

26. In Hari Obula Reddy and Ors. Vs. The State of Andhra Pradesh, 1981 3 SCC 675, a three-judge Bench of this Court observed:

"..It is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subject to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, if may, by itself, be sufficient, in the circumstances of the further case, to base a conviction thereon."

27. Again, in Ramashish Rai Vs. Jagdish Singh, (2005) 10 SCC 498, the following observations were made by this Court:

"The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

28. A survey of the judicial pronouncements of this Court on this point leads to the inescapable conclusion that the evidence of a closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Gangabhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52).

64. In view of the ratio of judgments laid in Yogesh Sing's case (supra), this court is only required to carefully scrutinise and appreciate the evidence of closely related witnesses before arriving at any conclusion. However, evidence cannot be disbelieved on the ground that these witnesses are related to each other or to the deceased and evidence has a ring of truth to it is cogent, credible and trustworthy.

65. If the testimony of these witnesses i.e. PW1, PW3, PW5 and PW39, which has been reproduced in extenso above, is gone through, the presence of the appellants at the spot has clearly been established and they have been so identified by these witnesses. Moreover, the prosecution is not bound to produce all the witnesses said to have seen the occurrence. The material witnesses necessary by the prosecution unfolding the prosecution story alone need to be produced without any un-necessary and redundant multiplication of the witnesses and in this connection general reluctance of average villager to appear as witness and get himself involved has also to be considered. In this background, it shall be worthwhile to reproduce the following observations of the Hon'ble Supreme Court in ***Appabhai and Anr***. Vs. ***State of Gujarat***, 1988 Supp1 SCC 241:-

> "52. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. hey keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The Court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused."

66. The learned counsel for the appellants then contended that in absence of identification parade the appellants could not have been convicted and in support of such contentions, has placed reliance on following judgments:-

1. ***Lakhwinder Singh and Ors***. Vs. ***State of Punjab***, AIR 2003 Supreme Court 2577;
2. ***Ravi alias Ravichandran*** vs. ***State represented by Inspector of Police***, (2007) 15 Supreme Court Cases 372
3. ***OMA @ Omparkash & Anr***. Vs. ***State of Tamil Nadu***, 2013 (3) SCC 440
4. ***Motilal Yadav*** Vs. ***State of Bihar*** (2015) 2 SCC 647

67. In **Lakhwinder Singh and Ors.** *Vs.* **State of Punjab AIR 2003 Supreme Court 2577**, Hon'ble Supreme Court held that on the basis of the facts of that case observed that since the assailants were not known to the witness by name, therefore, there was no reason why the test of identification parade was not held and this was a serious lacuna in the case of the prosecution. It is apt to reproduced para 36, which reads thus:-

> "36. It is not in dispute that one the date of occurrence i.e. 24th December, 1996 the informant PW.14 did not know the names of any of the gunmen who had taken part in the assault. Similarly, PW.15 also did not know the names of the gunmen of Ranjit Singh and his father. Admittedly PW.14 came to know of their names 3-4 days later. We have earlier noticed that despite the fact that they did not know the names of any of the gunmen, the name of Paramjit Singh finds place in the first information report as well as in the marginal notes of the site plan, both prepared at the instance of PW.14. That apart, since the assailants were not known to this witness by name, there appears to be no reason why a test identification parade was not held. It is not in dispute that no test identification parade was held to identify the assailants and this also is a serious lacuna in the case of the prosecution. "

68. In ***Ravi alias Ravichandran*** vs. ***State represented by Inspector of Police***, (2007) 15 Supreme Court Cases 372, the Hon'ble Supreme Court held that the substantive evidence of identification parade is the one made in the Court and judgment of conviction can be

arrived at even if no test identification parade has been held. But when first information report has been lodged against unknown persons, a test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing veracity of the witness in regard to his capability of identifying the persons who were unknown to him. It is apt to reproduce the relevant observations, which read thus:-

> "18. It is no doubt true that the substantive evidence of identification of an accused is the one made in the court. A judgment of conviction can be arrived at even if no test identification parade has been held. But when a first information report has been lodged against unknown persons, a test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him. The witnesses were not only sure as to whether they had seen the appellant before. Had the accused been known, their identity would have been disclosed in the first information report. PW1 for the first time before the Court stated that he had known the accused from long before, but did not know their names earlier, although he came to know of their names at a later point of time.
>
> 19. In case of this nature, it was incumbent upon the prosecution to arrange a test identification parade. Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the witnesses concerned or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification."

69. In **OMA @ Omparkash & Anr.** Vs. **State of Tamil Nadu, 2013 (3) SCC 440,** it was observed by Hon'ble Supreme Court that where the witness did not know the accused earlier, the accused could be identified through test identification parade, which had not been done in case of one of the accused, it is apt to reproduce the following observations:-

> "30. We may indicate that in the instant case, FIR was registered against unknown persons. A2, as already stated, was arrested after ten years on 26.02.2005 in connection with some other crime. We fail to see how PW1 and PW2 could identify A2 in the court at this distance of time. They were guided by the photographs repeatedly shown by the police.
>
> 31. Evidently, the witnesses did not know the accused earlier, hence the accused could be identified only through a test identification parade which was not done in this case, so far as A-2 is concerned. In this connection we may refer to the judgment of this court in Mohd. Iqbal M. Shaikh vs. State of Maharashtra (1998 4 SCC 494 wherein this Court held that"
>
> > "If the witness did not know the accused person by name but could only identify from their appearance then a test identification parade was necessary, so that, the substantive evidence in court about the identification, which is held after fairly a long period could get corroboration from the identification parade. But unfortunately the prosecution did not take any steps in that regard."

70. In ***Motilal Yadav*** Vs. ***State of Bihar***, (2015) 2 SCC 647, which is heavily relied upon by the learned Counsel for the petitioner held otherwise as would be evident from paras 10 to 14 of the judgment, which reads thus:-

> "10.Another argument advanced before us is that no test identification parade in the present case was held, as such, the conviction and sentence, recorded by the trial court, has been wrongly upheld by the High Court. In this connection, our attention is drawn to the case of Kanan and others v. State of Kerala[5]. In said case, this Court has opined that failure to conduct test

identification parade raises serious doubt about the testimony of the witnesses. On going through said case, we find that this Court doubted evidence of a particular witness (PW-25 of said case) who told the Court that he could identify the accused persons (not known to him) who were running away from the scene of occurrence. Contrary to that, in the present case the testimony of PW-3 Sourav Kumar is natural as he explained in what manner he reached Haldwani, and he had enough time to identify the accused who accompanied him to the persons who took money from him whereafter the victim was released.

11.The evidence as to the identity of a person is admissible under Section 9 of the Indian Evidence Act, 1872. In the case of Ravi Kumar v. State of Rajasthan[6], this Court has opined in paragraph 35 as follows: -

"35.... The court identification itself is a good identification in the eye of the law. It is not always necessary that it must be preceded by the test identification parade. It will always depend upon the facts and circumstances of a given case. In one case, it may not even be necessary to hold the test identification parade while in the other, it may be essential to do so. Thus, no straitjacket formula can be stated in this regard."

12. In the case of R. Shaji v. State of Kerala[7], regarding the evidential value of the test identification parade, this Court has stated in paragraph 58 as under: -

".... The identification parade is conducted by the police. The actual evidence regarding identification is that which is given by the witness in court. A test identification parade cannot be claimed by an accused as a matter of right. Mere identification of an accused in a test identification parade is only a circumstance corroborative of the identification of the accused in court. "

13. In Ashok Debbarma alias Achak Debbarma v. State of Tripura[8], this Court has made following observations in para 20 which are reproduced below: -

"20..... The primary object of the test identification parade is to enable the witnesses to identify the persons involved in the commission of offence(s) if the offenders are not personally known to the witnesses. The whole object behind the test identification parade is really to find whether or not the suspect is the real offender. In Kanta Prasad v. Delhi Admn.[9], this Court stated that the failure to hold the test identification parade does not make the evidence of identification at the trial inadmissible. ...."

14. In view of the above principle of law laid down by this Court, we are unable to accept the submission of learned amicus curiae that not holding of test identification parade in the present case is fatal for the prosecution."

71. On the basis of aforesaid conspectuous of law, it can be conveniently held that the court identification is a good identification in the eyes of law and it is not always necessary that it must be proceeded by test identification parade. This would always depend upon the facts and circumstances of the given case. In one case, it may not necessary to hold the test identification parade while in the other it may be essential to do so. Thus, no strait jacket formula can be stated in this regard, after all the actual evidence regarding identification is that which is given by the witnesses in court and moreover a test identification parade cannot be claimed by an accused as a matter of right. Mere identification of accused in a test identification parade is only a circumstance corroborative of the identification of the accused in court. The primarily object of test identification parade is to enable the witnesses to identify the persons involved in the commission of offence(s) if the offenders are not personally known to the witnesses. The whole object behind the test identification parade is really to find whether or not the suspect(s) is / are the real offender(s). Moreover, the failure to hold the test identification parade per se does not make the evidence of identification at the trial inadmissible.

72. As observed earlier, PW1, PW3, PW5 and PW39 have identified the accused not only by their physical frame but also on the basis of clothes worn by them, which have been recovered on the basis of their disclosure statements and such recovery have been duly proved on record. Even if, the identification parade is not conducted, the same can only be a lapse in investigation. It is then required to be examined as to whether due to such lapse any benefit should be given to the accused. The law on the subject is well settled that the defective investigation itself cannot be a ground for acquittal. Here it shall be apt to reproduce the observations made by Hon'ble Supreme Court in ***C.Muniappan and Others Vs. State of Tamil Nadu, 2010 9 SCC 567***, which read thus:

> "30.There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."

73. It is thereafter argued by the appellants that PW5 is a minor, who is an interested witness and has made marked improvements in his statement before the court. How the testimony of a child witness is to be appreciated has again been considered by the Hon'ble Supreme Court in ***Yogesh Singh's case (supra)***, wherein it was held as under:-

> "22. It is well-settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law. (See Prakash Vs. State of M.P., (1992) 4 SCC 225; Baby Kandayanathi Vs. State of Kerala, 1993 Supp (3) SCC 667; Raja Ram Yadav Vs. State of Bihar, (1996) 9 SCC 287; Dattu Ramrao Sakhare Vs. State of Maharashtra, (1997) 5 SCC 341; State of U.P. Vs. Ashok Dixit & Anr., 2000) 3 SCC 70; Suryanarayana Vs. State Of Karnataka, (2001) 9 SCC 29).
>
> 23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is a found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. [Vide Panchhi Vs. State of U.P., (1998) 7 SCC 177]."

74. Adverting to the testimony of PW5, it would be noticed that he has not only established the presence of the appellants at the spot but has also narrated in detail the sequence of events how the taller appellant went inside the shop while other remained outside the shop and how thereafter the taller appellant stabbed Swarna Devi with some sharp edged object while she was giving the balance amount to the appellant who had purchased a Soda bottle from her. He also described in detail how both the appellants had fled away from the spot and how Smt. Swarna Devi ultimately succumbed to the injuries. He has identified the motor cycle, which was without number and being an eye-witness his testimony cannot be easily discarded as this witness has withstood the test of cross-examination.

75. The so-called improvement only relates to the purchase of Soda bottle which did not find mention in the statement given to the police and also with regard to beating being given to Swarna Devi prior to her being stabbed.

76. The learned counsel for the appellants then argued that there are number of contradictions, embezzlement and improvement and therefore the prosecution must fail.

77. As regards the so-called discrepancies in evidence, the legal position has been long settled that minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness and whether the same inspire confidence in the mind of the Court.

78. The legal position has been scantly summed up by the Hon'ble Supreme Court in Yogesh Singh's case (supra), wherein it was held as under:-

> "29. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission. (See Rammi @ Rameshwar Vs. State of M.P., (1999) 8 SCC 649; Leela Ram (dead) through Duli Chand Vs. State of Haryana and Another, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors., (2004) 9 SCC 186; Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of West Bengal, (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796)."

79. In the present case, we do not find any major contradiction in the evidence of the witnesses, which may tilt the balance in favour of the appellants. The minor improvement and embezzlement etc. apart from being far yielded of human faculties are insignificant and to be ignored since the evidence of the witnesses otherwise overwhelmly corroborate each other in material particulars.

80. It is established on record that prior to committing the murder of Swarna Devi, the appellants had given beating to PW6 Jarnail Singh at lower Bathri and had also snatched mobile having sim No. 98160-63345 and Rs.400/- from him and he duly identified the appellants in the court. This mobile phone was then sold by appellant Gaurav Rana to PW10 Amrit Pal at village Samundra, who had further sold the same to Jagtar Singh PW21 for Rs. 400/-. The appellants had been arrested by the Punjab Police on 16.5.2011 in case FIR No. 34/11, registered under Section 394, 34 IPC, P.S. Nurpur Bedi. The investigation had been conducted by ASI Darshan Singh PW49. Appellants had made disclosure statement Ex.PW24/E and had disclosed that they had committed the murder of lady at village Bathri and snatched currency notes. No doubt, much reliance cannot be placed on such statement as the same is hit by Section 26 of the Evidence Act, however, the recovery of the kirtch, currency notes of Rs. 20,600/- and Rs.19,400/- with mobile on the basis of the statement, cannot be discarded. More particularly, when there is no iota of evidence to suggest that the prosecution witness had any enmity with the appellants or for any other reason wanted to involve them in a false case.

81. Learned counsel for the appellants would then argue that once the prosecution has miserably failed to prove the motive behind the murder, the conviction of the appellants cannot be sustained.

82. It is a settled legal proposition that even any absence of motive, as alleged, is accepted, that is of no significance and pales into insignificance when direct evidence establishes the crime. Therefore, in case, there is direct trustworthy evidence of witnesses as to the commission of offence, motive losses it significance.

83. Here again it shall be apt to reproduce the following observation made by Hon'ble Supreme Court in Yogesh Singh's case (supra):-

> " 46. It has next been contended by the learned counsel for the respondents that there was no immediate motive with the respondents to commit the murder of the deceased. However, the Trial Court found that there was sufficient motive with the accused persons to commit the murder of the deceased since the deceased had defeated accused Harcharan in the Pradhan elections, thus putting an end to his position as Pradhan for the last 28-30 years. The long nursed feeling of hatred and the simmering enmity between the family of the deceased and the accused persons most likely manifested itself in the outburst of anger resulting in the murder of the deceased. We are not required to express any opinion on this point in the light of the evidence adduced by the direct witnesses to the incident. It is a settled legal proposition that even if the absence of motive, as alleged, is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, motive loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. [Hari Shankar Vs. State of U.P., (1996) 9 SCC 40; Bikau Pandey & Ors. Vs. State of Bihar, (2003) 12 SCC 616; State of U.P. Vs. Kishanpal & Ors., (2008) 16 SCC 73; Abu Thakir & Ors. Vs. State of Tamil Nadu, (2010) 5 SCC 91 and Bipin Kumar Mondal Vs. State of West Bengal; (2010) 12 SCC 91]."

84. Learned counsel for the appellant have thereafter vehemently contended that the entire evidence of the prosecution is full of contradictions and discrepancies which creates a serious doubt about the truthfulness and credit worthiness of the witnesses, and therefore, the appellants could not have been convicted on the basis of such evidence.

85. As regards discrepancies, this issue has again been considered by the Hon'ble Supreme Court in ***Yogesh Singh's*** case (supra), and the legal position was summed up as under:-

> "29. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every

contradiction or omission. (See Rammi @ Rameshwar Vs. State of M.P., (1999) 8 SCC 649; Leela Ram (dead) through Duli Chand Vs. State of Haryana and Another, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors., (2004) 9 SCC 186; Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of West Bengal, (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796)."

86. The appellants have failed to point out any major contradictions though it is vehemently argued that PW1 in his examination-in-chief has stated that on checking of chest, he had found an amount of about Rs.2000/- -Rs.2500/- to be stolen, however, in his cross-examination, he had stated that he had kept his purse in the cash box. This fact had not been stated before the police in his statement Ex.PW1/A, and had only stated that he had not counted the remaining currency in cash box, which were found to be Rs.123/-.

87. We really do not find any discrepancies in the aforesaid statement as the statement regarding Rs.2000/- to Rs.2500/- is the one which pertains to the amount stolen by the appellants whereas the later part of the statement relates to the balance of Rs.123/-, and therefore, has no connection with the earlier part of the statement.

88. The appellants would then claim that there is major discrepancies with regard to the time of incident, as PW4 has stated that the incident took place at 10:30 p.m. whereas as per the police record, the incident took place at about 11:20 p.m. when the Pardhan, Gram Panchyat, Bathri informed the police.

89. We have considered this submission and find that the same is based upon complete mis-reading of the statements of PW4 and PW48. PW4 in his statement has categorically stated that on 26.4.2011 at about 10:30 p.m., he had heard noise of cries from the shop of Chaman Lal and thereafter reached the spot. As regards the testimony of PW48 Shakti Singh Pathania, who is an Investigating Officer. He has stated that on 26.4.2011 he had received a telephonic information about the incident at 11:20 p.m but nowhere has this witness stated that the incident itself took place at 11:20 p.m. It is obvious that when the incident took place people had assembled at the spot as otherwise stated by PW4 and it is after that, he informed the police and obviously the same would have taken some time.

90. That apart, the timing of the alleged occurrence is duly proved in the testimony of PW5 who categorically stated that the appellants came on a motorcycle at about 10:30 p.m. on 26.4.2011, when the committed the crime.

91. Learned counsel for the appellants would then contended that no reliance could be placed on the testimony of PW6, who in his cross-examination has categorically stated that the appellants were not got identified by the police and these were identified on the basis of photographs. We have gone through the statement of PW6 and find that the submissions made by the appellants is based upon mis-reading of the statement of PW6 who though has stated that the appellants were not got identified by the police but then he had identified them in the Court.

92. It is lastly contended that appellants' conviction cannot be sustained as it is based upon the testimony of PW14 who is a stalk witness whereas PW37, who is alleged to be an eye-witness to the recovery of the clothes worn by the appellant Rajesh, had turned hostile and had not supported the prosecution case.

93. Even this contention of the appellants cannot be accepted as there is nothing in the testimony of the statement of PW14 which may establish that he is stock witness rather this witness has clearly proved the disclosure statement of appellant Rajesh Singh PW14/A and of Gaurav Rana Ex/PW14/B. He has categorically denied that his village was 18 kilometers away from village Bathri. The mere fact that he has been frequently visiting the police station is of no consequence as he has explained the reason thereof. He being an ex Pardhan, obviously had good relations with the police, but that in any manner cannot be a reason to discard his testimony.

94. AS regards the statement of PW37 Balbir Singh, who is the ward panch of village Dhamai, Tehsil Garhshankar, no doubt he was declared hostile, however, in the cross-examination conducted by the Public Prosecutor, he clearly admitted that the sealed sample Ex. PW20/B bore his signature and also of HC Sanjay Kumar and accused. He further admitted that the parcel of clothes was taken into possession in his presence vide memo Ex.Pw20/A, which again bore his signature.

95. More importantly, he has categorically admitted that Banyan (T-shirt) Ex.P35 shown to him in the court was the same which had been sealed. That apart, the reason for this witness turning hostile was obvious because the appellant Rajesh Singh was his nephew.

96. In view of the aforesaid discussion, we find no reason to interfere with the judgment passed by the learned trial Court, which has correctly analyzed the material on record in the factual as well as legal perspective to arrive at its conclusion. Accordingly, there is no merit in this appeal, the same is accordingly dismissed and the judgment and order of conviction and sentence passed by the learned Sessions Judge is upheld.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO (MVA) No. 171 of 2012 and FAO No. 397 of 2012.
Judgment reserved on 28.10.2016.
Date of decision: 4th November, 2016.

1. FAO No. 171 of 2012.

ICICI Lombard General Insurance Co. Ltd. ......Appellant.

Versus

Smt. Satya Devi and others ....Respondents

2. **FAO No. 397 of 2012**.

Smt. Satya Devi and others ....Appellant.

Versus

Sh. Parkash Chand and another ....Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was a government employee and was drawing salary of Rs. 37,279/- - he was aged 57 years at the time of accident and was to retire within one year – compensation is to be assessed keeping in view this fact and that after retirement, he would be receiving pension and would be doing some part time job- 1/3rd was to be deducted towards personal expenses and the loss of dependency will be Rs. 25,000/- per month- multiplier of 7 is applicable out of which multiplier of 1 was to be applied on the salary and multiplier of 6 was to be applied on the pension- loss of dependency for one year will be 25,000/- x 12 x 1= Rs. 3,00,000/-- the deceased would have been receiving pension to the extent of 50% of the basic pay plus dearness allowance, which comes to Rs. 18,500/- - 1/3rd is to be deducted towards personal expenses and loss of dependency will be Rs. 12,500/- - claimants have lost source of dependency of Rs. 12,500/- X 12 X 6= Rs. 9,00,000/- - the deceased would have worked for sometime after getting part time job and the monthly income would not be less than Rs. 6,500/- per month- 1/3rd was to be deducted and the loss of dependency will be Rs. 4,500 x 12 x 6= Rs. 3,24,000/-, in addition to this, claimants are entitled to Rs. 10,000/- each under the heads loss of love and affection, loss of estate, funeral expenses and loss of consortium – thus, the claimants are entitled to Rs. 3,00,000/-+Rs. 9,00,000+ Rs. 3,24,000/- + Rs. 40,000/-.= Rs.15,64,000/-, with interest at the rate of 7.5%. (Para-16 to 26)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

T.T. Narayanan and another versus Mrs. P. Bridget and others II (1991) ACC 120 (DB)

For the appellant(s):	Mr.Jagdish Thakur, Advocate, for the appellant in FAO No. 171 of 2012 and Mr. Suneet Goel Advocate, for appellant in FAO No. 397 of 2012.
For the respondent(s):	Mr. Suneet Goel, Advocate, for respondents No. 1 to 3 in FAO No. 171 of 2012. Mr. Lovneesh Kanwar, Advocate, for respondent No. 4 in FAO No. 171 of 2012 and for respondent No.1 in FAO No. 397 of 2012. Mr. Jagdish Thakur, advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Both these appeals are outcome of judgment and award dated 15.2.2012, made by the Motor Accident Claims Tribunal Hamirpur, H.P., for short "the Tribunal", in MAC Petition No. 07 of 2010, titled *Satya Devi and others versus Shri Parkash Chand and another*, whereby compensation to the tune of Rs.19,90,000/- alongwith interest @ 7.5% came to be awarded in favour of the claimants and insurer was saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Feeling aggrieved, the claimants have questioned the impugned award by the medium of FAO No. 397 of 2012, on the ground of adequacy of compensation and the insurer has questioned the same by the medium of FAO No. 171 of 2012, on the grounds that the Tribunal has fallen in an error in saddling it with the liability and the amount awarded is excessive.

3. The owner-cum-driver has not questioned the impugned award on any ground. Thus, the same has attained the finality so far as it relates to him.

4. Both these appeals arise out of a common award thus; I deem it proper to determine both these appeals by this common judgment.

5. The claimants being the victims of a vehicular accident, filed claim petition before the Tribunal, for the grant of compensation to the tune of Rs.25,00,000/- as per the break-ups given in the claim petition on account of death of Shri Piar Chand who died in a motor vehicle accident on 3.1.2010. He was teacher by profession. He had gone to Ramehra alongwith Azad Singh and others to purchase household articles. It is averred that when they reached at place Simal-ka-Rihra, a Santro car bearing Registration No. HP-22-B-6667, being driven by respondent No. 1 Parkash Chand, came from the side of Ramehra in a very high speed due to which the driver could not control it, hit the deceased, who was on extreme left side of the road, as a result of which he fell down on the road, sustained the injures and succumbed to the same. FIR under Sections 279, 337 and 304-A of IPC was registered against driver Parkash Chand in police Station Bhoranj, District Hamirpur, H.P.

6. The claim petition was resisted by the respondents by filing the replies and following issues came to be framed by the Tribunal.

1. *Whether the death of Piar Chand was caused due to use/rash and negligent driving of Santro Car No. HP-22B-6667 by respondent No.1 as alleged? OPP*
2. *If Issue No.1 is proved in affirmative, whether the petitioners/claimants are entitled to compensation, if so, to what amount and from which of the respondents? OPP*
3. *Whether the petition is not maintainable as alleged? OPRs.*
4. *Whether the respondent No.1 was not holding a valid and effective driving licence to drive the vehicle in question at the relevant time, if so, its effect? OPR-2.*

5. Relief.

7. Claimants examined five witnesses, namely Jaswant Singh as PW1, Arun Katna as PW2, Uttam Singh as PW3, Ramesh Kumar as PW4 and Satya Devi claimant No. 1 herself stepped into the witness-box as PW5.

8. Respondents have examined three witnesses, namely, Vijay Kumar as RW2, Criminal Ahlmad of the Court of Judicial Magistrate 1st Class Court No. II Hamirpur as RW3 and respondent No. 1 Parkash Chand stepped into the witness-box as RW1.

9. The Tribunal, after scanning the evidence held that the driver had driven the offending vehicle rashly and negligently and caused the accident, in which Piar Chand sustained the injuries and succumbed to the same. The driver and insurer have not questioned the said findings. Thus, the same have attained the finality so far as the same relate to them. However, I have gone through the record. Claimants have proved that the driver had driven the offending vehicle rashly and negligently and caused the accident in which Piar Chand lost his life. Thus, the findings returned by the Tribunal on issue No. 1 are upheld.

10. Before I determine issue No.2, I deem it proper to determine issues No. 3 and 4.

Issue No.3.

11. The Tribunal has rightly decided issue No. 3 and the findings returned on this issue are not questioned by the insurer, are accordingly upheld.

Issue No. 4.

12. It was for the insurer to prove that the driver was not having a valid and effective driving licence, has failed to prove the said fact. The Tribunal has rightly decided this issue in favour of owner-cum-driver and against the insurer. The insurer, in fact, has not questioned the said findings. However, I have gone through the driving licence which does disclose that the driver was having a valid licence. Accordingly, findings returned on this issue are also upheld.

13. During the course of hearing on 21.10.2016, learned counsel for the appellant in FAO No. 171 of 2012 was asked to seek instructions to settle the claim by paying Rs.15,52,000/- with 7.5% interest from the date of filing the claim petition till its realization. He sought instructions and stated at the Bar that award be made accordingly. His statement was taken on record. Learned counsel for respondents/claimants No. 1 to 3 sought time to seek instructions and case was posted for 28.10.2016. It is apt to reproduce order dated 21.10.2016 herein.

> *"Learned counsel for the appellant in FAO No. 171 of 2012 was asked to seek instructions to satisfy the award in a lump sum of Rs.15,52,000/- with 7.5% interest from the date of filing the claim petition till its realization. He stated that the award be made accordingly. Mr. Suneet Goel, learned counsel for respondents No. 1 to 3, sought time to seek instructions. Granted. List on 28th October, 2016."*

14. On 28th October, 2016 Mr. Suneet Goel, learned counsel for the appellant in FAO No. 397 of 2012, stated that he has sought instructions and his clients were not ready to settle the claim. It is also apt to reproduce order dated 28th October, 2016 herein.

> *"Learned counsel for the appellant in FAO No. 397 of 2012 stated that he has sought instructions but his client is not ready to settle the claim in a lump sum of Rs.15,52,000/- as recorded in order dated 21.10.2016, as agreed by the insurer in FAO No. 171 of 2012. His statement is taken on record."*

15. Thus, the only dispute involved in these appeals is-whether the amount awarded is adequate or otherwise.

16. The entire controversy revolves around Issue No. 2. The deceased was a government employee and was drawing gross salary to the tune of Rs.37,279/- per month as per the LPC Ext. PW3/A, was 57 years of age at the time of the accident and had to retire at the age of 58 years. Keeping in view of the 2nd Schedule attached to the Motor Vehicles Act, 1988 for short "the Act", read with ***Sarla Verma and others versus Delhi Transport Corporation and***

another reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***.1/3rd was to be deducted towards his personal expenses. Thus, the source of pendency lost by the claimants comes to Rs.25,000/-, per month till the age of retirement, i.e., for one year only.

17. The compensation under the head 'loss of income' is to be assessed while keeping in view the fact that the deceased had to retire within one year and thereafter he would have been receiving pension and may be also doing some part time job.

18. In support of the aforesaid observations, reliance is placed on the judgment delivered by the Kerala High Court in case titled ***T.T. Narayanan and another versus Mrs. P. Bridget and others*** reported in ***II (1991) ACC 120 (DB).*** It is apt to reproduce para 3 of the said judgment herein.

> *"3. On the date of the occurrence and death deceased had 46 months more service left as headmaster. He was in a pensionable job and he would have drawn pension for fifteen years, namely, till he attains 70 years. The Tribunal computed pay and allowances due for 46 months and the pension due for 15 years and deducted 20% for personal expenses of the deceased and 10% for uncertainties of life and thus arrived at the compensation payable to the claimants. The only submission urged by learned Counsel for the appellants in this regard is that on account of premature death of U. Vincent, the amount of family pension for the period of 15 years has to be deducted from the amount awarded. This submission appears to be correct. Family would be entitled to maximum family pension of Rs. 150/- per month. Computing this for 15 years and deducting 30% the amount of family pension would be Rs. 18,900/-. This amount has to be deducted from Rs. 1,28,688/- awarded by the Tribunal. The correct quantum payable therefore would be Rs. 1,09,788/-."*

19. In view of the ***Sarla Verma's*** case supra, multiplier applicable is '7' and is applied accordingly.

20. It is worthwhile to record herein, at the cost of repetition that the deceased had to retire within one year and thereafter had to get pension. The Tribunal has fallen in an error in assessing the compensation. The assessment was to be made while keeping in view the gross salary of the deceased till the age of retirement, thereafter, pension payable and other income which he would have earned.

21. The multiplier '1' was applicable for assessing loss of dependency/income under the head 'gross salary' and multiplier '6' was applicable, i.e., (after deducting multiplier '1' out of multiplier '7') for assessing loss of dependency/income under the head 'pension and other income.'

22. The claimants have lost source of dependency and are entitled to compensation to the tune of Rs.25,000/-x12x1 =Rs.***3,00,000/-,*** under the head loss of income for one year as the deceased had to retire within one year from the date of accident.

23. The deceased would have been receiving pension to the tune of 50% of the basic pay plus dearness allowance which comes to Rs.18,500/- per month roughly. 1/3rd was to be deducted keeping in view the 2nd Schedule of the Act read with Sarla Verma's case supra, the source of dependency comes to Rs.12500/-. Thus, it can be safely held that the claimants have lost source of dependency to the tune of Rs.12500/-x12x6= ***Rs.9,00,000/-.***

24. The deceased would have worked for some period after retirement and would have been earning not less than Rs.6500/- per month by getting part time job and from other vocations. 1/3rd was to be deducted in view of the law referred to supra. Thus, it can be safely held that the claimants have also lost source of income roughly to the tune of Rs.4500x12x6= **Rs.3,24,000/-.**

25. In addition, the claimants are also held entitled to compensation under the four head as follows.

(i)	*Loss of love and affection:*		*Rs.10,000/-*
(ii)	*Loss of estate*	*:*	*Rs.10,000/-*
(iii)	*Funeral expenses*	*:*	*Rs.10,000/-*
(iv)	*Loss of consortium*	*:*	*Rs.10,000/-*
		Total	***Rs.40,000/-***

26. Thus, in all, the claimants are entitled to compensation to the tune of Rs.3,00,000/-+Rs.9,00,000+ Rs.3,24,000/- + Rs.40,000/-.= Rs.15,64,000/-, with interest at the rate of 7.5% as awarded by the Tribunal.

27. Accordingly, the appeal being FAO No. 171 of 2012, filed by the insurer is allowed, the impugned award is modified as indicated hereinabove and the appeal being FAO No. 397 of 2012 filed by the claimants for enhancement is dismissed.

28. Registry is directed to release the amount in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payees' cheque account or by depositing the same in their bank accounts and excess amount be released in favour of the insurer alongwith interest, through payees' cheque account, after proper verification.

29. Send down the record forthwith, after placing a copy of this judgment.

****

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

Kartara ....Appellant
Versus
Smt.Sinno Devi & Others ....Respondents

RSA No.75 of 2007
Judgment Reserved on: 09.09.2016
Date of decision: 04.11.2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit seeking declaration that the suit land is in possession of the plaintiff as tenant on the payment of the rent – he has become owner by operation of H.P. Tenancy and Land Reforms Act – he and his predecessor were never evicted – the entry in favour of the defendant is wrong – the civil suit was decreed by the Trial Court – an appeal was preferred, which was allowed- held in second appeal that predecessor-in-interest of the plaintiff was recorded but defendants No.1 , 2 to 4 have been recorded to be in possession as gairmaurusidoem while predecessor-in-interest of the plaintiff has been recorded as gairmaurusiavwal- the plaintiff admitted that entries were existing since 1979 – the suit was filed after 11 years – the witness of the plaintiff admitted that shops were constructed by the defendants – defendants proved that suit land is in their possession and they have constructed shops over the same- a road has also been constructed by PWD- the entries were changed during consolidation and correction was carried out as per the position on the spot- land is not under cultivation – no document was brought on record to show that the plaintiff was inducted as gairmaurusi tenant whereas, the defendants were able to prove that they were inducted as tenants over the suit land by the original owner- Trial Court had wrongly concluded that plaintiff is in possession of the suit land and entries were wrongly changed in favour of the defendants- on the other hand, the Appellate Court had rightly concluded that change in entries was in accordance with the procedure and the factual position at the spot – appeal dismissed.

(Para-13 to 32)

Case referred:
Durga (deceased) and Others vs. Milkhi Ram and Others, 1969 P.L.J. (SC), 105

For the Appellant: Mr.Ajay Sharma, Advocate,
For the Respondents: Mr.N.K. Thakur, Senior Advocate with Ms.Jamuna, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Instant Regular Second Appeal filed under Section 100 of the Code of Civil procedure, is directed against the judgment and decree dated 29.11.2006, passed by learned Additional District Judge, Fast Track Court Una, District Una, H.P., reversing the judgment and decree dated 20.9.2000, passed by learned Sub Judge Court No.II, Una, in Civil Suit No.215/1990.

2. The brief facts of the case, as emerged from the plaint, are that the appellant-plaintiff filed suit for declaration to the effect that the land measuring 2 kanal 10 marlas bearing khewat No.929, 480 min, khatauni No.851, 789, bearing khasra Nos. 3198(7511/3208 old), 3203 (9206/3207 old), situated in village Haroli, Sub-Tehsil Haroli, District Una, HP., as per Missal Hakiat for the year, 1986-87 is in possession of the plaintiff as tenant under the owners on payment of rent since the time of his ancestors and the entry changed in favour of defendants showing them as tenants over the suit land are illegal, unauthorized, null and void and without any order of competent authority and have no binding effect on the rights of the plaintiff with a consequential relief of permanent injunction restraining the defendants from interfering in any manner in the peaceful possession of the plaintiff in the suit land. Plaintiff averred in the plaint that he is in possession of the suit land as tenant on payment of rent since the time of his ancestors and he never surrendered the possession of the suit land. The plaintiff averred in the plaint that he came in possession over khasra No. 3188, 3190 alongwith the suit land and he became owner of the land by operation of the H.P. Tenancy and Land Reforms Act and Khasra Nos., 3191, 3202 is also in his tenancy alongwith the suit land. Plaintiff further averred that he or his predecessor were never dispossessed or evicted by the competent Authority from the suit land and the defendants never came in possession over the suit land and the alleged entry changed during the consolidation in the year, 1986-87 is without any basis, null and void and have been procured behind the back of the plaintiff. Plaintiff further averred that the defendants were never inducted as tenants over the suit land either by the plaintiff or anybody else and the plaintiff never relinquished the tenancy rights over the suit land. Plaintiff also averred that the defendants are very headstrong persons and on the basis of wrong entry of their names in revenue record have now started illegal threats of interference and changing the nature of the suit land by raising construction over the same and also dispossess the plaintiff from the suit land for the last one week. The plaintiff requested the defendants many times to desist from their illegal acts and to admit the claim of the plaintiff, but they are evading from the same.

3. Defendants by way of filing written statement raised various preliminary objections qua locus-standi, cause of action, suit bad for mis-joinder and non-joinder of necessary party, civil court has no jurisdiction to try the present suit and maintainability. On merits, defendants averred that the plaintiff or his predecessor-in-interest was neither inducted as tenant nor he is in possession of the suit land in any capacity and has no concern with the same. Defendants averred that defendants No.1 and 2 are in physical possession over the suit land as tenant at will under the owners for the last more than 25 year and they are having their abadi over the suit land in the shape of shops and part of the suit land bearing khasra No. 3203 is under H.P.PWD Road. Defendants further averred that the plaintiff and his predecessor were never in possession of the suit land in any capacity, so question of dis-possessing or their eviction does not arise. However, the entries in the name of the plaintiff and his predecessor-in-interest as tenant-at-will were wrong, illegal, unauthorized and against the factual possession at the

spot, which were duly corrected by the Revenue agency after due verification of the suit land as per the spot situation. Defendants further averred that the plaintiff has no right, title or any interest, whatsoever, over the suit land. In the aforesaid background, the defendants prayed for the dismissal of the suit.

4. By way of replication, plaintiff while denying the allegations made in the written statement, re-affirmed and reasserted the stand taken in the plaint.

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

> *"1. Whether the plaintiff has been coming in possession of the suit land as tenant-at-will as alleged? OPP.*
>
> *2. Whether plaintiff is entitled to the relief of injunction prayed for? OPP*
>
> *3. Whether the suit is not maintainable on the grounds mentioned in para No.1 of the preliminary objection? OPD.*
>
> *4. Whether plaintiff has got no cause of action to file this suit? OPD.*
>
> *5. Whether civil court has no jurisdiction to try this suit? OPD*
>
> *6. Whether suit is bad for non-joinder and mis-joinder of necessary parties? OPD.*
>
> *7. Relief."*

6. The learned trial Court on the basis of the evidence adduced on record by the respective parties, decided issues No.1 and 2 in favour of the plaintiff and issues No.3 to 6 were decided against the defendants.

7. Feeling aggrieved and dissatisfied with the impugned judgment and decree dated 20.9.2000, passed by learned trial Court, respondents/defendants filed an appeal in the Court of learned Additional District Judge, Fast Track Court, Una, H.P. i.e. Civil Appeal No.169/2000 RBT No.216/04/2000, however fact remains that learned Additional District Judge, Fast Track Court, Una vide judgment and decree dated 29.11.2006 accepted the appeal preferred by the respondents-defendants and quashed and set-aside the judgment and decree, dated 22.9.2000, passed by learned trial Court. In the aforesaid background, present appellant-plaintiff being aggrieved and dis-satisfied with the impugned judgment and decree, passed by learned lower Appellate Court, has approached this Court by way of instant Regular Second Appeal, praying therein for quashing and setting-aside the judgment and decree dated 29.11.2006, passed by learned lower Appellate Court.

8. This Regular Second Appeal was admitted on the following substantial questions of law No. 2 and 3:-

> "(1) Whether the learned first appellate court below misread and misappreciated the documentary and oral evidence more specifically Ex.P-5 and D-5 thereby vitiating the impugned judgment and decree?
>
> (2) Whether change of revenue entry being contrary to para 9.8 of H.P. Land Record Manual in law is void abinitio and could not have been looked into in favour of party, learned first appellate court below having heavily relied upon the same to non-suit the plaintiff in impugned judgment and decree thereby vitiating the same?"

9. Mr. Ajay Sharma, Advocate, representing the appellant–plaintiff vehemently argued that the judgment passed by the learned first appellate Court is not sustainable in the eye of law as the same is not based upon the correct appreciation of the evidence adduced on record by the parties, rather, same is based upon the conjectures and surmises and as such, same deserves to be quashed ad set-aside. Mr. Sharma, further contended that learned first appellate Court has erred in not appreciating the well settled provisions of law

applicable, pleadings of the parties and evidence adduced by them in its right perspective, as a result of which, great prejudice has been caused to the present appellant-plaintiff. As per Mr. Sharma, close scrutiny of the revenue record made available on record by the parties, clearly suggests that predecessor-in-interest of the plaintiff i.e. Melu, was tenant at will over the suit land and after his death, plaintiff entered into his shoes and was reflected/shown as ***"Gair Maurusi"*** on payment of rent in revenue record. With a view to substantiate his aforesaid argument, Mr. Sharma also invited attention of this Court to the oral evidence adduced on record by the plaintiff to demonstrate that the plaintiff witnesses unequivocally stated before the learned trial Court that after the death of Sh. Melu i.e. father of the plaintiff, plaintiff is in possession of the suit land as ***"Gair Maurusi"*** on payment of rent, and as such, judgment passed by the first appellate Court deserves to be set-aside being contrary to facts as well as law on record. Mr. Sharma, forcefully contended that learned first appellate Court miserably failed to take note of the fact that change as ordered in Rabi 1979 in Ext.D5 was made at the back of the plaintiff and as such, same could not be relied upon by the court below, especially, in view of para 9.8 of HP Land Record Manual, wherein specific procedure has been provided for change of revenue entry. Mr. Sharma, strenuously argued that revenue record, as available on record, clearly suggests that the defendants stood entered vide Ext.D5 as ***"Gair Maurusi Doem"*** and ***"Gair Murusi Doem"*** either could have been inducted by the plaintiff or by original owner. Neither defendants themselves nor any witness adduced by them in their defence uttered a word that who inducted them as ***"Gair Maurusi tenant"***. He also stated that neither original owners were produced nor agreement etc., if any, was placed on record by the defendants to suggest that they were inducted as ***"Gair Maurusi Doem"*** as reflected in Ext.D5. Mr. Sharma, further contended that no receipt of payment of rent has been adduced on record by the defendants to prove that they were inducted as ***"Gair Maurusi tenant"***, rather close scrutiny of revenue record suggests that defendants procured entry qua the ***"Gair Maurusi Doem***" at the back of the plaintiff without there being any order of competent authority and as such, same were rightly held void-abinitio by the trial Court. Moreover, careful perusal of the evidence available on record suggests that the plaintiff by way of leading cogent and convincing evidence was able to prove that he is coming in possession as tenant and entry in the name of defendants is procured at the back of the plaintiff and as such, same deserves to be declared null and void. Mr.Ajay Sharma vehemently argued that the latest revenue entries showing the defendants in possession are wrong and illegal and any change made without resorting to the procedure as prescribed in clause 9.8 *supra*, is not binding upon the plaintiff and as such, same were rightly rejected by the trial Court below while decreeing the suit of the plaintiff.

10. In this regard, reliance is placed on judgments passed by this Court as well as other High Courts:-

1. Kanshi Ram v. Nikka Ram, 1988, SLJ, 264.
2. Tulsa Singh V. Agya Ram and others, 1994(2) Sim.L.C. 434 and 1995 (10) SLJ 428.
3. Lal Chand and Ors. v. Pala, 1998 (2) SLJ 1526.
4. Satya Devi v. Raghubir Singh and Others, 1998(1) SLJ, 263.
5. Chanda v. Ram Chander, Punjab & Haryana High Court, 1980, 561."

11. Per contra, Mr. N.K. Thakur, Senior Advocate, duly assisted by Ms. Jamuna, Advocate, supported the judgment passed by the learned first appellate Court. Mr. Thakur, contended that bare perusal of the impugned judgment passed by the appellate Court clearly suggests that the same is based upon the correct appreciation of evidence available on record by the respective parties and it calls for no interference, whatsoever, of this Court and as such, present appeal deserves to be dismissed. While referring to the judgment passed by the learned first appellate Court, Mr. Thakur, strenuously argued that learned first appellate Court has dealt with each and every aspect of the matter very meticulously and there is no scope of interference whatsoever, of this Court in the findings returned by the first appellate Court, which are based

upon the correct appreciation of facts as well as law. Mr. Thakur, also invited attention of this Court to the judgment passed by the learned trial Court to demonstrate that learned trial Court mis-directed itself while deciding the actual controversy at hand. As per Mr. Thakur, bare perusal of the plaint filed by the plaintiff itself suggests that plaintiff was not able to prove its case by way of leading cogent and convincing evidence. With a view to substantiate his aforesaid argument, he invited attention of this Court to the statements of witnesses adduced on record by the plaintiff to demonstrate that bare perusal of the depositions made by the plaintiff witnesses nowhere proves the case of the plaintiff, rather all the witnesses proved the case of defendants that he is in possession over the suit land and he has constructed 6-7 shops over the same. Mr. Thakur, made this Court to travel through the depositions made by the plaintiff witnesses to specifically point out that plaintiff witnesses admitted that there are shops constructed over the suit land, whereas plaintiff in his plaint never claimed that shops, if any, ever exist upon the suit land. Mr. Thakur, contended that bare perusal of the written statement filed by the defendants clearly suggests that stand of defendant from day one has been that he was inducted as tenant about 20-25 years back by the original owners and he has already constructed 6-7 shops over the suit land. Apart from this, defendant by way of leading cogent and convincing evidence successfully proved on record that abadi exists over the suit land because all the defendant witnesses as well as plaintiff witnesses specifically stated /admitted while making depositions before the Court below that shops as well as PWD road exist over the suit land. Mr. Thakur, strenuously argued that during consolidation proceedings, entries were got changed illegally by the defendants rather, plaintiff claimed himself to have acquired the status of owner with the conferment of proprietary rights of the H.P. Tenancy & Land Reforms Act. Mr. Thakur further added that if for the sake of argument, it is presumed that no procedure in terms of aforesaid para 9.8 was followed by authorities concerned, remedy, if any, for the plaintiff to get the revenue entries corrected was somewhere else not by way of civil suit.

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

13. Now this Court would be making an attempt to explore the answer to aforesaid substantial questions of law framed by this Court at the time of admission of appeal by looking into evidence adduced on record by the parties to the lis. Perusal of documents Ext.P1 to 10 though suggests that the predecessor-in-interest of the plaintiff was entered as ***"Gair Maurasi Deom"*** over the suit land but latest revenue entries prepared after year 1979 reflects defendants No.1 and 2 to 4 in possession of the suit land as ***"Gair Maurasi Doem"*** on payment of rent while late Sh. Melu i.e. predecessor-in-interest of the plaintiff, has been shown as ***"Gair Maurasi Abal".***

14. Careful perusal of the judgments, as have been referred herein above, clearly provides that presumption of truth is attached to the latest revenue entry but same is rebuttable in case there is evidence to suggest that latest entry was not recorded in accordance with the procedure prescribed under Clause 9.8 of the H.P. Land Records Manual. However, this Court after carefully going through the pleadings, especially plaint filed by the plaintiff, is of the view that learned trial Court, while allowing the suit of the plaintiff, mis-directed itself because close scrutiny of plaint, as perused by this Court, clearly suggests that plaintiff claimed himself to be in possession of the suit land as tenant- at-will and sought permanent injunction restraining the defendants from interfering in his peaceful possession but interestingly, while proving the contents of the plaint neither plaintiff himself nor any of witnesses produced by him stated qua the possession, if any, of the plaintiff over the suit land, rather all the PWs admitted the factum of the shops having been constructed on the suit land as claimed by the defendants in the written statement. Moreover, plaintiff himself admitted that entries are coming in favour of the defendants after year, 1979; meaning thereby that the plaintiff was fully aware of the fact that the entries, if any, were changed in the year, 1979, whereas present suit admittedly was filed in the year, 1990 i.e. after 11 years. Interestingly, there is no explanation either in the plaint or in the depositions having been made on behalf of the plaintiff before the trial Court that what prevented him from filing appropriate proceedings in accordance with law for correction of revenue entries,

which, as per him, were allegedly changed in favour of the defendants without following due procedure as has been referred herein above.

15. During the proceedings of the case, this Court had an occasion to peruse the entire evidence led on record by the parties. Revenue Record available on record itself suggests that suit land comprising of khasra No. 3198 is measuring 0-18 marlas, out of which 0.16 marlas is abadi and 0-2 marlas is vacant land. It clearly reflects from the revenue record that major portion of the suit land is in the shape of *abadi*, wherein defendants have been shown in the possession. Similarly, khasra No. 3202 is measuring one kanal 12 marlas, out of which one kanal is *Banjar Jadid* and 0-12 marlsa is ***"Gair Mumkin Sarak"*** i.e. road. Perusal of record, as discussed herein above, clearly corroborates the version put forth on behalf of the defendants in the written statement or witnesses adduced by them that they have constructed *abadi* over the suit land in the shape of shop and there exits one road of Himachal Pradesh Public Works Department *(for short 'HPPWD').*

16. Plaintiff, with a view to prove its case, examined himself as PW-1 and stated that suit land is measuring 2 kanals 12 marlas and the real owner of the suit land is Sheela etc. He further stated that after that Melu, his father became non-occupancy-tenant. He further stated that after the death of Melu, he has come into possession of the suit land. He specifically stated that he never surrendered the possession of the land and no one else cultivated the suit land. Though he stated that *batai* is being paid tothe owners, but he nowhere stated to whom he paid *batai*. He also stated that at no point of time Patwari informed him regarding entries made in favour of defendants showing them non-occupancy tenants over the suit land, rather, he came to know about the same in the year 1989. But in his cross-examination he admitted that suit land is in the shape of two Khasra Numbers, i.e. one, 1 kanal 12 marlas and another, 0-18 marlas and both the Khasra Numbers are abutting to each other. He further stated in his cross-examination that the land was taken on *batai* from Natha Mal prior to 1947. However, he admitted that no writing was executed to this effect and *batai* was paid till 1971. He also admitted that there is no receipt. However, he denied the suggestion put to him that they never remained in possession of the suit land and never cultivated the same. He also denied that suit land remained in possession of the defendants and shops, which are existing on Khasra No.398, belong to the defendants. However, he categorically admitted that shops are existing on the spot. He also admitted that shops have been rented out by Gurbachan Singh and Rattan Singh. He also admitted that there is road on Khasra No.3203, however, he denied that remaining part of Khasra No.3203 is in possession of the defendants. He also admitted that he never objected regarding Girdawari before the Consolidation Officer because he did not know about the wrong entries.

17. Similarly, PW-2 Mohinder Singh, Patwari, stated that Khasra Girdawari of Khasra No.9206/3207 was changed on 24.3.1979 in the names of Gurbachan Singh and Rattan Chand sons of Partapa and similarly Khasra Girdawari of Khasra No.7511/3208 was also changed in the name of Gurbachan Singh. However, he stated that he can not tell whether this change was being made by any order or not because there is no mentioning with regard to the same on the record. He also stated that there is no order of any Court regarding this change in Rapat Roznamcha and the presence of Kartara is not recorded in Rapat Roznamcha dated 24.3.1979. In his cross-examination, he admitted that Girdawari is first made by the Kanoongo after conducting inquiry, thereafter the same is confirmed by the Tehsildar.

18. PW-3 Sarwan Singh also deposed that the parties are known to him and he has seen the suit land and the plaintiffs are in possession of the suit land since long from the time of their father. But in his cross-examination he admitted that shops of Gurbachan Singh are in his own number and are not abutting the road. He denied that the defendants are in possession of the suit land and their shops are existing for the last 30 years.

19. PW-4 Kaka Ram also stated that parties are known to him and he has seen the suit land which is in possession of Kartara i.e. plaintiff from the time of ancestors. However, in

his cross-examination, he admitted that some of the suit land is vacant and on some part, 6-7 shops have been constructed abutting the road which is in occupation of the shop-keepers. He further stated that he does not know who has given the shops on rent. In his cross-examination, he expressed his inability to state that who is owner of the shops. Conjoint reading of the statements of aforesaid plaintiff witnesses clearly establishes on record that there is no cultivation on the suit land. Rather, there exist 5-6 shops and one road, which has been constructed by *'HPPWD'.*

20. On the other hand, if the written statement of defendants is perused in its entirety, it clearly emerge from the same that they claimed that there exists *abadi* and shops over the suit land and one road of PWD passes through the same. Defendants specifically denied the contention put forth on behalf of the plaintiff that suit land is cultivable land.

21. DW-1 Satnam Singh specifically stated before the Court that suit land is 2½ kanals, which is in possession of the defendants since 30-35 years. He also stated that their shops exist on the suit land and a part of it is vacant and on some part there is road constructed by HPPWD. He also stated that they are tenants over the suit land. DW-1 also denied that suit land ever remained in possession of the plaintiff and they have no concern with the same. He also stated that revenue entries in the name of plaintiff were wrong and they neither remained in possession nor used to pay *batai* to the owners. In cross-examination, he expressed his inability to tell the measurement of each Khasra number of the suit land. However, he stated that their *abadi* is about 50 meters away from the suit land. He was also unable to tell whether any notice was given to the plaintiff regarding change in the entries in their names. However, he further stated that shops were constructed 35-40 years ago. However, in cross-examination he denied that the shops belong to the plaintiff and had been constructed by him.

22. DW-2 Mulaba Singh also deposed that parties are known to him and he has seen the suit land measuring 2½ kanals. He specifically stated that suit land is coming in defendants' possession for the last 40 years and Gurbachan Singh and Rattan Chand have constructed shops on the suit land. He also stated that plaintiff never remained in possession of the suit land. However, in his cross-examination, he stated that there are shops towards the eastern side of the suit land which belong to Jullahas and Jats. He further stated that earlier, the suit land was owned by Shiva and after that Rattna. He denied that the shops belong to Kartara and he is coming in possession since the time of his ancestors. He also denied that defendants never remained in possession of the suit land and the plaintiff is coming in possession of the suit land as non-occupancy-tenant since the time of his ancestors.

23. DW-3 Kushal Singh also deposed that he is co-sharer of the suit land, which is 2½ kanals and is in possession of Gurbachan Singh and Rattan Chand. He also stated that Gurbachan Singh and Rattan Chand had expired and now their sons are in possession. He also stated that he is witnessing the possession of the defendants since 35 years and the defendants have constructed shops on the suit land. He also stated that defendants are in possession of the suit land as tenants and now they have become owners under the Act. He categorically stated that the shops are existing for the last 30 years. In cross-examination, he stated that the suit land was owned by him, Sheela Devi and Nathu Ram etc. It has also come in his statement that the consolidation was completed in their village in 1986-87 and settlement was conducted in 1997-98. He stated that correct record has been prepared by the consolidation staff as per the spot. Gurbachan, Rattan Chand and Partapa have taken this land for cultivation before he gained consciousness. He stated that the entries are coming in favour of the defendants for the last 30 years, prior to 1970 and the defendants used to pay 1/4th share to the owners.

24. DW-4 Surjit Singh prepared the site plan Ex.DW-4/A. In his cross-examination, he stated that while preparing site plan, he has not seen the revenue papers. He admitted that he prepared the site plan as per instructions of his client.

25. Careful perusal of aforesaid evidence led on record by the defendants clearly suggests that defendants were able to prove on record that suit land, description whereof has

been given hereinabove, is in their possession and they have constructed shops over the same. It also emerges from their depositions, referred hereinabove, that on a part of the suit land there exists a road constructed by PWD. All these defence witnesses have categorically denied the possession, if any, of the plaintiff. Rather they in unequivocally terms stated before the Court that they have seen defendants in possession of the land. More importantly, DW-3 Kushal Singh, who claimed himself to be co-sharer of the suit land, categorically stated that the suit land was owned by him, Sheela Devi and Nathu Ram, etc., which clearly corroborates the version put forth by the plaintiff. He himself stated before the Court that original owner of the land was Sheela Devi. DW-3, while claiming himself to be co-owner alongwith Sheela Devi and Nathu Ram, categorically stated that shops exist over the suit land for the last 30 years. He also stated that consolidation was completed in their village in 1986-87 and settlement was conducted in 1997-98, which admission on his part corroborates the revenue record placed on record by the defendants, which suggests that entries were changed during consolidation and correction, if any, was carried out by consolidation staff as per spot. He specifically stated that the defendants used to pay 1/4th share to the original owners. Conjoint reading of aforesaid witnesses of both the parties clearly suggests that land is not under cultivation, as claimed by the plaintiff, rather there exists shops as well as road on the suit land as have been admitted by the plaintiff himself and witnesses adduced by him on record also. It is not understood as to how, on the basis of evidence as has been discussed in detail, learned trial Court came to conclusion that plaintiff was able to prove that he has been coming in possession of the suit land as tenant-at-will. Similarly, it is not understood that how learned trial Court came to conclusion that plaintiff is entitled to relief of injunction when it stands duly proved on record that possession, if any, over the suit land is of defendants, who have constructed their shops over the suit land. Moreover, cross-examination conducted upon DW-1, nowhere suggests that plaintiff at any point of time ever put suggestion to him that he is not tenant-at-will over the land or he has never raised shops over the suit land. Though plaintiff stated that alongwith Sheela, Mansho Devi was also owner, but admittedly neither original writing nor receipt were placed on record by the plaintiff to prove on record that they were inducted as ***"Gair Maurusi Tenant"*** over the suit land by the original owner, as named above. Whereas, defendants, while citing DW-3 Kushal Singh, were able to prove on record that they were inducted as tenants. Kushal Singh, who claimed himself to be co-sharer, successfully proved on record that defendants were inducted as a tenants over the suit land by the original owner. Once Kushal Singh himself stated that defendants are in possession of the suit land as tenants and now they have become owners under the Act, findings returned by the learned trial Court that defendants were not able to produce on record by leading cogent evidence to demonstrate that they were inducted as tenants by the original owners does not appears to be correct on its face value.

26. In view of detailed discussion made hereinabove, this Court is unable to accept the findings recorded by the learned trial Court below that the plaintiff is in possession of the suit land and being so the change of entries in favour of defendants from Rabi, 1979, during consolidation, was wrongly made in favour of the defendants. Rather, this Court, after perusing the entire evidence led on record, is fully convinced and satisfied that learned first appellate Court rightly came to the conclusion that change of entries in favour of defendants from Rabi, 1979 during consolidation was rightly made by the revenue officials as per factual position at the spot because prior to change there were only paper entries in the revenue record in favour of plaintiff, which did not create any right in his favour. This Court, while exploring answer to substantial question of law, as referred above, also perused Ex.P-5 and Ex.D-5. Ex.P-5 is the copy of Misalhaquiat Istemal for the year 1986-87, wherein name of plaintiff has been entered as ***"Gair Maurusi Doem".*** But, in the column of area and category of land, it has been specifically recorded over Khasra Nos.3188, 3190, there is ***"Gair Mumkin Abadi"*** and ***"PWD Road",*** which itself belies the stand taken by the plaintiff that they are cultivating the suit land. Similarly, if this Ex.P-5 is perused juxtaposing Ex.P-1, i.e. Misalhaquiat Istemal for the year 1986-87, Mohal Haroli, the defendants have been recorded as ***"Gair Maurusi Soem"***. Similarly, if Ex.D-1, copy of Jamabandi placed on record by the defendants, is seen, that also pertains to the the year 1986-87 for Mauza Haroli, which also suggests that names of defendants stand recorded in the

column of cultivation and possession as ***"Gair Maurusi Deom".*** Similarly, perusal of Ex.D-5 also reflects the names of defendants in the column of cultivation and rent for the year 1978-79 and moreover in Ex.P-6 names of Smt.Sheela Devi, Manso Devi have been shown as owners. Whereas, name of plaintiff Kartara son of Melu has been shown as ***"Gair Maurusi"*** in Ex.P-7, Khasra Girdawari for the year 1978-79, qua Khasra No.3207, but name of the owner has been reflected as Smt.Thakri widow of Shri Sant Ram.

27. After perusing the aforesaid documents, as indicated in substantial question of law, this Court is unable to accept the contention put forth on behalf of plaintiff that learned first appellate Court below misread and mis-appreciated the documentary and oral evidence, more particularly Ex.P-5 and Ex.D-1, while coming to the conclusion that entries in favour of defendants from Rabi, 1979 was rightly made by revenue official as per factual position on spot. Hence, substantial question of law is answered accordingly.

28. It is well settled that presumption of correctness is attached to the latest revenue entries and whenever there is conflict, it is the latest entry which would prevail. Where the earlier revenue entries were changed in the later revenue entries and the change was effected without there being any order of the revenue authorities showing how the change was made, the presumption would be in favour of the later entries but that presumption was a rebuttable one and it would stand rebutted by the fact that the alteration in the later entries was made unauthorisedly or mistakenly, there being no material to justify the change of entries.

29. In this regard reliance is placed on ***Durga (deceased) and Otheers vs. Milkhi Ram and Others, 1969 P.L.J. (SC), 105,*** wherein the Hon'ble Apex Court has held as under:

> *"3. Relying on Shri Raja Durga Singh of Solan v. Tholu (1963) 2 S.C.R. 693, 700 = 1962 P.L.J. 88), it was urged before the High Court, as before us, that the lower appellate court had wrongly relied on the earlier revenue entries placing the burden on the defendants, whose names appeared in the later entries, to rebut the presumption. This Court observed in that case as follows:*
>
> > *"It was urged before us that there are prior entries which are in conflict with those on which the learned District Judge has relied. It is sufficient to say that where there is such a conflict, it is the later entry which must prevail. Indeed from the language of Section 44 itself it follows that where a new entry is substituted for an old one it is that new entry which will take the place of the old one and will be entitled to the presumption of correctness until and unless it is established to be wrong or substituted by another entry."*
>
> *Grover j.,observed as follows:*
>
> > *"It is clear from the pedigree-table set out in its judgment that Mathar Mal had three sons Jiwan, Amin Chand and Relu. Durga and Sidhu are the descendants of Jiwan whereas the plaintiff and defendant No. 3 are the descendants of Amin Chand and Relu. Now, in the entries prior to 1929-1930 each one of the descendants of the three sons of Mathar Mal had been shown to have 1/3rd share and without any mutation the entries were changed in 1929-30. Admittedly there is no order of the revenue authorities showing how the change was made. Thus although the presumption would be in favour of the latter entries but that presumption was a rebuttable one and it would stand rebutted by the fact that the alteration in the entries in 1929-30 was made unauthorisedly or mistakenly, there being no material to justify the change of entries."*
>
> *Grover, J. distinguished Shri Raja Durga Singh of Solan v. Tholu (1963) 2 S.C.R. 693, 700 = 1962 P.L.J.88) thus:*
>
> > *"There is nothing to indicate that in the case decided by their Lordships such was the position. More-over, the decision in that case proceeded largely on the finding of fact arrived at by the District Judge on a consideration of the*

evidence being not open to interference in second appeal. The finding in the present case of the lower appellate Court is also based on evidence from which it has been inferred that the later entries are not the correct ones."

30. In the instant case, admittedly, later entries are in favour of defendants and presumption of correctness is attached to the same because plaintiff nowhere succeeded to prove them to be wrong. Apart from above, plaintiff in the instant case woefully failed to prove his tenancy, consent of owners and payment of rent and as such it can be safely concluded that plaintiff was unable to prove that he was inducted as tenant over the suit land by the original owners. Since plaintiff failed to prove his tenancy over the suit land, there is no point in relying upon the entries made in his favour prior to 1979, which were admittedly paper entries and nothing more than that. Judgments, as have been relied upon by the learned counsel representing the plaintiff, as have been noted above, may not be of any help in the present case, especially in view of the failure on the part of the plaintiff to prove his tenancy over the suit land and as such same are not being referred herein.

31. At this stage, it may be observed that learned first appellate Court, while accepting the appeal of defendants, has not solely relied upon the entries made in the revenue record in favour of defendants, rather plaintiff was non-suited on account of his failure to prove his tenancy over the suit land and as such there is no force in the contention put forth on behalf of the counsel representing the plaintiff that change of revenue entries being contrary to para 9.8 of the H.P. Land Records Manual could not have been looked into in favour of the parties. Therefore, the question is answered accordingly.

32. Consequently, in view of the aforesaid detailed discussion, this Court sees no illegality and infirmity in the judgment passed by learned first appellate Court and as such same deserves to be upheld. Hence, present appeal fails and the same is, accordingly dismissed.

33. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Kashmiri Lal .....Appellant
Versus
Rajni Devi and others .....Respondents

FAO No.80 of 2012
Decided on : 04.11.2016

Motor Vehicles Act, 1988- Section 149- Driver had a valid licence to drive light motor vehicle – offending vehicle was a tempo, which falls within the definition of Light Motor Vehicle – the Tribunal had wrongly held that driver did not possess a valid licence – the deceased was a photographer, who had gone to a Mela and was returning in the offending vehicle – he was rightly held to be a gratuitous passenger- the insurer directed to satisfy the award with the right to recovery. (Para- 5 to 15)

Cases referred:

S. Iyyapan versus United India Insurance Company Limited and another, (2013) 7 Supreme Court Cases 62
United India Insurance Co. Ltd. Versus K.M. Poonam and others, 2011 ACJ 917
Manager, National Insurance Co. Ltd. versus Saju P. Paul and another, 2013 ACJ 554
Dev Raj versus Shri Krishan Lal and others, I L R 2016 (III) HP 2288

For the appellant: Mr.R.R. Rahi, Advocate.

For the respondents: Mr.Vinay Thakur, Advocate, for respondents No.1 to 6.
Mr.Ratish Sharma, Advocate, for respondent No.8.
Nemo for respondents No.7 and 9.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 21st November, 2011, passed by Motor Accident Claims Tribunal-II, Mandi, District Mandi, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.7,40,000/, with interest at the rate of 7.5% per annum from the date of filing of the petition till deposit, came to be awarded in favour of the claimants, and the insured and the driver were saddled with the liability, (for short, the impugned award).

2. The claimants, the driver and the insurer have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insured has challenged the impugned award by way of instant appeal, on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant/insured argued that the Tribunal has fallen into an error in determining issues No.1A, 2A and 3A and has wrongly saddled the owner with the liability. Thus, the controversy in the instant appeal revolves around issues No.1A, 2A and 3A, framed by the Tribunal, which are reproduced below:

> *"1A. Whether the driver was not holding a valid driving license at the time of accident, if so its effect? OPR*
>
> *2A. Whether Devinder Kumar was sitting as a gratuitous passenger in the vehicle bearing registration No.PB-32-8826, if so its effect? OPR*
>
> *3A. Whether the driver was driving the vehicle in violation of terms and conditions of insurance policy and Motor Vehicle Act, if so its effect? OPR"*

5. Heard learned counsel for the parties and gone through the record. A perusal of the record shows that the driver of the offending vehicle was having a valid and effective driving licence to drive a light motor vehicle. The offending vehicle, in the instant case, was a tempo, which, admittedly, falls within the definition of Light Motor Vehicle. The Tribunal has fallen into an error in holding that the driver of the offending vehicle was not having a valid and effective driving licence. Accordingly, the findings returned by the Tribunal on issue No.1A are set aside and it is held that the driver of the offending vehicle was having a valid and effective driving licence at the time of accident.

6. Coming to issue No.2A, the claimants, in paragraph 24 of the Claim Petition, have specifically pleaded that the deceased was a photographer by profession and, on the fateful day, had gone to Dussehra festival, and while returning, came back in the offending vehicle, met with the accident and succumbed to the injuries. The offending vehicle was a goods vehicle. Thus, the Tribunal has rightly determined issue No.2A and held that the deceased was traveling in the offending vehicle as gratuitous passenger. Accordingly, findings on issue No.2A are upheld.

7. As far as issue No.3A is concerned, admittedly, the offending vehicle was a goods vehicle, was being driven in violation of the terms and conditions contained in the insurance policy, as discussed above. Thus, the findings on issue No.3A are also upheld.

8. However, the Tribunal has fallen into an error in not directing the insurer to satisfy the award at the first instance, with right of recovery. The mandate of Sections 146, 147 and 149 of the MV Act is to protect the rights of third parties and that is why, compulsory duty has been imposed on the owners to get the vehicles insured, so that, claim of third parties cannot be defeated.

9. The Apex Court has also discussed this aspect in a case titled as **S. Iyyapan versus United India Insurance Company Limited and another,** reported in **(2013) 7 Supreme Court Cases 62.** It is apt to reproduce para 16 of the judgment herein:

> *"16. The heading "Insurance of Motor Vehicles against Third Party Risks" given in Chapter XI of the Motor Vehicles Act, 1988 (Chapter VIII of 1939 Act) itself shows the intention of the legislature to make third party insurance compulsory and to ensure that the victims of accident arising out of use of motor vehicles would be able to get compensation for the death or injuries suffered. The provision has been inserted in order to protect the persons travelling in vehicles or using the road from the risk attendant upon the user of the motor vehicles on the road. To overcome this ugly situation, the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force."*

10. The same principle has been laid down by this Court in a series of cases.

11. In view of the above, the claimants, who are third party, cannot be left in lurch and cannot be dragged from pillar to post and post to pillar in order to get compensation. Thus, it is the duty of the Court to ensure that the compensation is paid to the claimants by directing the insurer to satisfy the award with right of recovery.

12. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **United India Insurance Co. Ltd. Versus K.M. Poonam and others,** reported in **2011 ACJ 917.** It is apt to reproduce paras 24 and 26 of the judgment herein:

> *"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle.*
>
> *25. ....*
>
> *26. Having arrived at the conclusion that the liability of the Insurance Company to pay compensation was limited to six persons travelling inside the vehicle only and that the liability to pay the others was that of the owner, we, in this case, are faced with the same problem as had surfaced in Anjana Shyam's case (supra). The number of persons to be compensated being in excess of the number of persons who could validly be carried in the vehicle, the question which arises is one of apportionment of the amounts to be paid. Since there can be no pick and choose method to identify the five passengers, excluding the driver, in respect of whom compensation would be payable by the Insurance Company, to meet the ends of justice we may apply the procedure adopted in Baljit Kaur's case (supra) and direct that the Insurance Company should deposit the total amount of compensation awarded to all the claimants and the amounts so deposited be disbursed to the claimants in respect to their claims, with liberty to the Insurance Company to recover the amounts paid by it over and above the compensation amounts payable in respect of the persons covered by the Insurance Policy from the owner of the vehicle, as was directed in Baljit Kaur's case."*

13. It would also be profitable to reproduce paras 19 to 21 and 25 of the judgment rendered by the Apex Court in the case titled as **Manager, National Insurance Co. Ltd. versus Saju P. Paul and another,** reported in **2013 ACJ 554,** herein:

> *"19. The next question that arises for consideration is whether in the peculiar facts of this case a direction could be issued to the insurance company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle (respondent no. 2 herein).*
>
> *20. In National Insurance Co. Ltd. v. Baljit Kaur and others, 2004 ACJ 428 (SC), this Court was confronted with a similar situation. A three-Judge Bench of this Court in paragraph 21 of the Report held as under :*
>
> *"(21) The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decision of this Court in Satpal Singh. The said decision has been overruled only in Asha Rani. We, therefore, are of the opinion that the interest of justice will be subserved if the appellant herein is directed to satisfy the awarded amount in favour of the claimant, if not already satisfied, and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988, in terms whereof, it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceeding."*
>
> *21. The above position has been followed by this Court in National Insurance Co. Ltd. v. Challa Bharathamma, 2004 ACJ 2094 (SC), wherein this Court in para 13 observed as under:*
>
> *"(13) The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing court shall take assistance of the Regional Transport Authority concerned. The executing court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case, considering the quantum involved, we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."*

22 to 24. ....

25. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in Baljit Kaur, 2004 ACJ 428 (SC) and Challa Bharathamma, 2004 ACJ 2094 (SC) should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, claimant was 28 years' old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The insurance company has already deposited the entire awarded amount pursuant to the order of this Court passed on 01.08.2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent No. 1) may be allowed to withdraw the amount deposited by the insurance company before this Court along-with accrued interest. The insurance company (appellant) thereafter may recover the amount so paid from the owner (Respondent No. 2 herein). The recovery of the amount by the insurance company from the owner shall be made by following the procedure as laid down by this Court in the case of Challa Bharathamma, 2004 ACJ 2094 (SC)."

14. The same principle has been laid down by this Court in a batch of FAOs, **FAO No. 353 of 2012,** titled as **Dev Raj versus Shri Krishan Lal and others,** being the lead case, decided on 24th June, 2016.

15. Having said so, the impugned award is modified to the extent that the insurer has to satisfy the impugned award at the first instance with right of recovery. The insurer is directed to deposit the amount, alongwith interest, as awarded by the Tribunal, within eight weeks from today, in the Registry of this Court, and the Registry is directed to release the same in favour of the claimants through their respective bank accounts, strictly in terms of the impugned award. The insurer is at liberty to lay motion for recovery before the Tribunal.

16. The appeal stands disposed of accordingly, alongwtih pending CMPs, if any.

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

New India Assurance Company Ltd. .....Appellant.
Versus
Lakshmi Devi & Others ....Respondents.

FAO No. 552 of 2009
Decided on: 4.11.2016

Workmen Compensation Act, 1923- Section 4- Deceased was a driver who died in an accident – compensation was awarded by the Commissioner- it was contended that the deceased was son of the owner and therefore it cannot be accepted that the deceased was employed by the owner – held, that there is no principle of law that a father cannot employ his son as a driver – it was duly proved that the owner had employed the deceased as driver on a monthly salary of Rs.2,600/- per month- receipts were also produced to this effect- therefore, Commissioner had rightly awarded the compensation- however, the interest was to be levied from the one month after the accident. (Para-2 to 6)

For the appellant: Mr. B.M Chauhan, Advocate.
For the respondents: Mr. B.S Chauhan, Sr.Advocate with Mr. Munish, Advocate for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (Oral)

The instant appeal came to be admitted on 28.12.2009 on the hereinafter extracted substantial question of law:-

"1. *Whether the workmen's compensation Commissioner was justified in hold that the deceased Rajinder Singh was working as an employee on the tractor in question?*

2. Whether the interest has been awarded by the workmen's Compensation Commissioner in accordance with the provisions of the workmen's Compensation Act, 1923?"

2. The learned counsel for the appellant has submitted with much vigor before this Court that the predecessor-in-interest of the claimants who uncontrovertedly is the son of the owner of the ill-fated vehicle and who met his end in an accident involving the ill-fated vehicle cannot per se hence render him to be construable qua his standing engaged as a driver in the ill-fated vehicle by his father nor he can be concluded to be drawing wages quantified in a sum of Rs.2600/- whereupon he contends of the impugned order recorded by the learned Commissioner warranting interference significantly when the trite factum of the deceased Rajinder Singh performing employment as a driver in the relevant vehicle under his father stands un-proven.

3. The aforesaid submission warrants its standing discountenanced as there is no inflexible proposition of law of a father not employing his son nor is it a rigid proposition of law qua the relevant employee/workman not drawing wages from his father, his employer.

4. Be that as it may the evidence on record was enjoined to pronounce qua the factum of the father of one Rajinder Singh who died in the ill-fated accident involving tractor Number HP21-0528 not receiving from his father wages per mensem constituted in a sum of Rs.2600/-. The relevant best evidence in portrayal thereof stood constituted in the appellant during the course of his holding the owner of the relevant vehicle to cross-examination endeavoring to make elicitations from his qua his maintaining receipts qua the amount of wages defrayed to his deceased son while his performing duties as a driver in the relevant vehicle.

5. However, the aforesaid evidence has remained unemerged as the owner of the vehicle died before the relevant trite issue standing put to trial, inevitable corollary whereof is qua this Court standing not seized with the relevant best evidence, for its hence accepting the contention addressed herebefore by the learned counsel for the appellant also hence for want thereof the impugned order recorded by the Commissioner while accepting the depositions of the claimants qua their predecessor-in-interest drawing from his employment under his father wages per mensem constituted in a sum of Rs.2600/-, holds field. Consequently, the finding qua the facet aforesaid warrants its acceptance by this Court. Substantial question of law answered accordingly.

6. In the impugned order the learned Commissioner on the compensation amount assessed qua the dependents/claimants of deceased Rajinder Singh had levied thereon interest @ 6%, liability whereof stood fastened upon the appellant herein also the aforesaid per centum of interest levied upon the compensation amount, stood mandated in the impugned order to accrue from 2.11.2003 whereas liability qua levy of 6% interest on the compensation amount was peremptorily enjoined to accrue thereon from one month elapsing since the date of accident. Consequently, the order impugned hereat is modified to the extent indicated above. In sequel the rate of interest levied on the compensation amount assessed qua the claimants of one Rajinder Singh would accrue thereon from one month elapsing since the date of accident. The impugned order is modified accordingly.

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

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd. …Appellant.

Versus

Sh. Jai Kumar and others …Respondents.

FAO No. 47 of 2012
Decided on: 04.11.2016

Motor Vehicles Act, 1988- Section 149- It was contended that the driver did not have a valid and effective driving licence at the time of accident- Insurer had not led any evidence to prove this plea- the burden of proving the breach of the terms and conditions of the policy was upon the insurer- the insurer was rightly saddled with liability, in these circumstances - appeal dismissed. (Para-13 to 17)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, 2013 AIR SCW 6505

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Jeevan Kumar, Advocate.

For the respondents: Mr. Rajiv Rai, Advocate, for respondent No. 1.
Mr. Sanjeev Kuthiala, Advocate, for respondent No. 2.
Mr. Umesh Kanwar, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

This appeal is directed against award, dated 1st October, 2011, made by the Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, Himachal Pradesh (for short "the Tribunal") in M.A.C. No. 44 of 2006, titled as Jai Kumar versus Smt. Sunita Devi and others, whereby compensation to the tune of ₹ 2,85,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimant-injured and the insurer was saddled with liability (for short "the impugned award").

2. The claimant-injured, owner-insured and driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has called in question the impugned award on the ground that the Tribunal has fallen in an error in saddling it with liability.

4. Learned Senior Counsel appearing on behalf of the appellant-insurer argued that the owner-insured of the offending vehicle has committed a willful breach as there was no fitness certificate of the offending vehicle at the time of the accident and that the driver was not having a valid and effective driving licence to drive the same at the relevant point of time.

5. The claimant-injured had claimed compensation to the tune of ₹ five lacs, as per the break-ups given in the claim petition, on the ground that he became the victim of the vehicular accident, which was caused by the driver, namely Shri Vijay Kumar, while driving tractor, bearing registration No. HP-69-0314, rashly and negligently, on 4th August, 2006, at about 11.00 A.M., at Village Padyalag, Tehsil Ghumarwin, in which he sustained multiple injuries.

6. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

7. On the pleadings of the parties, following issues came to be framed by the Tribunal on 28th May, 2009:

> *"1. Whether the petitioner suffered injuries due to rash and negligent driving on account of accident which took place on 4.8.2006 as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioner is entitled for compensation and if so from whom and to what extent? OPP*
>
> *3. Whether the petition is bad for non-joinder of necessary parties? OPR*
>
> *4. Whether the petition is not maintainable? OPR-3*
>
> *5. Whether the petition is bad for mis-joinder of necessary parties? OPR-3*
>
> *6. Whether the vehicle in question was being driven without R.C., insurance and valid route permit? OPR-3*
>
> *7. Whether the vehicle was being driven without any effective driving licence? OPR-3*
>
> *8. Whether the vehicle was being run in contravention of the terms of the Motor Vehicles Act? OPR-3*
>
> *9. Whether there was contributory/ composite negligence of the driver of vehicle HP-23B-1052 and HP-69- 0314? OPR-3*
>
> *10. Relief."*

8. Parties have led evidence.

9. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation in terms of the impugned award. Hence, the instant appeal.

Issue No. 1:

10. The Tribunal has held that the claimant-injured has proved that he sustained injuries due to the rash and negligent driving of the offending vehicle by its driver on 4th August, 2006 and decided issue No. 1 in favour of the claimant-injured. The said findings are not in dispute in this appeal. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

11. Before dealing with issues No. 2 and 6 to 8, I deem it proper to determine issues No. 3 to 5 and 9.

Issues No. 3 to 5 and 9:

12. It was for the insurer to prove issues No. 3 to 5 and 9, has not led any evidence to this effect, thus, has failed to discharge the onus. The Tribunal has made discussion that the insurer has not led any evidence and failed to discharge the onus. Accordingly, the findings returned by the Tribunal on issues No. 3 to 5 and 9 are upheld.

Issues No. 6 to 8:

13. The insurer has not led any evidence to the effect that the driver of the offending vehicle was not having a valid and effective driving licence, the offending vehicle was being driven without valid documents and in contravention of the Motor Vehicles Act, 1988 (for short "MV Act"), and the owner-insured has committed a willful breach, thus, has failed to prove issues No. 6 to 8. The Tribunal has rightly decided the said issues while making discussion in paras 25 to 27 of the impugned award.

14. Even otherwise, it was for the insurer to plead and prove that the owner-insured of the offending vehicle has committed willful breach as per the mandate of Sections 147 and 149 of the MV Act read with the terms and conditions of the insurance policy.

15. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. ....

(i) ....

(ii) ....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).......................

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

16. The Apex Court in another case titled as **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **2013 AIR SCW 6505,** has laid down the same principle. It is profitable to reproduce para 10 of the judgment herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the insurance company is not liable for the compensation."

17. Viewed thus, the findings returned by the Tribunal on issues No. 6 to 8 are upheld.

Issue No. 2:

18. The quantum of compensation is not in dispute. However, I have gone through the record and the impugned award, the awarded amount cannot be said to be excessive or meagre in any way. Thus, it is held that the Tribunal has rightly awarded ₹ 2,85,000/- to the claimant-injured and saddled the insurer with liability. Accordingly, the findings returned by the Tribunal on issue No. 2 are also upheld.

19. Viewed thus, the impugned award is well reasoned and legal one, needs no interference.

20. Having glance of the above discussions, the impugned award is upheld and the appeal is dismissed.

21. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account.

22. Send down the record after placing copy of the judgment on the Tribunal's file.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Sh. Rameshwar and another …Appellants.
Versus
Smt. Reshmi Devi and another …Respondents.

FAO No. 55 of 2012
Decided on: 04.11.2016

Motor Vehicles Act, 1988- Section 163-A and 167- Deceased was in the employment of owner/insured – claimants have right to claim compensation in terms of Workm Compensation Act- they had an option to file the claim petition either before the Commissioner or MACT – the claim petition was maintainable- however, the driving licence is not on record – case remanded for adjudication of the dispute afresh. (Para-9 to 11)

For the appellants:	Mr. Deepak Kaushal, Advocate.
For the respondents:	Mr. Amit Jamwal, Advocate, vice Mr. Ajay Sharma, Advocate, for respondent No. 1. Mr. Virender Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 17th December, 2011, made by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in MAC Petition No. 40-MAC/2 of 2009, titled as Rameshwar and another versus Reshmi Devi and another, whereby the claim petition filed by the appellants-claimants came to be dismissed (for short "the impugned award").

2. Appellants-claimants had invoked the jurisdiction of the Tribunal under Section 163-A of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation, as per the break-ups given in the claim petition, was resisted by the respondents and the following issues came to be framed by the Tribunal on 6th April, 2010:

"1. Whether Pawan Kumar had died on account of use of tractor No. HP-18-4506 on 10-5-2009 at about 7.20 AM near Tribhuwan, Shambhuwala, as alleged? OPP

2. In case issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP

3. Whether the petition is not maintainable in the present form, as alleged? OPR-1&2

4. Whether the vehicle was being plied in violation of the terms and conditions of insurance policy? OPR-2

5. Relief."

3. The Tribunal has only determined issues No. 1 to 3 and dismissed the claim petition without returning findings viz-a-viz issue No. 4.

4. The claimants have specifically pleaded that the deceased was engaged/employed as a driver by the owner-insured of the offending vehicle. The owner-insured, while filing reply to the claim petition, has denied the said fact, but has stated in para 4 of the reply that the deceased was not a driver, but was a labourer.

5. Thus, the deceased was in the employment of the owner-insured of the offending vehicle whether as a labourer or a driver. So, the claimants have a legal right to claim compensation in terms of the Workmen's Compensation Act, 1923 (for short "WC Act") without getting involved in the niceties of rashness, negligence and other legal grounds.

6. Section 167 of the MV Act provides another option to the claimants, other than filing a claim before an authority under the WC Act, to file a claim petition before the Claims Tribunal enabling them to have the compensation more than what is provided in terms of WC Act.

7. The factum of deceased being a labourer and his death are admitted. It is also proved that the deceased had sustained injuries and succumbed to the said injuries because he was crushed under the offending vehicle. Having said so, the claimants have proved that the deceased had died on account of use of the motor vehicle, i.e. the offending vehicle. Accordingly, the findings returned by the Tribunal on issue No. 1 are set aside and it is decided in favour of the claimants and against the respondents.

8. Now, the question is – whether the claimants are entitled to compensation, if so, from whom and in which proportion?

9. The Tribunal had to determine issue No. 4 before dealing with issue No. 2. The Tribunal has held that the claim petition was not maintainable. The said findings are not legally correct for the simple reason that the claimants are the victims of a vehicular accident and, as discussed hereinabove, were entitled to compensation as per the mandate of WC Act or Section 167 of the MV Act. Thus, the claim petition was maintainable. Accordingly, the findings recorded by the Tribunal on issue No. 3 are set aside and it is held that the claim petition was maintainable.

10. The Tribunal has not returned any finding on issue No. 4, which requires determination. The driving licence of the deceased, as it has been averred that he was working as a driver, is not on the record. The final report under Section 173 of the Code of Criminal Procedure (for short "CrPC") is also not on record.

11. In the given circumstances, the impugned award is set aside and the case is remanded to the Tribunal for determining issues No. 2 and 4 with a direction to the Tribunal to provide four opportunities with effect from 1st December, 2016 to 31st December, 2016 to the claimants for leading evidence, two opportunities to the owner-insured of the offending vehicle with effect from 1st January, 2017 to 15th January, 2017, thereafter, two opportunities to the insurer with effect from 16th January, 2017 to 31st January, 2017 and to conclude the proceedings by or before 1st March, 2017, after hearing the parties.

12. Parties are directed to cause appearance before the Tribunal on 1st December, 2016.

13. Send down the record after placing copy of the judgment on the Tribunal's file.

****

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

Sateesh Chander Kuthiala .....Petitioner.
Versus
State of Himachal Pradesh and another. .....Respondents.

Cr. MMO No. 256 of 2015
Judgment reserved on: 27.10.2016
Date of decision : November 4th , 2016.

Code of Criminal Procedure, 1973- Section 294 and 311- An application was filed for seeking permission to tender in evidence certified copies of the judgments passed by the Civil Courts, which was allowed- aggrieved from the order, present petition was filed contending that informant does not have a right to file the application directly without associating public prosecutor- held, that legislature has recognized importance and relevance of victim in the process of investigation, inquiry and trial as well as in appeal, revision etc. – he has a right to engage an advocate of his choice to assist the prosecution - permission was sought to assist the prosecution, which was allowed as not opposed – there is difference between assisting and conducting the prosecution– the permission can be granted by Magistrate to conduct the trial but such permission has to be expressly obtained by filing a written application- the permission was granted to assist the prosecution and therefore, it was not permissible to file the application to place the document on record- petition allowed- order passed by Magistrate set aside, however, liberty granted to file an application for conducting the trial. (Para- 6 to 22)

Cases referred:

Dhariwal Industries Ltd. vs. Kishore Wadhwani and others AIR 2016 SC 4369
M/s Tata Steel Ltd vs. M/s Atma Tube Products Ltd. and others, 2014 (173) Pun.LR 1

For the Petitioner: Mr. K.D.Sood, Senior Advocate, with Mr. Dushyant Dadwal and Mr. Rajnish K.Lal, Advocates.

For the Respondents: Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals, for respondent No.1.
Mr. Gautam Sood and Mr. Dheeraj K.Vashisht, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The moot question that falls for consideration in this petition under Section 482 Cr.P.C. is as to whether the complainant can conduct the trial when admittedly he has only sought and granted permission by the learned trial Court to assist and not conduct the trial.

2. This petition arises out of the order passed by learned Chief Judicial Magistrate, Shimla, H.P. in Cr.M.A. No. 6-4 of 2015 on 21.7.2015 whereby the application filed by the complainant/respondent under Sections 294 and 311 of the Code of Criminal Procedure, 1973, through his counsel, seeking permission to tender in evidence certified copies of the judgment passed by learned Sub Judge (II), Shimla in *Case No. 62/I of 1985 titled Shri Radha Krishan Kuthiala versus Shri Gian Chand Kuthiala* and copy of judgments dated 31.3.1998 passed by

learned Additional District Judge, Shimla passed in *Civil Appeal No.105/S/13 of 88/86 in case titled Shri Hari Krishan and others versus Shri Radha Krishan and others*, came to be allowed.

3. Mr. K.D. Sood, Senior Advocate, assisted by Mr. Dushyant Dadwal, Advocate, would vehemently contend that even if permission had been granted by the learned trial Magistrate to the respondent to assist the Public Prosecutor in the trial, it did not in any manner authorise the complainant/respondent to directly file the application in question, through his counsel, that too, without even associating the Public Prosecutor as this would not be assisting but would amount to conducting the trial itself.

4. On the other hand, Mr. Gautam Sood, learned counsel for the complainant/respondent would strenuously argue that once the permission has been granted to the complainant under Sections 301 and 302 Cr.P.C., then the complainant was not only entitle to assist the Public Prosecutor, but he could even conduct the trial independently.

5. Both the parties have placed reliance on the latest judgment of the Hon'ble Supreme Court in ***Dhariwal Industries Ltd. vs. Kishore Wadhwani and others AIR 2016 SC 4369*** to contend that the point in issue is squarely answered in their favour.

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

6. It would be noticed that prior to 31.12.2009 the concept of "victim" was virtually alien to the Code of Criminal Procedure. However, the Code of Criminal Procedure (Amendment) Act, 2008, brought about widespread amendments not only by introducing the definition of victim as Section 2 (wa) w.e.f. 31.12.2009, but various other provisions were also included in the Code for benefit of the victim. Thereby recognizing the importance and relevance of a "victim" in not only the process of investigation, enquiry, trial, but even in matters relating to appeal, revision etc.

7. The statement of objects and reasons for introducing the amendment inter alia mentions that "*At present, the victims are the worst sufferers in a crime and they don't have much role in the Court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the criminal justice system.*"

8. The definition of "victim" as found in Section 2(wa) reads as under:

> *"Section 2 (wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."*

9. The new clause introduces a definition of "victim" to confer certain rights on the guardians and legal heirs of the victim like to engage an Advocate under Section 24 (8), right to file an appeal under proviso to Section 372, to claim compensation under new Section 357-A.

10. The Scheme behind the insertion of this new definition of "victim" is also apparent from the insertion of a proviso to Section 24 (8) of Cr.P.C., so as to enable a victim, or those who are covered by this definition, to engage an advocate of his/their choice to assist the prosecution. Since the entire criminal justice machinery is set into motion on the asking of or due to the sufferings of the victim, the law makers have deemed it fit to enable the victim to actively participate in the judicial process. There can be no manner of doubt that right from the occurrence of the incident till the ultimate decision by the highest Court of law, the "victim" is as much interested in the decision as is the accused or the State. In fact, the "victim" on account of his being the sufferer/injured, has to be recognized as the most aggrieved party in a crime.

11. The rights of a "victim", who can be said to be a "victim", whether the same would include the complainant, what are his rights etc. have been subject matter of a Full Bench of the Punjab and Haryana High Court in ***M/s Tata Steel Ltd vs. M/s Atma Tube Products Ltd. and others, 2014 (173) Pun.LR 1*** and it shall be worthwhile to extract some portions of the judgment, which reads thus:

"(7). The universalist views on criminal justice system emphasize on the norms collectively recognized and accepted by all of humanity. The internationally accepted norms whereunder an individual's criminal act(s) is accountable are universally binding and applicable across national borders on the premise that crimes committed are not just against individual victims but also against mankind as a whole. The crime against an individual thus transcends and is taken as an assault on humanity itself. It is the concept of the humanity at large as a victim which has essentially characterized 'crimes' on universally- accepted principles. The acceptability of this principle was the genesis of Criminal Justice System with State dominance and jurisdiction to investigate and adjudicate the 'crime'. For long, the criminal law had been viewed on a dimensional plane wherein the Courts were required to adjudicate between the accused and the State. The 'victim' - the de facto sufferer of a crime had no participation in the adjudicatory process and was made to sit outside the Court as a mute spectator. The ethos of criminal justice dispensation to prevent and punish 'crime' would surreptitiously turn its back on the 'victim' of such crime whose cries went unnoticed for centuries in the long corridors of the conventional apparatus. Various international Declarations, domestic legislations and Courts across the world recognized the 'victim' and they voiced together for his right of representation, compensation and assistance. The UN Declaration of Basic Principles of Justice for the Victims of Crime and Abuse of Power, 1985, which was ratified by a substantial number of countries including India, was a landmark in boosting the pro-victim movement. The Declaration defined a 'victim' as someone who has suffered harm, physical or mental injury, emotional suffering, economic loss, impairment of fundamental rights through acts or omissions that are in violation of criminal laws operative within a State, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the 'victim'.

(8). European Union (EU) also took great strides in granting and protecting the rights of 'victims' through various Covenants including the following:-

i. The position of a victim in the framework of Criminal Law and Procedure, Council of Europe Committee of Ministers to Member States, 1985;

ii. Strengthening victim's right in the EU communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Reasons, European Union, 2011;

iii. Proposal for a Directive of the European Parliament and of the Council establishing "Minimum Standards on the Rights, Support and Protection of Victims of Crime, European Union, 2011".

(9). The United States of America (USA) had earlier made two enactments on the subject i.e. (i) The Victims of Crime Act, 1984 under which legal assistance is granted to the crime-victims; and (ii) The Victims' Rights and Restitution Act of 1990, followed by meaningful amendments, repeal and insertion of new provisions in both the Statutes through an Act passed by the House of Representatives as well as the Senate on April 22, 2004.

(10). In Australia, the Legislature has enacted South Australia Victims of Crime Act, 2001 while in Canada there are two legislations known as Victims of Crime Act, Prince Edward Island and Victims of Crime Act, British Columbia. Most of these legislations have defined the 'victim' of a crime liberally and have conferred varied rights on such victims.

***Indian Perspective**:*

(11). Much before the United Nations stepped into or the other developed nations legislated for the protection and promotion of victims' rights, the Supreme

Court in Rattan Singh vs. State of Punjab, (1979) 4 SCC 719, lamented against complete desertion of a victim in our criminal jurisprudence observing that "The victimization of the family of the convict may well be a reality and is regrettable. It is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependants of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law. This is a deficiency in the system which must be rectified by the Legislature. We can only draw attention to this matter. Hopefully, the Welfare State will bestow better thought and action to traffic justice in the light of the observations we have made".

(12). The Legislature though did not come forward to address the issue but the Law Commission of India, nonetheless, in its 154th Report attributed Chapter-XV on "Victimology" made radical recommendations on the aspect of compensatory justice through a Victim Compensation Scheme. Thereafter came the report of a Committee on the Reforms of Criminal Justice System, commonly known as "Malimath Committee Report, 2003". The Committee was constituted by Government of India with an avowed object of suggesting ways and means for developing a cohesive system in which all the parts work in coordination to achieve the common goal as the people by and large have lost confidence in the criminal justice system and the bewildered victim is crying for attention and justice. The Committee recommended the right of the victim or his legal representative 'to be impleaded as a party in every criminal proceeding where the charge is punishable with seven years imprisonment or more'; the right of voluntary organizations for impleadment in court proceedings in select cases; the victim's right to be represented by an advocate of his choice and if he is not in a position to afford, to provide an advocate at the State's expenses; victim's right to participate in criminal trial; the right to know the status of investigation and take necessary steps in this regard and to be heard at crucial stages of the criminal trial including at the time of grant or cancellation of bail. The Committee further recommended that "the victim shall have a right to prefer an appeal against any adverse order...; he should be provided legal services and that 'victim compensation' is a State obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted" and for this object a separate legislation be enacted.

(13). Soon after the Malimath Committee report came the verdict in Jahira Habibullah H. Sheikh & Anr. vs. State of Gujarat & Ors., (2004) 4 SCC 158, ripping apart the ailing criminal justice system in India and ordering re-trial of Best Bakery Case and desirability of further investigation in terms of Section 173(8) CrPC due to the factors like dishonest and faulty investigation, holding of trial in a perfunctory manner, non-production of vital witnesses, prosecuting agency acting unfairly and forcing eye-witnesses to turn hostile, resulting into the acquittal of several accused suspected to be involved in the gruesome murder of as many as 14 people as a result of communal frenzy.

(14). Before we proceed further, let there be a special reference to those decisions of the Hon'ble Supreme Court which built up the victim's right brick by brick, revolutionalised the conventional criminal justice system and sensitized its stakeholders, notwithstanding the fact that statutory initiatives through the desired amendments in the Code of Criminal Procedure, 1973 (in short, 'the Code') were still illusory.

(15). In PSR Sadhanantham vs. Arunachalam & Anr., (1980) 3 SCC 141, the Constitution Bench considered the question whether the brother of a victim who had been murdered, possessed the right to petition under Article 136 of the Constitution for special leave to appeal against the acquittal of the accused? After noticing that under the Code, the right of appeal vested in the State is subject to leave to be granted by the High Court and a complainant's right to appeal was also

subject to his obtaining 'special leave' to appeal from the High Court, it was held that a petition filed by the private party other than the complainant should be entertained "in those cases only where it is convinced that the public interest justifies an appeal against the acquittal and that the State has refrained from petitioning from special leave for reasons which do not bear on the public interest but are prompted by private influence, want of bona fide and other extraneous considerations".

(16). In Bhagwant Singh vs. Commissioner of Police, (1985) 2 SCC 537, the right of the complainant to be heard before the acceptance of a cancellation report submitted by the police after investigation of the FIR, was accepted laying down that the informant must be given an opportunity of hearing so that he could make his submissions to persuade the Magistrate to take cognizance of the offence and issue due process.

(17). In M/s JK International vs. State Government of NCT of Delhi, (2001) 3 SCC 462, the Supreme Court recognized the right of the complainant at whose instance the police-case was registered, to be heard by the High Court in the proceedings initiated by the accused for quashing those proceedings. It held thus:-

> *"9. The scheme envisaged in the Code of Criminal procedure (for short the Code) indicates that a person who is aggrieved by the offence committed, is not altogether wiped out from the scenario of the trial merely because the investigation was taken over by the police and the charge sheet was laid by them. Even the fact that the court had taken cognizance of the offence is not sufficient to debar him from reaching the court for ventilating his grievance. Even in the sessions court, where the Public Prosecutor is the only authority empowered to conduct the prosecution as per Section 225 of the Code, a private person who is aggrieved by the offence involved in the case is not altogether debarred from participating in the trial..."*

(18). In Puran Shekhar and Anr. vs. Rambilas & Anr., (2001) 6 SCC 338, the locus standi of father of the deceased in a dowry death case, to move the High Court and seek cancellation of bail granted by the Sessions Court was upheld as he was not a stranger.

(19). In Delhi Domestic Working Women's Forum vs. Union of India & Ors, (1995) 1 SCC 14, the Supreme Court in exercise of its PIL jurisdiction directed the National Commission for Women to evolve a Scheme to protect rape victims through various measures and cast obligation on the Union of India to implement the Scheme so evolved by the Commission.

(20). Rama Kant Rai vs. Madan Rai & Ors., (2003) 12 SCC 395 was a case where against an order of acquittal passed by the High Court in a murder case, the right of the private party to file an appeal under Article 136 of the Constitution was eloquently recognized especially to meet the pressing demands of justice.

(21). In Sakshi vs. Union of India & Ors, (2004) 5 SCC 518, mandatory guidelines for the recording of evidence of victim of offence under Sections 354, 375, 367 & 377 IPC were laid down.

(22). In Mosiruddin Munshi vs. Mohammad Siraj & Ors., (2008) 8 SCC 434, the right of the complainant to be heard before an order affecting the criminal proceedings initiated at his instance was recognized and it was held that the FIR could not be quashed by the High Court at the instance of the accused without notice to the original complainant.

(23). Some of the High Courts also dutifully espoused the cause of 'victims' and expanded the jurisprudence to create a space for them at one or the other stage of Court hearings. We may usefully quote the following observations made by a

Division Bench of Assam High Court in NC Bose vs. Prabodh Dutta Gupta, AIR 1955 (Assam) 116:-

> *"[I]t seems to me that the person vitally interested in the issue of the prosecution or the trial is the person aggrieved who 'initiates' the proceedings. He may be both civilly and criminally liable if, on account of any unfairness or partiality, the trial or the proceeding ends in wrongful acquittal or discharge of the accused. The Legislature therefore could not have intended to shut out such a person from coming to the High Court and claiming redress under Section 526 of the Code. The words should be construed to have the widest amplitude so long as the effect of the interpretation is not to open the door to frivolous applications at the instance of intermeddlers or officious persons having no direct interest in the prosecution or trial".*

Evolution of Right to Appeal:

(24). Since the issues to be determined by three-Judge Bench, as mentioned in para 6, are hedging around the 'right to appeal' given to a 'victim', we may briefly notice the evolution of that right under the Indian legal regime.

(25). The Code of Criminal Procedure when originally enacted in the year 1861 did not provide for any right to appeal against acquittal to anyone including the State. It was in the Code of Criminal Procedure of 1898 that Section 417 was inserted enabling the Government to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. The Law Commission of India in its 41st Report given in September, 1969 as also in 48th Report pertaining to the Criminal Procedure Bill, 1970, however, recommended to restrict the right of appeal given to the State Government against an order of acquittal by introducing the concept of 'leave to appeal' and that all appeals against acquittal should come to the High Court though it rejected the right to appeal to "the victim of a crime or his relatives".

(26). The Code of Criminal Procedure, 1973 came into being on January 25, 1974 repealing the Code of Criminal Procedure, 1898. The recommendations made by the Law Commission of India, referred to above, largely found favour with the Parliament when it inserted an embargo in sub-Section (3) to Section 378 against entertainment of an appeal against acquittal "except with the leave of the High Court". Sub- section (4) of Section 378 retained the condition of maintainability of an appeal at the instance of a complainant against an order of acquittal passed in a complaint-case only if special leave to appeal was granted by the High Court. Save in the manner as permitted by Section 378, no appeal could lie against an order of acquittal in view of the express embargo created by Section 372 according to which "no appeal shall lie from any judgement or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force". The Code of Criminal Procedure (Amendment) Act, 2005:

(27). Hon'ble Supreme Court in a string of decisions a few of which are already cited, has recognized time and again one or the other right of the 'victim' including locus standi of his/her family members to appeal against acquittal in the broadest sense. Notwithstanding these decisions or the chorus of such like rights being heard in all civic societies, the Legislature in its wisdom did not deem it necessary to permit a 'victim' to appeal against the acquittal of his wrong-doer even while carrying out sweeping amendments in the Code in the year 2005….."

12. Before adverting to the relative merits of the case, it would be necessary to first make note of the application filed by the complainant/respondent under Sections 301 and 302 Cr.P.C., which reads thus:

"Application under Section 301 and 302 of Cr.P.C., 1973 on behalf of Sh. Radha Krishan Kuthiala, with a prayer for assisting prosecution in the above titled case.

1. *That the above titled case is pending of adjudication before this Ld. Court for offences U/s 420, 468, 467 of IPC.*
2. *That the complainant Sh. Radha Krishan Kuthiala had filed a complaint in the said case with regard to said offences.*
3. *That the undersigned wants to assist the prosecution in the said case through the undersigned counsel.*

It is, therefore, prayed that the present application may very kindly be allowed and the undersigned counsel be permitted to assist the prosecution as per the provisions of Cr.P.C."

13. A perusal of the aforesaid application would reveal that not only in the prayer clause, but even in the heading of the application the only relief prayed for by the respondent was that he through his counsel, be permitted to assist the prosecution and had not sought any permission to conduct the trial of the case. It was perhaps for this reason that even the petitioner had not opposed the application as is evident from order dated 4.8.2012, the relevant portion thereof, reads as under:

"At this stage, Sh. Gautam Sood, Advocate, moved an application U/s 301 & 302 Cr.P.C, the same is considered and allowed as not opposed by Ld. APP."

14. Notably, there is an ocean of difference between assisting the Public Prosecutor under Section 301 and conducting the prosecution on the basis of a permission granted under Section 302. A Public Prosecutor is not actuated by any personal interest in the case. Whereas, the pleader engaged by a person, who is a de facto complainant has a personal interest in the case.

15. Now, adverting to the judgment rendered by the Hon'ble Supreme Court in ***Dhariwal Industries Ltd. vs. Kishore Wadhwani and others AIR 2016 SC 4369***, it would be noticed that the learned Single Judge of the Bombay High Court had modified the order passed by the Additional Chief Metropolitan Magistrate, whereby he had permitted the appellant before the Hon'ble Supreme Court (Dhariwal Industries) to be heard at the stage of framing of charge under Section 239 of the Code of Criminal Procedure by expressing the view that the role of the complainant was limited under Section 301 Cr.P.C. and that he could not be allowed to take control over the prosecution by directly addressing the Court, but can only act under the directions of the Assistant Public Prosecutor in charge of the case.

16. The Hon'ble Supreme Court not only upheld the order passed by the Bombay High Court, but it even explained the distinction between Sections 301 and 302 Cr.P.C. as would be evident from the following observations:

"**8.** *Section 301 CrPC reads as follows:-*

*"**Appearance by Public Prosecutors**.-(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal.*

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case."

9. *In Shiv Kumar (supra), the Court has clearly held that the said provision applies to the trials before the Magistrate as well as Court of Session.*

10. *Section 302 CrPC which is pertinent for the present case reads as follows:-*

> *"**Permission to conduct prosecution**-(1)Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:*
>
> *Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.*
>
> *(2) Any person conducting the prosecution may do so personally or by a pleader."*

11. *In Shiv Kumar (supra) interpreting the said provision, the Court has ruled:-*

> *" 8. It must be noted that the latter provision is intended only for magistrate courts. It enables the magistrate to permit any person to conduct the prosecution. The only rider is that magistrate cannot give such permission to a police officer below the rank of Inspector. Such person need not necessarily be a Public Prosecutor.*
>
> *9. In the Magistrate's Court anybody (except a police officer below the rank of Inspector) can conduct prosecution, if the Magistrate permits him to do so. Once the permission is granted the person concerned can appoint any counsel to conduct the prosecution on his behalf in the Magistrate's Court.*
>
> *Xxx xxx xxx*
>
> *11. The old Criminal Procedure Code (1898) contained an identical provision in Section 270 thereof. A Public Prosecutor means any person appointed under Section 24 and includes any person acting under the directions of the Public Prosecutor,(vide Section 2(u) of the Code).*
>
> *12. In the backdrop of the above provisions we have to understand the purport of Section 301 of the Code. Unlike its succeeding provision in the Code, the application of which is confined to magistrate courts, this particular section is applicable to all the courts of criminal jurisdiction. This distinction can be discerned from employment of the words any court in Section 301. In view of the provision made in the succeeding section as for magistrate courts the insistence contained in Section 301(2) must be understood as applicable to all other courts without any exception. The first sub-section empowers the Public Prosecutor to plead in the court without any written authority, provided he is in charge of the case. The second sub-section, which is sought to be invoked by the appellant, imposes the curb on a counsel engaged by any private party. It limits his role to act in the court during such prosecution under the directions of the Public Prosecutor. The only other liberty which he can possibly exercise is to submit written arguments after the closure of evidence in the trial, but that too can be done only if the court permits him to do so."*

12. *It is apt to note here that in the said decision it hasalso been held that from the scheme of CrPC, the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the public prosecutor. It is because the legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. The Court has further observed that a public prosecutor is not expected to show the*

thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case.

***13**. In J.K. International (AIR 2001 SC 1142) (supra), a three-Judge Bench was adverting in detail to Section 302 CrPC. In that context, it has been opined that the private person who is permitted to conduct prosecution in the Magistrate's Court can engage a counsel to do the needful in the court in his behalf. If a private person is aggrieved by the offence committed against him or against any one in whom he is interested he can approach the Magistrate and seek permission to conduct the prosecution by himself. This Court further proceeded to state that it is open to the court to consider his request and if the court thinks that the cause of justice would be served better by granting such permission the court would generally grant such permission. Clarifying further, it has been held that the said wider amplitude is limited to Magistrate's Court, as the right of such private individual to participate in the conduct of prosecution in the sessions court is very much restricted and is made subject to the control of the public prosecutor.*

***14.** Having carefully perused both the decisions, we do not perceive any kind of anomaly either in the analysis or ultimate conclusion arrived by the Court. We may note with profit that in Shiv Kumar (supra), the Court was dealing with the ambit and sweep of Section 301 CrPC and in that context observed that Section 302 CrPC is intended only for the Magistrate's Court. In J.K. International (supra) from the passage we have quoted hereinbefore it is evident that the Court has expressed the view that a private person can be permitted to conduct the prosecution in the Magistrate's Court and can engage a counsel to do the needful on his behalf. The further observation therein is that when permission is sought to conduct the prosecution by a private person, it is open to the court to consider his request. The Court has proceeded to state that the Court has to form an opinion that cause of justice would be best subserved and it is better to grant such permission. And, it would generally grant such permission. Thus, there is no cleavage of opinion.*

***15**. In Sundeep Kumar Bafna (AIR 2014 SC 1745) (supra), the Court was dealing with rejection of an order of bail under Section 439 CrPC and what is meant by "custody". Though the context was different, it is noticeable that the Court has adverted to the role of public prosecutor and private counsel in prosecution and in that regard, has held as follows:-*

> *"... in Shiv Kumar v. Hukam Chand (supra), the question that was posed before another three - Judge Bench was whether an aggrieved has a right to engage its own counsel to conduct the prosecution despite the presence of the Public Prosecutor. This Court duly noted that the role of the Public Prosecutor was upholding the law and putting together a sound prosecution; and that the presence of a private lawyer would inexorably undermine the fairness and impartiality which must be the hallmark, attribute and distinction of every proper prosecution. In that case the advocate appointed by the aggrieved party ventured to conduct the cross-examination of the witness which was allowed by the trial court but was reversed in revision by the High Court, and the High Court permitted only the submission of written argument after the closure of evidence. Upholding the view of the High Court, this Court went on to observe that before the Magistrate any person (except a police officer below the rank of Inspector) could conduct the prosecution, but that this laxity is impermissible in the Sessions by virtue of Section 225 CrPC, which pointedly states that the prosecution shall be conducted by a Public Prosecutor. ..."*

> ***16***. *Mr. Tulsi, learned senior counsel, has drawn inspiration from the aforesaid authority as Shiv Kumar (supra) has been referred to in the said judgment and the Court has made a distinction between the role of the public prosecutor and the role of a complainant before the two trials, namely, the sessions trial and the trial before a Magistrate's Court.*
>
> ***17***. *As the factual score of the case at hand is concerned, it is noticeable that the trial court, on the basis of an oral prayer, had permitted the appellant to be heard along with the public prosecutor. Mr. Tulsi, learned senior counsel submitted such a prayer was made before the trial Magistrate and he had no grievance at that stage but the grievance has arisen because of the interference of the High Court that he can only participate under the directions of the Assistant Public Prosecutor in charge of the case which is postulated under Section 301 CrPC.*
>
> ***18***. *We have already explained the distinction between Sections 301 and 302 CrPC. The role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. As far as Section 302 CrPC is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently.*
>
> ***19.*** *.We would have proceeded to deal with the relief prayed for by Mr. Tulsi but, no application was filed under Section 302 CrPC and, therefore, the prayer was restricted to be heard which is postulated under Section 301 CrPC. Mr. Singh, learned senior counsel appearing for the respondents would contend that an application has to be filed while seeking permission. Bestowing our anxious consideration, we are obliged to think that when a complainant wants to take the benefit as provided under Section 302 CrPC, he has to file a written application making out a case in terms of J.K. International (supra) so that the Magistrate can exercise the jurisdiction as vested in him and form the requisite opinion."*

17. It would be clear from the aforesaid that the role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. However, as far as Section 302 Cr.P.C. is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently. However, such permission has to be expressly obtained by filing a written application.

18. At this stage, it also needs to be clarified that though the application was filed by the respondent invoking both the provisions as contained in Sections 301 and 302 Cr.P.C. and even the learned Magistrate considered and allowed the same vide his order dated 4.8.2012. However, the permission so granted by the learned Magistrate has essentially to be read and considered in light of the prayer contained in the application.

19. Once the respondent had specifically sought permission that his counsel be permitted to assist the prosecution, he cannot turn around to contend that such permission included a right to conduct the trial. Therefore, the petitioner at this stage has every right to object against the filing of the application directly by the counsel engaged by the respondent, instead of the same having been filed by the Public Prosecutor.

20. Adverting to the facts, it would be noticed that the application filed by the complainant/respondent under Sections 294 and 311 Cr.P.C. was opposed by the petitioner by filing reply wherein number of preliminary objections had been raised including the maintainability of the application on the ground that the complainant was granted permission to assist the Public Prosecutor but he was overstepping his limits by moving the application directly through his counsel.

21. Strangely enough, the learned trial Magistrate somehow assumed that the application had been filed by the complainant/State which finding is contrary to the record.

Before allowing the application, it was obligatory on the Magistrate to have first gone into the question of maintainability of the application and only thereafter could the same have been allowed, more particularly, when the petitioner had questioned the locus-standi of the complainant/respondent. Having failed to take into consideration all these facts and law on the subject, the order passed by the learned Magistrate cannot be sustained.

22. In view of the aforesaid discussion, there is merit in the petition and the same is accordingly allowed and the order dated 21.7.2015 passed by the learned Magistrate is quashed and set-aside. However, it shall not prevent the respondent, if so advised, from filing an application under Section 302 Cr.P.C. before the learned Magistrate and as and when the same is filed, the learned Magistrate shall consider the same in accordance with law.

23. With the aforesaid observations, the petition is disposed of in terms of the liberty aforesaid, so also the pending application(s) if any.

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

State of Himachal Pradesh .....Appellant.
Versus
Ashwani Kumar .....Respondent.

Cr. Appeal No. 345 of 2007
Decided on : 4.11.2016

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a bus in a rash and negligent manner and caused death of B – he was tried and acquitted by the trial Court- held in appeal that P was a passenger in the bus she was getting down from the bus, when the bus was started by the accused – all the eye witnesses except PW-8 resiled from their earlier testimonies – record shows that P had tried to get down the bus at a place, which was not a bus stop- thus, the prosecution version that the bus was stopped and thereafter started suddenly is doubtful- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-9 to 12)

For the Appellant: Mr. R.S.Thakur, Advocate.
For the Respondent: Mr. N.K.Sood, Sr. Advocate with Mr. Aman Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge, Oral

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 1.5.2007 by the learned Additional Chief Judicial Magistrate, Dehra, District Kangra, Himachal Pradesh, in Criminal Case No. 49-II/2003, whereby the learned trial Court acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 31.12.2002 at around 10.50 a.m. on the public highway at Kiryada Chowk, the accused Ashwani Kumar was driving bus No. HP-36-0398 in a rash and negligent manner and caused the death of Ms. Pooja due to his negligent driving. The matter was reported to the police by the complainant Hardayal Singh vide his statement under Section 154 Cr.P.C. Ex. PA, in which it was mentioned by him that on 30.12.2002 he had gone to the house of his sister Babita Devi at Muhal and on 31.12.2002 at about 10.30 a.m. he alongwith his sister Pooja boarded the bus and at around 10.50 at Kiryada Chowk the bus was stopped and he came out from the bus and his sister Pooja tried to came out from the bus from front window and bus driver all of a sudden started the bus, as a result of which Pooja fell on the road and received multiple injuries. The bus driver did not stop the bus and he accordingly arranged van and took Pooja to hospital at Sub Divisional Hospital, Dehra but Pooja succumbed

to her injuries at around 11.30 a.m. It was also stated by the complainant in his statement that accident in question occurred due to rash and negligent driving of bus driver. On the statement of complainant, FIR Ex. PW-1/B was registered and investigation conducted by SI/SHO Daulat Ram. The photographs of deceased Ex. P-1 to Ex. P-6 alongwith negatives Ex. P-6 to Ex. P-12 were obtained and postmortem of deceased Pooja was conducted at Sub Divisional Hospital, Dehra and report of concerned Doctor Ex. PD was obtained. The investigating officer during the course of investigation, prepared site plan of spot of occurrence Ex. PW-7/A and also took into possession bus involved in the accident alongwith its documents vide memo Ex. PA in presence of witnesses Baldev Raj and Chandel Singh. Inquest report of Ms. Pooja was prepared. The mechanical examination of the bus was conducted and report of mechanic Ex. PE was produced. The statements of the witnesses under Section 161 Cr.P.C. were recorded by the investigating officer. After completion of investigation, the police found prima facie case against the accused for offences under Sections 279 and 304-A I.P.C. and Sections 184 and 187 of Motor Vehicles Act. After completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused, a challan was prepared and filed before the learned trial Court.

3. Notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279, 304-A IPC and under Section 187 of the Motor Vehicles Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record by the learned trial Court 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 the deceased was a passenger on board of bus bearing No. HP-36-0398. At the relevant time, the aforesaid bus was driven by the accused/respondent herein. The accused is alleged to without facilitating a safe egress therefrom of the deceased abruptly galvanize the relevant bus into motion whereupon the deceased is alleged to fall onto the road, in sequel whereto, she sustained a fatal injury. The post mortem report comprised in Ext.PA unravels qua the demise of deceased being ascribable to 'hemorrhagic shock leading to cardiac respiratory arrest'. Apparently the demise of one Pooja an occupant of bus aforesaid occurred on hers suffering fracture of pelvis sequelled by hers purportedly falling onto the road from a moving bus.

10. The learned trial Court while recording an order of acquittal upon the accused/respondent herein had alluded to the testimonies of eye witnesses to the occurrence, all of whom except PW-8 reneged from their previous statements recorded in writing. Necessarily hence the learned trial Court concluded of with the testification of purported eye witnesses to the

occurrence not lending vigour to the prosecution case, the genesis of the prosecution story propagated in the F.I.R. comprised in Ext.PW-1/B not warranting any acceptance. As aforestated all eye witnesses to the illfated occurrence except PW-8 omitted to lend succor to the prosecution version. The efficacy of the testimony of PW-8 brother of deceased stood concluded by the learned trial Court to stand undermined by the factum of his being an interested witness. The aforesaid reason as stands assigned by the learned trial Court to dispel the vigour of the testification of PW-8 may not be sufficient to affirm the findings of acquittal recorded by it upon the accused/respondent herein preeminently when the learned defence counsel while subjecting him to cross-examination has not put any suggestion to him personifying the factum of his not being an eye witness to the occurrence. Absence of the aforesaid suggestions to PW-8 rather despite other eye witnesses to the occurrence not supporting the prosecution case was sufficient to record a conclusion qua the prosecution succeeding in proving the genesis of the occurrence comprised in the F.I.R. embodied in Ext.PW-1/B. Even if the defence has by not putting apposite suggestions to either PW-8 or to the Investigating Officer concerned hence efficaciously not propagated its defence qua the ill fated demise of an occupant of the bus driven at the relevant time by the accused/respondent herein arising not from hers suffering fatal injuries on hers falling onto the road from a moving bus given the accused respondent herein galvanizing it in motion without permitting hers safely egressing therefrom rather her demise occurring on hers colliding with a tractor which arrived at the relevant site of occurrence. Nonetheless omissions in support of the aforesaid defence does not empower the learned Additional Advocate General to contend of with hence the defence not concerting the aforesaid espousals its hence acquiescing to the factum of the ill fated demise of an occupant of bus aforesaid occurring during the course of hers alighting therefrom nor also he stands empowered to canvass qua the defence hence acquiescing to the factum of the accused respondent herein while not facilitating her safe egress therefrom his hence apparently negligently driving the bus nor thereupon it would be imperative for this Court to conclude of the penal liability constituted in the charge standing convincingly established against the accused respondent herein.

11. Otherwise too, though the aforesaid submission addressed before this Court by the learned Additional Advocate General is extremely impressive also may constrain this Court to thereupon record an inference of the accused respondent herein by proactively waiving in the manner aforesaid his defence, his hence acquiescing to the relevant propagations made by the prosecution. Nonetheless the stark imminent fact which emerges from a perusal of Ext.PW-7/A embodying therein the site plan whereat the relevant occurrence took place is qua PW-8 alighting from the relevant bus at point “G” whereas the deceased at a distance of 70 meters therefrom stands unravelled therein to suffer her demise. The aforesaid graphic depictions occurring in Ext.PW-7/A which stands relied upon by the prosecution visibly overcome the efficacy, if any, of the testimony of PW-8 also thereupon rather the testimonies of other eye witnesses to the occurrence wherein they reneged from their previous statements recorded in writing do assume vigour besides the espousal made herebefore by the learned Additional Advocate General of the sole testimony of a credible eye witness to the occurrence comprised in the deposition of PW-8 being sufficient to constrain this Court to reverse the findings of acquittal recorded by the learned trial Court is also concomitantly bereft of any legal sinew. The reason for benumbing the arguments addressed before this Court by the learned Additional Advocate General apparently stands foisted upon the trite factum of the aforesaid revelations occurring in Ext.PW-7/A wherein a graphic articulation stands pronounced qua PW-8 alighting from the relevant bus at a stage prior to the deceased alighting therefrom. The aforesaid factum leads to a further concomitant inference of both not simultaneously alighting therefrom besides thereupon also an inference is erectable qua at the stage where PW-8 alighted from the bus, its driver thereat stopping it, it being an ear marked place for its stoppage whereas the deceased at an unear-marked place for its stoppage voluntarily concerting to thereat disembark therefrom, wherefrom it is apt to conclude of the accused respondent herein neither by his not applying the brakes of the bus hence prohibiting her safe egress therefrom nor it can be concluded of the accused respondent being penally inculpable for the charges for which he stood tried. Contrarily reiteratedly it has to be concluded of the deceased at the relevant unearmarked place for the stoppage of the bus

voluntarily trying to egress therefrom. In aftermath, no imputation of penal negligence can be ascribed to the accused/respondent herein. Accentuated strength to the aforesaid inference stands marshaled from the factum of the testimony of PW-8 holding no veracity, inference whereof stands spurred by the factum of his evidently alighting from the bus not simultaneously alongwith his deceased sister rather his alighting therefrom earlier to the departure therefrom of his deceased sister whereupon he stood disabled to sight the factum of hers gaining fatal injuries in the manner he espouses in his testification besides thereupon his testification in disconcurrence to the testifications of other eye witnesses to the occurrence looses credibility.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

13. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

State of Himachal Pradesh ....Appellant
Versus
Paramjeet Singh @ Bangu ....Respondent

Cr. Appeal No. 272 of 2014
Decided on: 4th November, 2016

Indian Penal Code, 1860- Section 341, 323, 506 and 376 read with Section 511- Prosecutrix was going home from School after appearing in examination – the accused caught her, dragged her inside a maize field and started kissing her – he put his hand on the string of her salwar- prosecutrix raised hue and cry on which PW-7 arrived at the spot- the accused was tried and acquitted by the Trial Court- held in appeal that there is discrepancy in the name of the accused- prosecutrix mentioned that she was restrained by B, son of N, whereas, the name of the accused is P, son of H - prosecutrix admitted in cross-examination that the name of the boy who assaulted her was not known to her – the photographs of the spot do not corroborate the prosecution version- the age of the prosecutrix was not properly proved – the Trial Court had rightly acquitted the accused- appeal dismissed. (Para-7 to 12)

For the appellant: Mr. Virender Verma, Addl. A.G.
For the respondent: Mr. Gaurav Gautam and Ms. Megha Kapur Gautam, Advocates.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

State of Himachal Pradesh is in appeal before this Court. The complaint is that learned trial Court has acquitted the respondent (hereinafter referred to as the 'accused') of the charge under Sections 341, 323, 506 and 376 read with Section 511 of the Indian Penal Code vide judgment dated 11.03.2014 passed in RBT Sessions Case No. 3-J/VII/14/12 erroneously without appreciating the prosecution evidence in its right perspective. The evidence as has come on record by way of testimony of the prosecutrix who has stepped into the witness box as PW-5 and that of her mother PW-6 and her uncle PW-7. The evidence as has come on record by way of

testimony of PW-1, the Pradhan of Gram Panchayat is also stated to be erroneously ignored. The evidence qua age of the prosecutrix as has come on record by way of birth certificate Ext. PW-9/A and PW-11/K have also been erroneously brushed aside.

2. The charge against the accused in a nut shell is that on 1.9.2012 around 1.00 p.m. at village Papahan under Police Station, Jawali, District Kangra he wrongfully restrained the prosecutrix from proceeding ahead on her way to home from school after appearing in examination. He asked her to disclose the name of her parents and when she was about to disclose name their names to him, he put his hand on her shoulder. She objected to such unbecoming behaviour of the accused and asked him as to what he was doing. Instead of letting her free, he dragged her inside the maize field situated nearby and asked her to kiss him, failing which, threatened to torn out her clothes. She objected to such behaviour of the accused and on this he put his hand on the string of her salwar. On hearing that someone is going on motorcycle, she raised an alarm. The motorcyclist, none-else but her uncle Praveen Kumar (PW-7) on hearing her cries entered inside the maize field and noticed that the accused had caught hold the prosecutrix and was kissing her. On observing the presence of someone (PW-7) there, the accused set the prosecutrix free and fled away. PW-7 could not caught hold him. It is with these allegations, a case under Sections 341, 323, 354 and 506 IPC was registered against him in Police Station, Jawali, District Kangra vide FIR Ext. PW-11/A, on the basis of application Ext. PW-1/A made by PW-6 Sandla Devi, the mother of the prosecutrix to Smt. Santosh Kumari (PW-1) Pradhan Gram Panchayat, Papahan.

3. The investigation in the case was conducted by Sub Inspector Ashwani Kumar, PW-11. It is pertinent to note that the prosecutrix and her mother both have refused for getting the medical examination of the prosecutrix conducted. Any how, the prosecutrix was medically examined by PW-2 Dr. Sulekha Gupta vide MLC Ext. PW-2/A. No injury except for an abrasion was noticed on right wrist and on right knee joint. The Radiologist PW-4 Dr. Raman Sharma and Dr. Sulekha Gupta PW-2 both have disclosed the radiological age of the prosecutrix as 16 to 18 years. Such opinion Ext. PW-4/B was formed by them on the basis of X-ray films Ext. P-3 to Ext. P-8. The date of birth certificate Ext. PW-9/A was produced in evidence by PW-9 Rajinder Singh, Trained Graduate Teacher, Government Senior Secondary School, Guglara. Birth certificate Ext. PW-11/K was also obtained by the I.O from Secretary, Gram Panchayat, Papahan. The mother of the prosecutrix and her uncle Praveen Kumar were associated during the course of investigation and their statements under Section 161 of the Code of Criminal Procedure were recorded.

4. Learned trial Court after holding trial and on analyzing the evidence available on record has arrived at a conclusion that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. The accused has, therefore, been acquitted of the charge as pointed out at the very out set.

5. On behalf of the appellant-State, Mr. Virender Verma, learned Additional Advocate General has forcefully contended that in view of own statement of the prosecutrix supported by that of her mother PW-6 and uncle PW-7 as well as corroborated by the link evidence available on record, the prosecution has been able to bring the guilt home to the accused. Therefore, according to Mr. Verma, the findings of acquittal recorded by learned trial Court being beyond pleadings of the parties and evidence available on record are legally unsustainable.

6 On the other hand, Mr. Gaurav Gautam, learned counsel representing the accused-respondent has urged that what to speak of cogent and reliable evidence produced by the prosecution, the present is a case of no evidence and as such, according to him the impugned judgment calls for no interference by this Court.

7. As pointed out hereinabove, the charge framed against the accused is under Sections 341, 323, 506 and 376 read with Section 511 of the Indian Penal Code. In order to infer the commission of an offence punishable under Section 341, the restraint should be wrongful and in a manner so as to prevent a person from proceeding beyond the circumscribing limits. For

example, if a person walking within a vacant space, which is blocked by another person and thereby prevented him from proceeding in any direction beyond the circumscribing line of wall such another person can be said to have committed an offence within the meaning of Section 341 of the Indian Penal Code and rendered himself liable to be punished under Section 341 of the Code. Similarly, in order to infer the commission of an offence punishable under Section 323 of the Indian Penal Code, there must be material available on record that the offender has voluntarily caused the hurt to the victim and as regards the offence punishable under Section 376 read with Section 511 of the Code, the essential ingredients are that the offender must found to have done any act towards the commission of substantive offence viz. in the case in hand an offence punishable under Section 376 of the Code. The first and foremost question which needs adjudication in the present case is that it is the accused alone who restrained the prosecutrix wrongfully and voluntarily caused hurt to her as well as did any act to be treated a step towards the commission of an offence punishable under Section 376 of the Indian Penal Code within the meaning of Section 511 of the Code.

8. The first version qua the manner in which the occurrence has taken place find mentioned in the application Ext. PW-1/A addressed to the Pradhan, Gram Panchayat, Papahan. In this application, the name of the accused has been disclosed as Baggu son of Shri Nana Ram. His name as per the prosecution case is Paramjeet Singh @ Bangu, whereas, name of his father is Harnam Singh. The prosecutrix while in the witness box as PW-5 tells us that it is the accused who met her and asked to disclose the name of her parents and that when she was about to disclose their names, he put his hand on her shoulder. When she objected to such conduct and behaviour of the accused, he dragged her to nearby maize fields. She was asked to give kiss to him and that in case he is not allowed to kiss her, he would tear her clothes. On this, he put his hand on the string of her salwar, however, her uncle PW-7 Praveen Kumar came there for her rescue. The accused ran away from the place. She revealed the occurrence to her uncle Praveen Kumar and also disclosed that the person who had been outraging her modesty was having beard. According to her, accused was seen by her outside the liquor vend and it is her uncle who disclosed that he was resident of nearby village. In order to connect the accused with the commission of offence, the prosecutrix has further stated that when she accompanied by other women folks visited the house of the accused on the same day, he was found to have ran away therefrom. Interestingly enough, in her cross-examination, she has stated that the name of the boy who had assaulted her was not known to her. Not only this but she has admitted the suggestion that the accused was arrested on the basis of suspicion. It is as such the identity of the accused was disclosed by them to the police. Her testimony also reveals that test identification parade was not got conducted by the police during the investigation of the case. In view of the statement made by the prosecutrix while in the witness box, the ingredients of an offence punishable under Section 341 of the Indian Penal Code nor that of Section 323 IPC are made out for the reason that the present is not a case where she was restrained wrongfully by the accused from moving in a particular direction or voluntarily caused hurt to her. At the most the accused/assailant has applied force and taken the prosecutrix inside the maize fields. The testimony of another material prosecution witness Sandla Devi to the extent that it is the accused who had taken the prosecutrix inside the maize field is hearsay. Though, in the application Ext. PW-1/A, it is she who had disclosed the name of accused as Baggu son of Nana Ram and while in the witness box she has stated that it is her daughter the prosecutrix who told her that accused Baggu had met her on the way from the school to the house. The prosecutrix was not knowing the name of accused as she has said while in the witness box, who told PW-6 that the name of the boy who dragged her daughter inside the maize fields is Baggu remained unexplained. Not only this but in her cross-examination, she has denied that it is her daughter who has disclosed the physical features of person who assaulted her. Though, it is stated by her voluntarily that her daughter has disclosed only that the boy was having beard, however, in the application Ext. PW-1/A this witness has not disclosed that boy was having beard. She admits that when the accused was apprehended by the police, he was clean shaved and also that he was arrested only on suspicion. Therefore, the testimony of the prosecutrix and that of her mother PW-6, if

scrutinized minutely, it is not at all established that it is the accused alone and none else who dragged the prosecutrix inside the maize fields and outraged her modesty.

9. Now if coming to the testimony of Praveen Kumar who allegedly came for the rescue of the prosecutrix is seen, he seems to have deposed falsely that the accused was seen by him while dragging the prosecutrix and pressing her mouth because the prosecutrix has also not said so while in the witness box as according to her on observing the presence of someone there, the accused set her free and ran away. She has not said that her uncle Praveen Kumar has tried to caught hold that boy, therefore, his testimony to this effect is also false. When as per his version in cross-examination he did not notice the colour of the clothes worn by the assailant, how he could have deposed that he noticed the boy while dragging the prosecutrix or that he tried to caught hold him. As per his version, he had disclosed the identifying features of the person to the police, however, PW-6 has denied the disclosure of such features to the police except for that the boy was having beard. As per further version of PW-7, he was not knowing the name and father's name of the boy who had assaulted the prosecutrix nor test identification parade was got conducted by the police. Therefore, his testimony is also not suggestive of that it is the accused who was the assailant. According to prosecutrix, it is PW-7 who had revealed to her that the boy who had assaulted her belongs to nearby village. However, the accused is not a resident of any other village and rather resident of village Papahan itself, to which the prosecutrix and PW-6 as well as PW-7 belong. Meaning thereby that the accused is the resident of the same village. As per version of the prosecutrix, he had noticed the accused sitting outside a liquor vend, however, no-one i.e. salesman etc., has neither been associated nor examined during the course of investigation. The present in the light of what has been said hereinabove is, therefore, a case where the identity of the accused is not at all proved. He, therefore, cannot be said to have assaulted the prosecutrix and outraged her modesty, in the manner as claimed by the prosecution.

10. Be it stated that the photographs Ext. P-8 to Ext. P-15 pertain to the fields. One hair clip is visible in the photograph Ext. P-14. The photographs Ext. P-9, P-10 and P-15 show the grass and maize field in badly crushed condition. The grass and crop in such a condition do not match with the prosecution case because had the prosecutrix been only taken inside the fields and within no time PW-7 appeared there for her rescue, this would have not been the condition of the grass and also the maize crop in the field. In this regard, without commenting any further qua this aspect of the matter, suffice would it to say that the factual position has been concealed by the I.O for the reasons best known to him. Any how, the prosecutrix seems to have been taken inside the maize crop and an attempt to assault her sexually also seems to have been made, however, it is not at all proved beyond all reasonable doubt that the assailant was the accused alone and none else. Therefore, the link evidence as has come on record from the photographs and also the recovery of broken pieces of bangles from the place of occurrence is hardly of any help to the prosecution case. The injuries on the neck and wrist of the prosecutrix were found simple in nature, as is evident from the perusal of MLC Ext. PW-2/A. Her age has been claimed below 16 years, however, the evidence i.e. the school certificate Ext. PW-11/K issued by the Secretary, Gram Panchayat, Chalwara cannot be treated as a validly proved proof qua the date of birth of the prosecutrix recorded therein has to be treated as correct for the reason that the birth and death register has not been produced nor the Secretary, Gram Panchayat, Chalwara examined during the course of trial. The certificate has simply been produced in evidence by the I.O. while in the witness box. Therefore, the same cannot be treated as a valid proof qua the date of birth of the prosecutrix. The extract of parivar register Ext. PW-11/H cannot also be treated as legal and valid proof qua the age of the prosecutrix. The another certificate Ext. PW-9/A proved by PW-9 TGT, Government Senior Secondary School, Guglara, District Kangra cannot also be said to be treated as valid proof so as to the date of birth of the prosecutrix is concerned for the reason that the same has not been proved to be issued on the basis of school record i.e. the admission and withdrawal register maintained in the primary school which could have only been treated as the primary evidence qua the date of birth of the prosecutrix and not the certificate issued from the record of Senior Secondary School, that too,

without producing the admission and withdrawal register. On the other hand, the radiological age of the prosecutrix in the opinion of Radiologist PW-2 at the relevant time was between 16 to 18 years. While determining the age of a person radiologically, margin of two years on either side is always there. Therefore, if such margin is taken into consideration, the prosecutrix may have been 18 years or 20 years of age also on the day of occurrence. The benefit of such error as per settled legal principles always available to the accused and not to the prosecution.

11. In view of the re-appraisal of the evidence hereinabove and examining the prosecution case from each and every angle, the only irresistible conclusion would be that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. The accused has rightly been acquitted by learned trial Court. We, therefore, find no illegality, irregularity or infirmity in the impugned judgment. The same, as such, is hereby affirmed.

12. For all the reasons discussed hereinabove, this appeal fails and the same is accordingly dismissed. Personal bonds furnished by the accused shall stand cancelled and surety discharged.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

The New India Assurance Co. Ltd. .....Appellant
Versus
Kamlesh Kumari and others ..... Respondents

FAO No.90 of 2012
Decided on : 04.11.2016

Motor Vehicles Act, 1988- Section 173- Insurer had limited grounds available to file an appeal – it can seek permission to contest the claim petition on all the grounds after seeking permission under Section 170 of the Act- no such permission was granted by the Insurer and appeal cannot be filed on the ground of adequacy of compensation. (Para-3 to 10)

Cases referred:

United India Insurance co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541
Josphine James versus United India Insurance Co. Ltd. & Anr., 2013 AIR SCW 6633

For the appellant: Mr.B.M. Chauhan, Advocate.
For the respondents: Mr.O.C. Sharma, Advocate, for respondents No.1 to 4.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 30th March, 2011, passed by Motor Accident Claims Tribunal-II, Solan, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.15,17,600/, with interest at the rate of 9% per annum from the date of filing of the petition till realization, came to be awarded in favour of the claimants, and the insurer was saddled with the liability, (for short, the impugned award).

2. The claimants, the owner and the driver have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. The insurer has filed the instant appeal on the ground of adequacy of compensation.

4. It is moot question whether the insurer can question the impugned award on the ground of adequacy of compensation?

5. The answer is in the negative for the following reasons. In terms of the mandate of Sections 147 and 149 of the MV Act read with the terms and conditions contained in the insurance policy, the insurer has limited grounds available, but, it can contest the claim petition on other grounds provided permission in terms of Section 170 of the MV Act has been obtained.

6. The insurer can seek permission to contest the claim petition on all grounds available to it and in case permission has not been sought and granted, it is precluded from questioning the award on adequacy of compensation or any other ground, which is not otherwise available to it.

7. This question arose before the Apex Court in the case titled as **United India Insurance co. Ltd. Versus Shila Datta & Ors.,** reported in **2011 AIR SCW 6541,** and the matter was referred to the larger Bench.

8. The question again arose before the Apex Court in the case titled as **Josphine James versus United India Insurance Co. Ltd. & Anr.,** reported in **2013 AIR SCW 6633.** It is apt to reproduce paras 8, 17 and 18 of the judgment herein:

> *"8. Aggrieved by the impugned judgment and award passed by the High Court in MAC Appeal no. 433/2005 and the review petition, the present appeal is filed by the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi's case and instead, placing reliance upon the Bhushan Sachdeva's case. Nicolletta Rohtagi's case was exhaustively discussed by a three judge bench in the case of United India Insurance Company Vs. Shila Datta, 2011 10 SCC 509. Though the Court has expressed its reservations against the correctness of the legal position in Nicolletta Rohtagi decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside.*
>
> *9. to 16. ....*
>
> *17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (2002) 7 SCC 456 : AIR 2002 SC 3350 : 2002 AIR SCW 3899, and earlier decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to though the correctness of the aforesaid decision is referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.*
>
> *18. In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V. Act.*

> *Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to 4,20,000/- under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs. 5,000/- and applying 14 multiplier, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. Delhi Transport Corporation, 2009 6 SCC 121 instead of applying the principle laid down in Baby Radhika Gupta's case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the M.V. Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under section 149(2) of the M.V. Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."*

9. Thus, the insurer can question the adequacy of compensation only if it has sought permission under Section 170 of the MV Act.

10. In the present case, the application filed by the insurer under Section 170 of the MV Act was dismissed by the Tribunal vide order, dated 8th September, 2010. Thus, the insurer is precluded from questioning the adequacy of compensation.

11. It appears that the amount awarded is excessive and the rate of interest is also on the higher side.

12. At this stage, Mr.O.C. Sharma, learned counsel for the claimants/respondents No.1 to 4 herein, stated that he is under instructions to settle the dispute for a sum of Rs.14.00 lacs alongwith interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit. His statement is taken on record. The said offer is acceptable to Mr.B.M. Chauhan, learned counsel for the insurer.

13. Accordingly, with the consent of the learned counsel for the parties, the impugned award is modified by providing that the claimants are entitled to a sum of Rs.14.00 lacs, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit, as compensation. The Registry is directed to release the entire amount alongwith interest in favour of the claimants, through their respective bank accounts, and the excess amount alongwith interest be released in favour of the insurer through payees' account cheque.

14. The impugned award is modified and the appeal is disposed of as settled.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

The New India Assurance Company .....Appellant

Versus

Smt. Urmila Devi and others ...Respondents.

FAO (MVA) No. 160 of 2011.

Date of decision: 4th November,2016.

Motor Vehicles Act, 1988- Section 149- It was contended that the driver did not have a driving licence at the time of accident- insurer had not led any evidence to prove that driver did not have a valid and effective driving licence and the owner had committed willful breach – RW-1 proved that driver had driving licence issued by R & LA, Bilaspur, which was renewed by R & LA, Sarkaghat after getting confirmation from R & LA, Bilaspur- the insurer had failed to discharge the onus placed upon it and was rightly saddled with liability- MACT had awarded interest @ 9% per annum, which is reduced to 7.5% per annum. (Para- 4 to 13)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others vs National Insurance Company Limited and others, (2012) 11 SCC 738
Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr. Vivek Chandel, Advocate, for respondents No. 1 and 2.
Mr. Baldev Singh Negi and Ashwani Negi, Advocates, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 7.2.2011, passed by the Motor Accident Claims Tribunal-II, Una, H.P. hereinafter referred to as "the Tribunal", for short, in MACP No.2 of 2009, titled *Smt.Urmila Devi and another versus Sh. Hem Raj and others*, whereby compensation to the tune of Rs.2,87,000/- alongwith interest @ 9% per annum with counsel fee assessed at Rs.1,000/- came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimants, owner and driver have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant argued that the driver was not having a valid and effective driving licence at the time of the accident. Thus, the only question to be determined in this appeal is-whether the driver was having a valid and effective driving licence and the owner has committed willful breach?

5. The insurer has examined only one witness, i.e., Kamlesh Kumar RW1, who is licence Clerk, from the office of S.D.M. Sarkaghat. The insurer has not led any evidence to the effect that the driver was not having a valid and effective driving licence and the owner has committed willful breach.

6. It was for the insurer to plead and prove that the owner has committed any willful breach in terms of Sections 147 and 149 of the Motor Vehicles Act read with the judgment rendered by the apex Court in case titled **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. ....

(i) ....

(ii) ....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).........................

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

7. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

8. RW-1 Kamlesh Kumar has deposed that the driver was having driving licence No. 151 /1999 dated 10.2.1999, issued by the R & LA, Bilaspur and it was renewed vide renewal No.

991/2010 dated 16.12.2010 by R& LA, Sarkaghat after getting confirmation from the R& LA Bilaspur that the driving licence was genuine and valid.

9. Having said so, the insurer has failed to prove that the driver was not having a valid and effective driving licence at the time of accident. The Tribunal has made discussion in para 23 of the impugned award, needs no interference.

10. The Tribunal has awarded interest @ 9% per annum. However, interest was to be awarded at the rate of 7.5% per annum, for the following reasons.

11. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, reported in (2002) 6 SCC 281; Satosh Devi versus National Insurance Company Ltd. and others, reported in 2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others reported in (2012) 11 SCC 738; Smt. Savita versus Binder Singh & others, reported in 2014, AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn., reported in 2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, reported in (2015) 4 SCC 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, reported in (2015) 4 SCC 434,* and discussed by this Court in a batch of *FAOs, FAO No. 256 of 2010*, titled as *Oriental Insurance Company versus Smt. Indiro and others*, being the lead case, decided on 19.06.2015.

12. Accordingly, interest @7.5% per annum is awarded from the date of claim petition till realization of the amount.

13. The insurer is directed to deposit the amount alongwith interest @ 7.5% per annum, within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification and excess amount, if any, be refunded to the insurer/appellant through payees' cheque account.

14. Viewed thus, the impugned award is modified as indicated hereinabove and appeal is disposed of alongwith pending applications.

15. Send down the record forthwith, after placing a copy of this judgment.

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

Shri Babu Ram. .....Appellant/non-objector/non-applicant.

Versus

Shri Santokh Singh & another. ......Respondent/Objector/applicant(Santokh Singh).

CMP(M) No. 1118 of 2014 in Cross Objection No. 50 of 2014 in RSA No. 457 of 2002-F
Reserved on: 02.11.2016
Decided on: 07 .11.2016

Code of Civil Procedure, 1908- Order 41 Rule 22- Limitation Act, 1963- Section 5- The cross-objections are barred by eleven years eight months and 17 days – no actual date of hearing was issued – the Court has discretion to entertain the cross-objections, even after the expiry of 30 days – the objector was not asked to file the cross-objections within 30 days and he being illiterate, rustic and old person could not file them within the period of 30 days- there are sufficient grounds to condone the delay- held, that limitation will start running from the first date of hearing – the date of hearing will start from the day when the objector and his pleader appeared in the Courts- the appeal is yet to be decided and the interest of justice will be served, if

the objector is heard on merits- application allowed and the delay in filing the cross-objections condoned.(Para- 7 to 11)

Case referred:

Mahadev Govind Gharge and others vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, (2011) 6 Supreme Court Cases 321

For the appellant/ non-objector:	Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Nishant Kumar, Advocate.
For respondent No. 1/ Objector:	Mr. G.C. Gupta, Sr. Advocate, with Mr. Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present application has been filed by the applicant/respondent/objector, Santokh Singh (now deceased, represented through legal representatives) (hereinafter referred to as 'the objector') under Order 41, Rule 22 CPC read with Section 5 of the Indian Limitation Act for condoning the delay in moving the cross-objections.

2. As per the objector, he has moved the cross-objections, which are barred by eleven years, eight months and seventeen days, but, in fact, the objections were filed within a year after fixing the date of hearing by this Hon'ble Court. It is further contended by the objector that he has preferred the cross-objections, in the present regular second appeal (RSA No. 457 of 2002), which is pending adjudication, against judgment dated 15.05.2002, passed by the learned District Judge, Hamirpur, in Civil Appeal No. 86 of 1994, whereby findings recorded by the learned Sub Judge, 1st Class(2), Hamirpur, in Civil suit No. 194/91, decided on 04.05.1994, were partly set-aside. As per the objector, the cross-objections have been filed within time, as no actual date notice of hearing was ever issued to him. As per Order 41, Rule 22 CPC, the Court has discretion to entertain the cross-objections, even after the expiry of thirty days. The objector was an old, illiterate and ailing person and he did not understand the intricacies of law. The objector further contends that he was never advised to file the cross-objections, till the last date of hearing, so the same could not be filed within thirty days from the date of admission. Even otherwise also, the period of thirty days, as per the provision of CPC would start from the date when actual date notice of hearing is issued by the Court. As per the objector, there are sufficient grounds for condoning the delay in filing the cross-objections and the same may kindly be condoned. The application is duly supported with an affidavit.

3. Reply to the application stands filed and it is averred therein that the regular second appeal was admitted on 08.10.2002. No objections were filed within the stipulated time of one month or extended period, therefore, the application deserves dismissal.

4. I have heard the learned Senior counsel for the parties and gone through the record in detail.

5. The learned Senior Counsel appearing on behalf of the objector/respondent/applicant has argued that the matter was listed for the first time for hearing on 14.12.2012 and the period of one month is to be taken from 14.12.2012. Taking this into consideration, the cross-objections cannot be said to be too much time barred. He has further argued that even Under Order 41, Rule 33 CPC, the objector (respondent) has a right to argue and assail the judgment, as against him. He has prayed that the delay, in moving the cross-objections, may be condoned. To fortify his arguments, he has relied upon a judgment rendered by the Hon'ble Apex court in case titled as ***Mahadev Govind Gharge and others vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, (2011) 6 Supreme Court Cases 321.***

6. Conversely, the learned Senior Counsel appearing on behalf of the appellant/non-objector/non-applicant (hereinafter referred to as 'the non-objector') has also relied upon the judgment (supra) referred by the learned Senior Counsel appearing on behalf of the objector. He has argued that as the delay has not been sufficiently explained, the application for condonation of delay is required to be dismissed. He has further argued that the objector is taking contradictory pleas and first he should decide whether he want to pursue the present cross-objections under Order 41, Rule 22 CPC or want to argue the matter under Order 41, Rule 33 CPC. However, he has argued that the application deserves dismissal and may be dismissed.

7. Precisely, the grounds, which the objector has taken in the application, are that he is an old, illiterate and ailing person having no knowledge of the intricacies of law and more so he was never advised to file cross-objections till the last date of hearing.

8. The judgment of Hon'ble Apex Court in ***Mahadev Govind Gharge and others vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, (2011) 6 Supreme Court Cases 321,*** has been relied upon by both the parties, wherein the Hon'ble Apex Court in para 60 has held as under:

> "60. Having analytically examined the provisions of Order 41 Rule 22, we may now state the principles for its applications as follows:
>
> (a) The respondent in an appeal is entitled to receive a notice of hearing of the appeal as contemplated under Order 41 Rule 22 of the Code.
>
> (b) The limitation of one month for filing the cross-objection as provided under Order 41 Rule 22 of the Code shall commence from the date of service of notice on him or his pleader of the day fixed for hearing the appeal.
>
> (c) Where a respondent in the appeal is a caveator or otherwise puts in appearance himself and argues the appeal on merits including for the purposes of interim order and the appeal is ordered to be heard finally on a date fixed subsequently or otherwise, in presence of the said respondent/caveator, it shall be deemed to be service of notice within the meaning of Order 41 Rule 22. In other words the limitation of one month shall start from that date."

9. Further the Hon'ble apex Court in the judgment (supra) has also held as under:

> *" 24. Rule 22 is not only silent on the consequences flowing from such default from filing appeal within one month, from the period fixed hereunder, but it even clothes the court with power to take on record the cross-objections even after the expiry of the said period. Thus, the right of the cross-objector is not taken away in absolute terms in case of such default. The courts exercise this power vested in them by virtue of specific language of Rule 22 itself and thus, its provisions must receive a liberal construction.*
>
> … … … … … …
>
> *28. In Kailash v. Nanhku ((2005) 4 SCC 480), a Bench of three Judges of this Court while —interpreting the provisions of Order 8 Rule 1 of the Code, which has more stringent language and provides no such discretion to extend the limitation as provided to the courts in Order 41 Rule 22, had observed that despite the use of such language in the provisions of Order 8 Rule 1 of the Code, the judicial discretion to extend the limitation contained therein has been a matter of legal scrutiny for quite some time but now the law is well settled that in special circumstances, the court can even extend the time beyond the 90 days as specified therein and held as under: (SCC pp. 494-95, paras 27-28)*

"27. ... The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried. ...

28. ... In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."

... ...

37. Procedural laws, like the Code, are intended to control and regulate the procedure of judicial proceedings to achieve the objects of justice and expeditious disposal of cases. The provisions of procedural law which do not provide for penal consequences in default of their compliance should normally be construed as directory in nature and should receive liberal construction. The court should always keep in mind the object of the statute and adopt an interpretation which would further such cause in light of attendant circumstances. To put it simply, the procedural law must act as a linchpin to keep the wheel of expeditious and effective determination of dispute moving in its place. The procedural checks must achieve their end object of just, fair and expeditious justice to the parties without seriously prejudicing the rights of any of them.

... ...

54. In Rashida Begum (AIR 2008 Rajasthan 131) the Delhi High Court had noticed that limitation for filing the cross-objection would start from the date of service of notice of hearing of the appeal. A notice containing only the date of hearing of the stay application but not the appeal would not be "notice" as contemplated under Order 41 Rule 22 of the Code.

55. The view taken by the Delhi High Court is more in line with the intent of the provisions of Order 41 Rule 22 while the decision of the Rajasthan High Court was on its own facts and cannot be treated to be stating a proposition of law. The application of law would always depend upon the facts and circumstances of a given case and what is the true and correct construction of Order 41 Rule 22 we shall shortly proceed to state."

10. From the above referred judgment it is amply clear that the limitation will start from the date the objector has given the first date of hearing. Taking this into consideration, it cannot be said that the cross-objections are hopelessly time barred, as as per the record, the date of one month will start from the date the objector or his pleader appears in the Court on the date fixed for hearing of the appeal, hearing in appeal was fixed on 14.12.2012, on which date the case was listed for hearing on 25.02.2013. It is clear from the record that earlier the case was not listed for hearing by this Hon'ble Court. Even if this Court takes that the cross-objections are barred by eleven years, eight months and seventeen days, then also the objector can request this Court to hear and give findings against the portion of the judgment which is against him. As the appeal is still to be heard and the Court under Order 41, Rule 33 CPC may render findings in favour of the objector, this Court finds that the interests of justice would be subserved if the objector (respondent) is heard on cross-objections. Moreover, the delay in moving the cross-objections has been sufficiently and satisfactorily explained, which, in the opinion of this Court, is the ill advice of the Advocate and when the objector was advised, he maintained the cross-objections.

11. Applying the law, this Court finds that the interest of justice would be met, in case the delay is condoned in moving application under Order 41, Rule 22 CPC. Accordingly, the

delay in moving the cross-objections is allowed and the cross-objections are taken on record. The application stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Khem Chand son of Shri Jagdish Chand ….Revisionist/Landlord

Versus

Kuldeep Chand son of Shri Khem Chand ….Non-Revisionist/Tenant

Civil Revision No. 188 of 2006
Order Reserved on 17th August 2016
Date of Order 7th November 2016

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed on the ground that the tenant is in arrears of rent, premises is in dangerous condition and may collapse at any time, the same is required bonafide for re-construction, which cannot be carried out without vacating the building - the premises, is required bonafide for personal use and the same is required for being demolished at the instance of Municipal Committee, Palampur- the petition was allowed by Rent Controller on the ground of non-payment of arrears of rent- an appeal was filed, which was dismissed- held in revision that Rent Controller had recorded that issue No. 3 was not pressed, however, the Statement of Counsel was not recorded to this effect – Appellate Court held that premises is commercial in nature and cannot be vacated for non occupation- however, the law was amended during the pendency of the proceedings and this ground became available to the landlord – Revision allowed and the case remanded to the Appellate Authority to decide the same afresh in accordance with law. (Para-11 to 15)

Case referred:
Hari Dass Sharma vs. Vikas Sood and others, 2013(5) SCC 243

For the Revisionist: Mr. K.D. Sood Sr. Advocate with Mr.Mukul Sood Advocate
For the Non-Revisionist: Mr. Bhupender Gupta Sr. Advocate with Mr.Janesh Gupta Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Order of Limited remand:- Present civil revision petition is filed under Section 24(5) of H.P. Urban Rent Control Act 1987 against order of learned Appellate Authority(III) Kangra dated 13.10.2006 whereby order of learned Rent Controller dated 30.3.2002 affirmed.

Brief facts of the case

2. Khem Chand landlord filed eviction petition under Section 14 of H.P. Urban Rent Control Act 1987 for eviction of tenant. It is pleaded that premises is commercial premises situated in Shop No. M/257 main market Palampur. It is pleaded that monthly rent is Rs.100/- (Rupees one hundred) per month and premises was let out in the year 1971. It is pleaded that electricity bill is paid by tenant. It is pleaded that tenant has not paid rent of premises w.e.f. 1.12.1993 and premises is in dangerous condition and would collapse at any time. It is pleaded that premises is required by landlord for rebuilding into three stories structure after demolition of existing structure. It is pleaded that tenant could not carry out rebuilding without vacation of premises by tenant. It is pleaded that landlord requires the premises for his own use as landlord did not own any building within urban area and landlord has not vacated any such building within five years of filing the eviction petition. It is pleaded that back portion of demised premises

has collapsed and partially demolished at the instance of Municipal Committee Palampur in consequence of notice. Prayer for acceptance of eviction petition sought.

3. Per contra response filed on behalf of tenant pleaded therein that eviction petition is not legally and factually maintainable. It is pleaded that act and conduct of landlord bars the landlord to file present petition. It is pleaded that landlord is estopped by his act, conduct and acquiescence to file the present eviction petition. It is pleaded that present petition has been filed just to harass the tenant. It is pleaded that present eviction petition is barred on concept of resjudicata. It is denied that premises has become unsafe and unfit for human habitation. It is pleaded that landlord can raise three stories structure/building without demolition of existing structure and without eviction of tenant. It is also denied that landlord requires the building for his own occupation. It is pleaded that earlier also eviction petition was filed on same ground and earlier eviction petition was dismissed upto the level of High Court. Prayer for dismissal of eviction petition sought.

4. Landlord also filed rejoinder and re-asserted the allegations mentioned in eviction petition. As per pleadings of parties following issues were framed by learned Rent Controller on 22.7.2001:-

1. Whether tenant has not paid rent of premises from December 1993 uptil now if so its effect? ....OPA

2. Whether premises in question/building is in a dangerous condition and unsafe which would collpase at any time and same cannot be re-build without the building being vacated, as alleged? ....OPA

3. Whether building in question is required by landlord for his own occupation as alleged? If so, its effect? .....OPA

4. Whether petition is not maintainable? .....OPR

5. Whether petitioner is estopped by his act and conduct to file the present petition? ...OPR

6. Whether petition is barred under the principle of resjudicata? .....OPR

7. Relief.

5. Learned Rent Controller decided issue No.1 in affirmative and decided issues Nos. 2, 4, 5 and 6 in negative. Learned Rent Controller held that issue No.3 was not pressed at the time of arguments. Learned Rent Controller decided issue No. 3 as not pressed. Learned Rent Controller allowed the petition of landlord partly on the ground of non-payment of arrears of rent w.e.f. 1.12.1993 at the rate of Rs.100/- per month. Learned Rent Controller dismissed the eviction petition on other grounds. Learned Rent Controller further directed that if tenant would pay the arrears of rent plus interest at the rate of 9% per annum within a period of thirty days w.e.f. 30.3.2002 plus costs assessed at Rs.200/- then tenant would not be evicted from demised premises.

6. Thereafter Khem Chand landlord filed appeal under Section 24 of H.P. Urban Rent Control Act 1987 against order of learned Rent Controller and learned Appellate Authority dismissed the appeal filed by landlord on dated 13.10.2006 and affirmed the order of learned Rent Controller.

7. Feeling aggrieved against order of learned Appellate Authority landlord filed present revision petition.

8. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist and Court also perused entire record carefuly.

9. Following points arise for determination in civil revision petition:-

Point No.1 Whether revision petition filed under Section 24(5) of Urban Rent Control Act 1987 is liable to be accepted as mentioned in memorandum of grounds of civil revision petition?

Point No.2 Relief.

10. ***Findings upon point No.1 with reasons***

10.1. AW1 Khem Chand has stated that premises is situated in main market Palampur. He has stated that premises was rented out at the rate of Rs.100/- per month. He has stated that tenant did not pay the arrears of rent w.e.f. December 1993. He has stated that shop is 75-80 years old and some portion of shop was burnt in the year 1954-55. He has stated that application was filed before SDM with allegations that premises would fall at any time and would cause damage to human beings. He has stated that thereafter SDM issued notice to him and he also filed response. He has stated that thereafter back portion of shop was demolished. He has stated that he consulted the expert and expert had given the opinion that for re-construction eviction of tenant is essential. He has stated that he would spend Rs. 5 to 7 lacs for reconstruction purpose and he is drawing pension of Rs.6461/-(Rupees six thousand four hundred sixty one). He has stated that he is also owner of three hundred kanal of land in Una and he used to earn rupees three lacs annually from that land. He has stated that banks have also agreed to give loan to him. He has stated that copy of notice issued by SDM is Mark A-3 and further stated that he has also prepared site plan of proposed construction. He has denied suggestion that after December 1993 tenant offered rent but he declined to accept the rent. He has denied suggestion that wall of demised premises is constructed with cement. He has denied suggestion that demised premises did not require any major repair. He has denied suggestion that demised premises is safe for commercial purpose. He has admitted that he and Manohar Lal were joint owners of four shops. Self stated that family partition effected between him and Manohar. He has denied suggestion that three stories building could be constructed without eviction of tenant. He has denied suggestion that he is in possession of other shops also. He had admitted that his earlier eviction petition was dismissed upto High Court level. He has denied suggestion that no notice was given to him by SDM. He has denied suggestion that he did not obtain the opinion of any expert engineer. He has stated that he is not income tax assessee because his income is from agriculture product. He has denied suggestion that documents Mark 1 to 3 have been prepared in fraudulent manner. He has denied suggestion that eviction petition filed by him in order to harass the tenant in illegal manner.

10.2 AW2 Ajay Sharma has stated that he is civil engineer consultant at Palampur since 6-7 years and he has seen the demises premises. He has stated that basement of demised premises is damaged and premises is unsafe for commercial purpose. He has stated that no construction could be raised upon the old demised premises and demolition of demised premises is required for new reconstruction purpose. He has stated that he has filed report Ext.AW2/A placed on record. He has denied suggestion that he has not personally visited the demised premises. He has denied suggestion that report Ext.AW2/A is not written by him. He has denied suggestion that foundation and walls of demised premises are of permanent nature. He has denied suggestion that two stories structure could be raised upon the upper roof of demises premises. He has denied suggestion that he has prepared report Ext.AW2/A in his house.

10.3 AW3 Kishori Lal Ahlmad SDM Court Palampur has stated that he has brought the record. He has stated that copy of notice issued under Section 133 Cr.P.C. is Ext.AW3/A which is correct as per original record.

10.4 AW4 Rakesh Kumar Clerk Municipal Committee Palampur has stated that he is posted as Clerk in Municipal Committee and he did not bring the summoned record.

10.5 AW5 Mool Chand has stated that his shop is given upon tenancy to Shiv Kumar proprietor Janta Sweet shop. He has stated that Shiv Kumar informed him that shop of Khem Chand would demolish at any point of time and would damage his shop. He has stated that he told Shiv Kumar tenant to take necessary action. He has stated that thereafter Shiv Kumar filed

application before SDM and thereafter official of committee demolished the wall. He has stated that demised premises is not in proper condition. He has stated that his house is situated at a distance of 90 K.m. from Palampur. He has denied suggestion that he is not owner of any shop at Palampur. He has denied suggestion that demised premises is in proper condition. He has denied suggestion that walls of demised premises are in proper condition. He has denied suggestion that he came from 100 K.m. because he is friend of landlord.

10.6 AW6 Mahesh Dutt has stated that he is posted as executive officer at Municipal Committee Palampur. He has stated that municipal committee has written request letter to SDM with allegations that if back portion of house would fall then path would be blocked. He has stated that SDM was requested to take necessary action.

10.7 AW7 Mohinder Singh has stated that he is posted as Manager in KCC bank. He has stated that bank used to pay loan for construction of house. He has stated that landlord came to him for loan sanction. He has stated that he told the landlord that loan would be sanctioned after completion of loan formalities and he issued letter Ext.AW7/A. He has denied suggestion that landlord did not file any application for loan. He has denied suggestion that revenue papers were not perused. He has denied suggestion that he has issued wrong certificate Ext.AW7/A. He has denied suggestion that he has issued letter against the rules and regulations.

10.8 AW8 Vinay Sharma has stated that he is architect at Palampur. He has stated that he has prepared site plan Ext.AW8/A at the instance of landlord. He has stated that cost of structure would be 3-4 lacs. He has stated that he has prepared document Ext.AW8/A after perusal of tatima and after inspection of site. He has stated that he could not state that plinth of demised premises and shop of Manohar are same.

10.9 RW1 Khem Chand has stated that he is special attorney of tenant and same is Ext.R-1. He has stated that demised premises is constructed of permanent concrete bricks and further stated that walls are also concrete and lintel is raised upon roof. He has stated that floors are also cemented. He has stated that demised premises was taken in the year 1974 from Manohar Lal. He has stated that SDM did not pass any order relating to demised premises. He has stated that in family partition demised premises came to share of revisionist. He has stated that landlord did not receive the rent despite tendered by tenant. He has stated that expert also visited the demised premises and submitted reports Mark R-1 and Mark R-2. He has denied suggestion that back portion of demised premises fallen. He has stated that he did not see the basement of demised premises. He has stated that he did not visit the back portion of demised premises. He has admitted that tenant did not pay rent after 1993 and self stated that tenant is ready to pay rent after 1993.

10.10 RW2 Surender Kumar has stated that he is a member of Municipal Committee Palampur since 1974 and he also remained as President and as of today he is also member of Municipal Committee. He has stated that he has seen the demised premises and further stated that demised premises is constructed of concrete bricks. He has stated that floors are also concrete and lintel is raised upon the premises. He has stated that demised premises did not require any repair. He has stated that a room which was situated behind the shop was demolished and demised premises and rooms are two different portions. He has stated that house was 70-80 years old and demised premises was constructed in the year 1954-55. He has stated that shop of Manohar Lal is also situated adjoining to demised premises. He has stated that there is common wall of demised premises and shop of Manohar Lal. He has stated that demised premises was constructed in his presence. He has stated that two shops came in share of landlord and two shops came in share of Manohar Lal. He has stated that Manohar Lal has constructed two stories building upon his shop. He has stated that two stories building could also be constructed upon demised premises. He has stated that his shop is situated in front of demised premises. He has denied suggestion that cracks have developed in walls of demised premises. He has denied suggestion that 2-3 stories building could not be constructed upon the demised premises.

10.11 RW3 Raj Kumar has stated that he is posted in Agriculture University as Assistant Engineer and he has acquired diploma in civil engineering. He has stated that he was appointed as Junior Engineer and he worked as Junior Engineer for 17 years and now he is working as Assistant Engineer since 11 years. He has stated that he also used to do construction work and repair work of buildings and he has inspected the demised premises twice and submitted the report. He has stated that report is Ext.RW3/A. He has stated that entire demised premises is cemented. He has denied suggestion that walls of demised premises have tilted. He has denied suggestion that cracks have developed in demised premises.

11. Submission of learned Advocate appearing on behalf of revisionist that learned Appellate Authority did not decide ground No. 5 of appeal relating to issue No. 3 in accordance with law and caused grave miscarriage of justice to revisionist and on this ground case be remitted back to Appellate Authority is accepted for the reasons hereinafter mentioned. Learned Rent Controller has specifically mentioned in order that issue No. 3 was not pressed during the course of arguments by learned Advocate and learned Rent Controller decided issue No. 3 as not pressed. Thereafter landlord filed appeal before learned Appellate Authority and took specific ground in paragraph 5 of appeal that learned Rent Controller gravely erred in not deciding issue No. 3 on merits. Landlord pleaded in paragraph 5 of grounds of appeal that Advocate was not authorised to give any statement relating to issue No.3. Learned Rent Controller did not record statement of learned Advocate in writing to the effect that issue No. 3 was not pressed at the time of arguments. Learned Appellate Court decided ground No. 5 of appeal with observations that demised premises is commercial in nature and landlord cannot seek eviction of tenant in commercial premises on the ground of requirement for own occupation as per H.P. Urban Rent Control Act 1987. Section 14 of H.P. Urban Rent Control Act 1987 was amended vide H.P. Urban Rent Control Amendment Act 2009 (Act No. 8 of 2012) which received assent of President of India on 28.2.2012 and published in H.P. Gazetted on 16.3.2012. Vide amendment in Section 14 of H.P. Urban Rent Control Act 1987 landlord can seek eviction of tenant in residential and non-residential premises for his own occupation. It is well settled law that Court can take judicial notice of amendment in law at subsequent stage.

12. Submission of learned Advocate appearing on behalf of non-revisionist that amendment in Section 14 of H.P. Urban Rent Control Act 1987 is prospective in nature and not retrospective in nature and on this ground revision petition be dismissed is decided accordingly. It is well settled law that when legislature enacts a statute then whether its operation would be prospective or retrospective would depend upon the provision of statute. It is well settled law that amendment in statute is always prospective in nature unless it is expressly made retrospective in nature. There is no recital in H.P. Urban Rent Control Amendment Act 2009 (Act No. 8 of 2012) that its operation would be retrospective in nature.

13. It is well settled law that when Hon'ble Apex Court of India gives any decision declaring law then Hon'ble Apex Court of India declares pre-existence rights and obligations. It is well settled law that decision of Hon'ble Apex Court of India is always binding upon all Courts situated in India as per Article 141 of Constitution of India. It is well settled law that decision of Hon'ble Apex Court of India is binding upon pending cases of similar nature. Hon'ble Apex Court of India in case reported in ***2013(5) SCC 243 titled Hari Dass Sharma vs. Vikas Sood and others*** made operative amended provision of Section 14 of H.P. Urban Rent Control Amendment Act 2009 (Act No. 8 of 2012) upon pending cases also. In view of decision of Hon'ble Apex Court of India cited supra it is held that provision of H.P. Urban Rent Control Amendment Act 2009 (Act No. 8 of 2012) will also operative in present case.

14. Submission of learned Advocate appearing on behalf of revisionist that in view of disposal of civil revision No. 335 of 1997 by Hon'ble H.P. High Court on dated 6.3.1998 present revision petition be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that when civil revision No. 335 of 1997 was disposed of by Hon'ble H.P. High Court on dated 6.3.1998 at that time ground for eviction of tenant on the basis of requirement of premises for own occupation in commercial premises was not available to landlord

as per law. But now due to subsequent change in law vide H.P. Urban Rent Control Amendment Act 2009 (Act No. 8 of 2012) landlord can seek eviction of tenant from commercial premises on ground that landlord requires demised premises for his own occupation. Point No.1 is decided accordingly.

Point No. 2 (Relief)

15. In view of findings upon point No.1 order passed by learned Appellate Authority-III Kangra at Dharamshala dated 13.10.2006 is set aside and case is remanded back to learned Appellate Authority-III Kangra at Dharamshala for limited purpose only with direction to decide ground No. 5 of appeal upon merits afresh in accordance with law and thereafter dispose of entire appeal afresh in accordance with law. Parties are left to bear their own costs. Parties are directed to appear before learned Appellate Authority-III Kangra at Dharamshala on ***25.11.2016.*** Observations will not effect merits of case in any manner and will be strictly confined for disposal of present revision petition. Learned Appellate Authority-III Kangra at Dharamshala will dispose of appeal expeditiously within three months from today. Record of learned Rent Controller and learned Appellate Authority-III Kangra at Dharamshal be sent back forthwith along with certified copy of order. Revision petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

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

Cr. MP (M) No.1293 of 2016
Decided on: 7th November, 2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offence punishable under Section 302 of I.P.C – the petitioner applied for bail- the petitioner was last seen by the witnesses with the deceased – therefore, it is not a fit case, where judicial discretion to admit the petitioner on bail is required to be exercised -petition dismissed. (Para-4)

For the petitioner	:	Mr. N.S. Chandel, Advocate.
For the respondent	:	Mr. Virender Kumar Verma, Addl. AG, with Mr. Rajat Chauhan, Law Officer. ASI Ravinder Singh, P.S. Jawalamukhi, District Kangra, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge ***(oral).***

The present bail application is maintained by the petitioner under Section 439 of the Code of Criminal Procedure for releasing him on bail in case FIR No.60/2016, dated 14.06.2016, under Section 302 of the Indian Penal Code, registered at Police Station Jawalamukhi, District Kangra, H.P.

2. As per the petitioner, he is innocent and has been falsely implicated in the present case. He is behind the bars and there is nothing against him, so he may be released on bail.

3. Police report filed. As per the prosecution case, on 13.06.2016 complainant, Shri Basant Kumar, was on his way to Village Muhal to labour work. At about 6 p.m. he was

telephonically informed by his mother, Smt. Sheela Devi, that his brother, Shri Nirmal Kumar, went with the present petitioner towards Beas river, but did not return. The complainant came back and reported the matter to Pradhan of the Gram Panchayat, who informed the police. Both, police and Pradhan visited the spot where the mother of the complainant gave application to the police. The complainant came to know that the deceased took drinks with the petitioner and was with him around 3-4 p.m. On the subsequent day, divers were called by the police and they started searching the deceased and the dead body of the deceased was taken out. There were bruises on nose and forehead of the deceased. Around 2-3 months ago the petitioner thrashed the deceased and few days prior to reporting the matter, the deceased was beaten by the accused. Thus, as per the prosecution story, there is strong suspicion that the petitioner might have taken the deceased by alluring him for drinks and thereafter pushed him in the river. On this, FIR No. 60 of 2016, dated 14.06.2016, was registered under Section 302 of the Indian Penal Code, at Police Station Jawalamukhi.

4. Heard. At this stage, this Court finds that it has come on record that the petitioner was last seen by the witnesses with the deceased. Keeping in view overall facts and circumstances into mind, the present is not a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised. Therefore, the petition, being devoid of merits, deserves dismissal and is accordingly dismissed.

5. In view of the above, the petition stands disposed of.

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

State of H.P. …..Appellant.

Versus

Sukh Dev …..Respondent.

Cr. Appeal No. 107 of 2012.
Decided on : 7/11/2016

Indian Penal Code, 1860- Section 498-A and 506- Informant was married to the accused- the accused demanded Rs.4 lacs and gave her beatings- the accused threatened to throw her in Pandoh dam, in case of non-payment of dowry– the accused was tried and convicted by the trial Court- an appeal was preferred, which was allowed- held, that the marriage was not disputed- informant had not disclosed the beatings to any person- medical examination was not conducted to corroborate her version – material witnesses were not examined- the accused was rightly acquitted by the Appellate Court- appeal dismissed. (Para-9 to 15)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Vivek Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of Himachal Pradesh against the judgement recorded by the learned Sessions Judge, Kullu, Himachal Pradesh, whereby he reversed the verdict of conviction recorded by the learned Judicial Magistrate 1st Class, Manali, qua the commission by the respondent herein of offences constituted under Sections 498A and 506 IPC borne in F.I.R Ext.PW-5/A.

2. The brief facts of the case are that on the basis of application filed by the complainant Hira Devi FIR was registered at Police Station Manali. The complainant had alleged that her marriage was solemnized with the accused on 20.10.2008 by exchange of affidavits.

Thereafter they cohabitated together. Thereafter, the accused demanded dowry of Rs. four lacs and gave her beatings. The accused told her that marriage will not be registered until Rs. four lacs is paid to him. On 18.7.2009 she was given merciless beatings by the accused and demanded dowry of Rs. four lacs. She came in a Government bus alongwith accused and she was threatened that in case dowry amount was not paid to him the accused will throw her in the Pandoh Dam. It was further alleged that when she reached near a place known as 17 miles, she noticed Gokal Chand who is her cousin. She called him and at the relevant time the accused was also sitting with her. He inquired from the accused who told him that he wanted four lacs rupees dowry. Thereafter she fled away from the spot. The matter was investigated and after completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the accused by the learned trial Court for his committing offences punishable under Sections 498A and 506 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 7 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused whereas the learned Sessions Judge returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Sessions Judge standing not based on a proper appreciation by him of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. Ext.PW-1/A embodies an affidavit holding therewithin recitals qua marriage standing solemnized inter se the complainant and the accused/respondent herein whereafter both stayed for two days at Manali thereafter both cohabitated at Jahu. The accused/respondent herein in his statement recorded under Section 313 Cr.PC. admitted the factum of the complainant being his wife. However, despite the accused, in his statement recorded under Section 313 Cr.P.C. admitting the factum of the informant being his legally wedded wife would not per se render open an inference qua the charge to which he stood tried standing efficaciously proven. The complainant in F.I.R. borne on Ext.PW-5/A has voiced therein qua the accused/respondent by belabouring her hence subjecting her to cruelty. She therein also ascribes to the accused an inculpatory role qua his demanding Rs. four lacs as dowry from her. Necessarily hence the factum of the accused/respondent belabouring her also his making a demand upon her for dowry stood enjoined to be proven by creditworthy evidence. Though in her testification the complainant has supported the recitals constituted in Ext.PW-5/A yet PW-2 wherefromwhom she concerts to lend corroborative vigour to her testimony has not rendered the required efficacious corroboration to her testification. Even though in his examination in chief he has testified qua on 18.7.2009 while he was standing at a place called 17 miles for alighting a bus therefrom his thereat noticing the complainant travelling in a bus alongwith the accused whereafter he testifies qua the complainant weeping in his presence and disclosing to him qua

the accused belabouring her also his demanding four lacs as dowry from her. He in his examination in chief has testified qua earlier to 18.07.2009 also the complainant twice or thrice disclosing to him of the respondent herein belabouring her besides making a demand of dowry. The aforesaid disclosures embedded in the examination of PW-2 for theirs being construable to lend corroborative vigour to the testification of PW-1 were enjoined to not suffer any erosion qua their probative sinew arising from contradictions thereto occurring in his cross-examination to which he subjected to by the learned defence counsel yet when therewithin he has been unable to disclose with precision the time(s) whereat revelations earlier to 18.07.2009 stood purportedly made to him by the complainant qua the latter standing belaboured by the accused, is an abundant portrayal of his relevant testifications in his examination in chief wherewithin he has made the aforesaid disclosures not warranting imputation of credence thereon also when he in his cross-examination concedes to the suggestion put to him by the learned defence counsel qua the accused not in his presence demanding dowry from the complainant besides his admitting qua the respondent herein not threatening the complainant in his presence also predominantly his admitting the suggestion put to him by the learned defence counsel qua his deposing in Court at the instance of PW-1, with aplomb fosters an inference of his not rendering a voluntary deposition in purported corroboration to the testification of PW-1 rather his rendering a version qua the relevant fact only at the behest besides at the instance of PW-1. In sequel thereto his testifying a tutored besides a concocted version qua the incident renders it to not stand imbued with any virtue of truth.

10. Be that as it may, the factum of the relevant disclosure standing made to him on 18.07.2009 at a place called 17 miles whereat he was standing for alighting a bus whereupon he noticed both the accused and the complainant to be travelling together is unbelievable given in his cross-examination his deposing qua the relevant revelations standing made to him at 15 miles. Since the anvil of the prosecution case is qua the relevant disclosure purportedly made by PW-1 to PW-2 occurring at 17 miles whereas PW-2 in his cross examination unraveling therein qua the relevant disclosures standing made to him by PW-1 at 15 miles distance inter se both location stands conceded by him to be two and half kilometers ipso facto renders the factum of the relevant disclosure occurring at 15 miles to be stained with a gross vice of inveracity also thereupon a conclusion is erected qua his contriving the factum of PW-1 making any disclosure to him on 18.7.2009. Consequently, the testification of PW-2 in purported corroboration of the testification of PW-1 is unworthy of reliance. In aftermath, the sole uncorroborated testimony of PW-1 cannot acquire any formidable vigour.

11. The complainant in her testification embodied in her examination in chief voices therein qua hers disclosing the factum probandum to her mother who despite her name occurring in the list of prosecution witnesses was given up by the learned APP concerned. Though her examination would have lent corroborative vigour to the testification of PW-1 yet the prosecution chose to not examine her as its witness rather it proceeded to examine PW-2 who however has for reasons aforesaid not lent any vigour to the prosecution version. Cumulatively hence the omission of the prosecution to examine the mother of the complainant as its witness whereas with the complainant making a communication qua hers unveiling the relevant disclosures to her mother constrains a conclusion of the prosecution failing to prove the charges to which the accused stood subjected to.

12. The accused respondent herein and the complainant both resided together at Jahu whereat she alleges qua hers standing belaboured by the former. However, she did not make any disclosure qua the purported belabourings perpetrated upon her person by the accused at Jahu to any of the inhabitants of the homesteads existing in the vicinity of her homestead rather she proceeded to make a disclosure to her mother and to PW-2 the latter of whom for reasons aforestated had not supported the prosecution case whereas the former stood unexamined by the prosecution. In sequel thereto the complainant is to be concluded to contrive the factum of the accused respondent herein belabouring her at Jahu.

13. The prosecution has not placed on record the apposite medical certificate prepared by the doctor concerned holding communications therein of the complainant standing subjected to physical beatings by the respondent herein. Omission of the aforesaid factum when construed in tandem with the factum qua the F.I.R qua the relevant occurrence standing belatedly lodged before the Police Station concerned significantly also when the relevant delay stands inexplicated, stirs an inference of the allegations constituted in the F.I.R. holding no truth rather theirs being a result of mere concoction on the part of the complainant.

14. For the reasons which have been recorded hereinabove, this Court holds that the learned Sessions Judge has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Sessions Judge does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

15. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Asha Ram and another …Petitioners.
Versus
State of Himachal Pradesh & others …Respondents.

CMP No.7039 of 2016 in CWP No.1402 of 2016.
Reserved on: 25.10.2016.
Date of Decision: November 08, 2016.

Constitution of India, 1950- Article 226- Government issued a notification for opening Government Degree College, which is the subject matter of the writ petition- an application for interim direction was filed, which was allowed and the order was stayed – it was prayed that interim direction be vacated – held, that Government formulates the policy upon number of circumstances based on its resources – it would be dangerous, if the Court is asked to test the utility or beneficial effects of the policy based on the facts set out in affidavit – Court cannot strike down a policy or decision merely because it feels that another decision would have been fairer and more scientific, logical or wiser- the wisdom and advisability are not amenable to judicial review unless the policies are contrary to statutory or constitutional provision or arbitrary or irrational or an abuse of power – the Government has right to frame policy and there is no need to raise any grievance, if the policy is changed- the policy will not be vitiated merely because it has been changed- the Government has discretion to adopt a different policy to make it more effective – the decision to open a new college is not malicious, arbitrary or whimsical – the matter is also pending before Hon'ble Supreme Court of India- the decision to open the college cannot be stayed indefinitely- prayer allowed and the stay order vacated. (Para-12 to 28)

Cases referred:

State of Punjab and others versus Ram Lubhaya Bagga etc. etc. AIR 1998 SC 1703
Ram Singh Vijay Pal Singh and others versus State of U.P. and others (2007) 6 SCC 44
Villianur Iyarkkai Padukappu Maiyam versus Union of India and others (2009) 7 SCC 561
State of Kerala and another versus Peoples Union for Civil Liberties, Kerala State Unit and others (2009) 8 SCC 46.
State of Madhya Pradesh versus Narmada Bachao Andolan and another (2011) 7 SCC 639

Union of India & Anr. versus International Trading Co. and Another (2003) 5 SCC 437
Essar Steel Ltd. versus Union of India and others AIR 2016 SC 1980
State of Maharashtra and others versus Lok Shikshan Sanstha and others AIR 1973 SC 588
Raj Shikshan Prasarak Mandal versus State of Maharashtra and others (2001) 10 SCC 75

For the Petitioners : Mr. K.D.Sood, Senior Advocate with Mr.Dhananjay Sharma, Advocate.

For the Respondents: Mr.Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No.1 to 3.
Ms.Archana Dutt, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

CMP No.7039 of 2016.

The instant petition has been filed by the petitioners claiming therein the following reliefs:-

"a. Quash the notification dated 16th May, 2016, Annexure P-11 in so far it relates to the opening of the Government Degree College, Jandaur, District Kangra, H.P.

b. Prohibit the respondents from opening or starting Government Degree College Jandaur, District Kangra, H.P. from the Academic Sessions 2016-2017 and constructing building and creating infrastructure for the Degree College at Jandaur."

2. The respondents in the year 2012 decided to open eight colleges including the one at Kotla Behr. On 02.03.2013, the college at Kotla Behr was de-notified and the said decision was challenged by one Harbans Lal Kalia by medium of CWP No.1526 of 2013. This petition was decided alongwith bunch of petitions which pertained to the other colleges as de-notified vide notification dated 02.03.2013. This Court upheld the decision of the respondents, as would be clear from para-43 of the judgment which reads thus:-

"43. We may now turn to writ petition No.1526 of 2013 in respect of Government Degree College at Kotla Behar in Kangra District.The original record produced before us contains a communication, purported to be dated 15th June, 2012, sent from the office of the then Chief Minister addressed to the Principal Secretary (Education), mentioning that during the tour to Dehra, District Kangra, on 9th June, 2012, the (then) Chief Minister made announcement to start a Government Degree College at Kotla Behar, Tehsil Jaswan, District Kangra, from current academic session i.e. 2012-13. The communication calls upon the Principal Secretary (Education), Government of Himachal Pradesh, to take immediate action to comply with the said announcement made by the (then) Chief Minister and send compliance report within 15 days. It is in this backdrop, the Department moved into action and after completing the necessary paper work, issued notification on 23rd June, 2012 within the prescribed time. Notably, the decision to start new College is sought to be justified on some report prepared in the year 2003. However, no attempt was made by the dispensation to examine other relevant factors before taking the final decision. The Government Senior Secondary School was, obviously, compelled to set apart three rooms from its building to accommodate the College. That inevitably compromised the quality education imparted to its students. Besides, only 16 students were finally admitted in this College for the academic year 2012-13. In other words, the three reasons recorded for closing this College cannot be discarded nor can be said to be mala fide or unreasonable. The fact that the local Gram

> *Panchayats were supportive of setting up the said College cannot be the basis to ignore the opinion recorded in the impugned decision, which is taken in public interest. Accordingly, even this petition ought to fail for the same reasons."*

3. It would be evident from the aforesaid decision that the considerations which primarily weighed with the Court to uphold the decision of the Government was that the opening of college at Kotla Behr would have inevitably compromised the quality education to be imparted to the students and, therefore, the reasons given by the respondents for closing the college could not be discarded nor said to be tainted with malafide or unreasonable. It was also observed that merely because the Gram Panchayats had been supporting the setting up of the colleges could not be the basis to ignore the opinion recorded in the decision of the Government which had been taken in public interest.

4. It was pursuant to the decision rendered in CWP No.1526 of 2013 alongwith other batch of petitions that the respondents formulated the guidelines for setting up the colleges vide notification dated 02.01.2014. Later, vide notifications dated 15.01.2014 and 24.02.2014, the Government took decision to open various new colleges, but college of Kotla Behr was not included in the aforesaid notifications. However, strangely enough, the petitioners filed a writ petition therein again assailing the notification dated 02.03.2013 whereby the respondents had already de-notified the college at Kotla Behr. This petition came to be allowed and the decision dated 02.03.2013 which as stated above had already been upheld in CWP No.1526 of 2013 came to be quashed and set aside vide judgment dated 20.07.2015.

5. The matter is now sub-judice before the Hon'ble Supreme Court in Special Leave Petition C.C. No.21698 of 2015 and the judgment and order passed by this Court on 20.07.2015 has been ordered to be stayed vide order dated 29.02.2016.

6. On 16.05.2016, the Government issued yet another notification for opening Government Degree College at Jandaur, District Kangra, which decision is the subject matter of the instant petition. The petitioners have assailed the notification on the ground that the same was arbitrary and irrational and taken with a view to frustrate the decision rendered by this Court on 20.07.2015 and that the respondents have not been guided by sound policies and doctrine of good governance in the State.

7. Alongwith the writ petition, the petitioners filed an application for interim directions and vide orders passed by this Court on 27.05.2016 the notification dated 16.05.2016 was ordered to be stayed.

8. The respondents have filed their reply wherein they have raised preliminary objections regarding the very maintainability of the petition on the ground that it is more than settled law that Court should be chary from interfering in policy matters and infusing or imposing its assessment of the policy, especially, when the same does not suffer from any malice or arbitrariness. On merits, it is averred that the decision of the Government to establish college at Jandaur was taken as the same would benefit the general public of the area as it would cater to the areas of Sanasrpur terrace Suelkhad, Nari Ghati, Ghati Bilwan, Jandaur, Katola, Bathu, Tippari, Ghamroor, Gangret, Dharmshala Mahantan, Gindpur Malon, Bari and such other backward adjoining areas. It is further averred that the area in question is semi-hill area and only one major district road passes through the same. Moreover, as the mode of transport is very limited and the students, particularly girl students cannot conveniently travel long distances and, therefore, after taking into consideration the judgment rendered by this Court on 18.06.2013 in CWP No.1468 of 2013 and after keeping in view the guidelines issued on 02.01.2014, the respondents have decided to open a college at Jandaur.

9. At this stage, the learned Advocate General has prayed for vacation of the interim orders dated 27.05.2016 on the ground that these orders virtually amount to sitting over the judgment rendered by this Court in CWP No.1468/2013 and that apart this Court ought not to interfere with the policy matters, particularly, when the decision of the respondents is not tainted with malafide and is not even otherwise arbitrary and illegal.

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

10. Shri K.D.Sood, learned Senior Counsel for the petitioner has vehemently argued that the decision taken by the respondents for not re-starting the Government Degree College at Kotla Behr and issuing notification to open the same at Jandaur which is 3 kilometres away from Kotla Behr is arbitrary, irrational and has been brought about with a view to frustrate the decision rendered by this Court on 20.07.2015. He further argued that the decision has been taken without taking into consideration the local conditions ignoring the comparative advantages of Kotla Behr vis-à-vis Jandaur like Kotla Behr was having no institution of higher studies, but was having sufficient feeder institution as there were 11 Government Senior Secondary Schools in the vicinity with a strength of more than 1000 students. The decision was taken by the respondents in haste and amounted to discrimination to the people of the area and the decision had been taken only when there was change of guard in the State.

11. On the other hand, Shri Shrawan Dogra, learned Advocate General, for respondents No.1 to 3, would vehemently argue that the decision by the respondents had been taken in the larger public interest that too strictly in accordance with the guidelines dated 02.01.2014. It is further argued that the policy cannot be vitiated only on the ground of change of Government as the Government has discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. The choice in the balancing of pros and cons relevant to the change in policy lies with the authority and until and unless proved to be in conflict with Wednesbury's reasonableness or arbitrary, irrational, bias or malafide should not normally be interfered with.

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

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

14. Thus, what emerges to be a settled legal proposition is that the Government has the power and competence to change the policy on the basis of the ground realities. A public policy cannot be challenged through PIL when the State Government is competent to frame a policy and there is no need to anyone to raise any grievance if any policy is changed. The public policy can only be challenged where it offends some constitutional or statutory provisions (*Refer:* ***State of Madhya Pradesh*** *versus* ***Narmada Bachao Andolan and another (2011) 7 SCC 639).***

15. It is trite law that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

16. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the

field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness. (See: ***Union of India & Anr.*** *versus* ***International Trading Co. and Another (2003) 5 SCC 437.***

17. It is equally settled that the Government policy can be changed with the changing circumstances and only on the ground of change, such policy will not be vitiated. The Government has discretion to adopt a different policy or alter or change its policy calculated to solve the public interest and make it more effective. The choice in the balancing of pros and cons relevant to the change in policy lies with the authority.

18. What would be the extent of the powers vested with the Court to review policy decision was the subject-matter of recent decision of the Hon'ble Supreme Court in ***Essar Steel Ltd.*** *versus* ***Union of India and others AIR 2016 SC 1980*** wherein the Hon'ble Supreme Court held as under:-

> *"30. Before we can examine the validity of the impugned policy decision dated 06.03.2007, it is crucial to understand the extent of the power vested with this Court to review policy decisions.*
>
> *In the case of Delhi Development Authority (AIR 2008 SC 1343) (supra) on issue of judicial review of policy decisions, the power of the court is examined and observed as under:*
>
> > *"An executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the natty grittiest of the policy, or substitute one by the other but it will not be correct to contend that the court shall like its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review.*
> >
> > *Broadly, a policy decision is subject to judicial review on the following grounds:*
> >
> > *(a) if it is unconstitutional;*
> >
> > *(b) if it is de'hors the provisions of the Act and the Regulations;*
> >
> > *(c) if the delegatee has acted beyond its power of delegation;*
> >
> > *(d) if the executive policy is contrary to the statutory or a larger policy."*
>
> *31.Thus, we will test the impugned policy on the above grounds to determine whether it warrants our interference under Article 136 or not. Further, this Court neither has the jurisdiction nor the competence to judge the viability of such policy decisions of the Government in exercise of its appellate jurisdiction under Article 136 of the Constitution of India. In the case of Arun Kumar Agrawal v. Union of India (2013) 7 SCC 1, this Court has further held as under:*
>
> > *"This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and Assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve*

complex economical factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be a correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be a wrong, that itself is not a ground to hold that the decision was mala fide or done with ulterior motives."

(emphasis laid by this Court)

In the case of Villianur Iyarkkai Padukappu Maiyam v. Union of India (2009) 7 SCC 561, it was held as under:

> *"It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a Petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts."*

(emphasis laid by this Court)

A Three Judge bench of this Court in the case of Narmada Bachao Andolan v. Union of India (2000) 10 SCC 664 cautioned against Courts sitting in appeal against policy decisions. It was held as under:

> *"234.In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in Public Interest to require the Court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the Court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the Court to go into the matter afresh and, in a way, sit in appeal over such a policy decision."* *(emphasis laid by this Court)*

A similar sentiment was echoed by a Constitution Bench of this Court in the case of Peerless General Finance & Investment Co. Ltd. v. Reserve Bank of India (1992) 2 SCC 343, wherein it was observed as under:

> *"Courts are not to interfere with economic policy which is the function of experts. It is not the function of the Courts to sit in*

> *Judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts."*

> *A perusal of the above mentioned judgments of this Court would show that this Court should exercise great caution and restraint when confronted with matters related to the policy regarding commercial matters of the country. Executive policies are usually enacted after much deliberation by the Government. Therefore, it would not be appropriate for this Court to question the wisdom of the same, unless it is demonstrated by the aggrieved persons that the said policy has been enacted in an arbitrary, unreasonable or malafide manner, or that it offends the provisions of the Constitution of India."*

19. It would, thus, be clear from the aforesaid exposition of law that broadly a policy decision is subject to judicial review on the following grounds:-

> *(i) if the policy fails to satisfy the test of reasonableness, it shall be unconstitutional;*
>
> *(ii) the change in policy must be made fairly and should not give impression that it was so done arbitrarily of any ulterior intention;*
>
> *(iii) the policy can be faulted on the ground of malafide unreasonableness, arbitrariness or unfairness etc.;*
>
> *(iv) if the policy is found against any statue or Constitution or runs counter to the philosophy behind these provisions;*
>
> *(v) it is dehors the provisions of the Act or Legislations;*
>
> *(vi) if the delegatee has acted beyond its power of delegation.*

20. It cannot be disputed that it is within the complete domain of the State to select a site for construction of college which decision obviously would be taken after taking into consideration various factors in mind. The Court has very limited jurisdiction to interfere with such policy matters.

21. Direct authority on the subject is judgment rendered by an Hon'ble Constitution Bench of the Hon'ble Supreme Court in ***State of Maharashtra and others*** *versus* ***Lok Shikshan Sanstha and others AIR 1973 SC 588*** wherein while dealing with the State Policy in the matter of giving permission to start educational institutions, it was held that the High Court should not interfere so long as fundamental rights and principles of natural justice are not violated and it would be apt to reproduce para-9 of the judgment which reads thus:-

> *"9. Before we deal with the above contentions advanced before us on behalf of both sides, it is necessary to state that the High Court in the judgment under attack has made certain observations regarding what according to it should be the policy adopted by the educational authorities in the matter of permitting the starting of a new school or of an additional school in a particular locality or area. It is enough to state that the High Court has thoroughly misunderstood the nature of the jurisdiction that was exercised by it when dealing with the claims of the two writ petitioners that their applications had been wrongly rejected by the educational authorities. So long as there is no violation of any fundamental rights and if the principles of natural justice are not offended, it was not for the High Court to lay down the policy that should be adopted by the educational authorities in the matter of granting permission for starting schools. The question of policy is essentially for the State and such policy will depend upon an overall assessment and summary of the requirements of residents of a particular locality and other categories of persons for whom it is essential to provide facilities for education. If*

the overall assessment is arrived at after a proper classification on a reasonable basis, it is not for the courts to interfere with the policy leading up to such assessment."

22. A similar issue with regard to shifting of school from one place to another came up for consideration before the Hon'ble Supreme Court in ***Raj Shikshan Prasarak Mandal*** *versus* ***State of Maharashtra and others (2001) 10 SCC 75*** and it was held that the High Court should not interfere with the Government order granting permission to shift the school in absence of it being malicious, arbitrary or whimsical and it is apt to reproduce para-3 of the judgment which reads thus:-

> *"3........The shifting of the school from one place to the other or having an ashram school at one place is not governed by any statutory rules and it is in fact a policy decision of the Government. So long as the government decision is not actuated with any malice or is not the outcome of an arbitrary and whimsical act, the same should not be interfered with by a court of law under Article 226 of the Constitution of India......"*

23. Similar reiterations of law can be found in **CWP No.621 of 2014 titled as Nand Lal and another versus State of H.P. & others, CWP No.7115 of 2013 titled as Sher Singh versus State of H.P. & others, CWP No.4625 of 2012 titled as Gurbachan versus State of H.P. & others, CWP No.3862 of 2014 titled as Surinder Kumar versus State of H.P. and others, CWP No.2927 of 2015 titled as Rikhi Ram and another versus State of H.P. and others, CWP No.359 of 2016 titled as Ranjan Singh and others versus State of H.P. and others, CWP No.1764 of 2012 titled as Meena Kumari versus Union of India and others and CWP No.1307 of 2016 titled as Mohan Dutt and another versus Union India and others.**

24. As we are only dealing with the prayer of vacation of stay, we need not to delve in detail in merits of the case. Suffice it to say that prima facie we do not find the action of the respondents in opening the college at Jandaur to be either malicious, arbitrary or whimsical. That apart, the decision taken by the respondents cannot be termed to be unconstitutional or dehors the provisions of any Act or Regulation or even notification dated 02.01.2014. The decision is not even contrary to the statutory provision and larger public policy, but appears to have been taken after due care and consideration.

25. In addition to the aforesaid, it appears that the petitioners at the time of passing of interim orders had not even brought to the notice of this Court the fact that the decisions qua de-notifying the Degree College at Kotla Behr dated 02.03.2013 had already been upheld by this Court in CWP No.1526 of 2013 titled Harbans Lal Kalia versus State of Himachal Pradesh and another.

26. Moreover, no reliance, at this stage, can be placed on the judgment rendered by this Court in CWP No.1526 of 2013 (supra) as the same has been stayed and the matter is now sub-judice before the Hon'ble Supreme Court.

27. That apart, the petitioners during the course of hearing of this petition had repeatedly sought adjournments, firstly, on the ground that they wanted to move a transfer petition before the Hon'ble Supreme Court in Special Leave Petition C.C.No.21698 of 2015 as mentioned in para-5 (supra) and thereafter after having preferred a Transfer Petition (Civil) No.1173 of 2016 sought adjournment on the ground that the application is likely to take up for consideration before the Hon'ble Supreme Court. However, the facts remains that the application though stands filed, yet no orders till date have been passed thereupon.

28. As observed earlier, the decision to open a college at Jandaur, prima facie, appears to have been taken in the larger public interest and, therefore, the said decision cannot be stayed indefinitely. We are, therefore, of the considered view that the interim order passed by this Court on 27.05.2016 whereby the notification dated 16.05.2016 (Annexure P-11) to the extent it pertains to the opening of Degree College at Janduar has been stayed deserves to be

vacated. Ordered accordingly. However, it is made clear that in case the respondents open the college at Jandaur, the same shall be subject to the final outcome of this petition. The application is accordingly disposed of in the aforesaid terms.

****

BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.

Sh. B.R.Sammi son of late Sh Sohan Lal. ....Revisionist..

Vs.

Sh. Narinder Singh son of Niranjan Singh and another. ....Non-revisionists.

Civil Revision No. 133 of 2014.
Order reserved on: 14.9.2016.
Date of Order: November 8, 2016**.**

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed on the grounds of arrears of rent and subletting- the petition was allowed on the grounds of arrears of rent but was dismissed on the ground of subletting- an appeal was filed, which was dismissed- held in revision that relationship of lessor and lessee is to be proved to establish subletting – necessary ingredients to establish subletting were not proved – alleged sub- tenant is the real brother of the tenant who is assisting the tenant in business- this will not fall within the definition of sub-tenant – no official from Sale Tax Office or Labour Department was examined to prove subletting – the petition was rightly dismissed regarding subletting – revision dismissed. (Para-12 to 19)

Cases referred:

Kala and another Vs. Madho Parshad Vaidya, AIR 1998 SC 2773
Resham Singh Vs. Raghbir Singh and another, AIR 1999 SC 3087
Benjamin Premanand Rawade Vs. Anil Joseph Rawade, 1998 (9) SCC 688
Nedunuri Kameswaramma Vs. Sampati Subba Rao, AIR 1963 SC 884 (Full bench)
Masjid Kacha Tank Nahan Vs. Tuffail Mohammed, AIR 1991 SC 455
Indore Municipality Vs. K.N.Palsikar, AIR 1969 SC 580
P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao, AIR 1995 SC 1357
Gurdial Singh Vs. Raj Kumar Aneja, AIR 2002 SC 1004

For revisionist: Mr.R.K.Sharma Sr. Advocate with Ms.Anita Parmar, Advocate.
For Non-revisionists. Mr. Vikas Rathore, Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present revision petition is filed under Section 24 (5) of HP Urban Rent Control Act 1987 against order dated 31.3.2014 passed in rent appeal No. 13 of 2013 whereby learned Appellate Authority dismissed the appeal and affirmed order dated 31.7.2012 passed by learned Rent Controller Chamba in rent petition No. 1 of 2010 title Sh. B.R Sammi Vs. Sh. Narinder Singh and another.

BRIEF FACTS OF CASE:

2. Sh. B.R.Sammi landlord filed eviction petition against tenant under section 14 of HP Urban Rent Control Act 1987 pleaded therein that demised premises was rented out at the rate of Rs.300/- (Three hundred) per month on 1.4.1998. It is further pleaded that demised premises is commercial in nature situated in ward No.8 locality upper Julakari Chamba Town District Chamba H.P. It is further pleaded that non-revisionist No.1 has inducted non-revisionist No.2 as

sub tenant and non-revisionist No.2 is in exclusive possession of demised premises. It is further pleaded that tenant is also in arrear of rent w.e.f. 1.3.1999 to the tune of Rs.39600/- (Thirty nine thousand six hundred). Prayer for acceptance of eviction petition sought.

3. Per contra response filed on behalf of tenant pleaded therein that landlord has got no cause of action to file eviction petition. It is further pleaded that landlord is estopped by his own act and conduct to file eviction petition. It is further pleaded that eviction petition is barred by time. It is further pleaded that shop is used as workshop for the purpose of manufacturing small steel articles such as trunks and other steel articles. It is further pleaded that demised premises is in exclusive possession of tenant Narinder Singh. It is further pleaded that tenant did not induct any sub tenant in the demised premises. It is further pleaded that father of tenant namely Niranjan Singh was tenant at Dogra market Chamba HP and shop in the possession of father of tenant was destroyed in fire incident in the year 1988 at Dogra market Chamba. It is further pleaded that government of HP in order to rehabilitate fire victims of Dogra market Chamba provided a stall to the father of tenant at chowgan No.3 Chamba HP. It is further pleaded that steel products such as almirahs, chairs, tables, trunk used to be manufactured by tenant Narinder Singh and used to be sold by his father Niranjan Singh at chowgan No.3 Chamba. It is further pleaded that after death of the father of tenant non revisionist No.2 Sh Harinder Singh who is real younger brother of Sh Narinder Singh started sale of above mentioned steel articles at chowgan No.3 Chamba HP. It is further pleaded that non-revisionist No.2 namely Sh Harinder Singh has no right, title and interest in demised premises. It is further pleaded that no arrears of rent is due to landlord. Prayer for dismissal of eviction petition sought. Landlord filed rejoinder and reasserted the allegations mentioned in eviction petition.

4. As per pleadings of parties following issues framed by learned Rent Controller.

1.Whether demised premises is in possession of co-respondent No.2 or sublet without permission of landlord as alleged? ...OPP.

2.Whether tenant is in arrears of rent w.e.f. 1.3.1999 onwards if so its effect? ...OPR.

3.Whether landlord has no cause of action to file present petition?...OPR.

4. Whether landlord is estopped by his own act and conduct to file present petition? ...OPR.

5.Whether eviction petition is time barred? ...OPR

6. Relief.

5. Learned Rent Controller decided issue Nos.1,3,4 and 5 in negative and decided issue No.2 in affirmative. Learned Trial Court partly allowed eviction petition and ordered eviction of tenant Narinder Singh on account of arrears of rent w.e.f. 1.3.1999 at the rate of Rs.300/- per month. Learned Rent Controller directed tenant to pay Rs.48370/- (Forty eight thousand three hundred seventy) to landlord with interest @ 9% per annum till date. Learned Rent Controller further directed that tenant would not be evicted if arrears of rent is paid within 30 days from the date of eviction order. Learned Rent Controller dismissed eviction petition on the ground of subletting.

6. Feeling aggrieved against the order of learned Rent Controller landlord filed appeal before learned Appellate Authority. Learned Appellate Authority vide order dated 31.3.2014 dismissed appeal and affirmed order of learned Rent Controller.

7. Feeling aggrieved against the order of learned Appellate Authority revisionist landlord filed present revision petition.

8. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionists and also perused entire record carefully.

9. Following points arise for determination in present revision petition:

1. Whether revision petition filed under section 24(5) of HP Urban Rent Control Act 1987 is liable to be accepted as mentioned in memorandum of grounds of revision petition?.

2. Relief.

10. Findings upon point No.1 with reasons:

10.1. PW1 Sh Baldev Raj has tendered in evidence Ext PW1/A in examination-in-chief. There is recital in affidavit that demised premises was given upon rent to Narinder Singh son of Sh. Niranjan Singh in the year 1980 for eleven months. There is recital in affidavit that rent was Rs.300/- per month. There is recital in affidavit that after 28.2.1999 tenant Narinder singh did not pay rent. There is further recital in affidavit that Narinder Singh has sublet demised premises to his brother Harinder Singh. There is further recital in affidavit that demised premises is in possession of Harinder Singh as of today. There is further recital in affidavit that possession of demised premises be handed over to landlord. Landlord has tendered into evidence documents Ext P1 to Ext P15. In cross-examination PW1 has admitted that rent receipts Ext R1 to Ext R83 have been issued by him. PW1 has stated that he does not know that fire incident took place at Dogra market Chamba HP. PW1 has admitted that Niranjan Singh father of tenant used to work in stall No.3 at chowgan Chamba HP. PW1 has admitted that trunks and almirahs are manufactured in demised premises and sold in stall No.3 at Chowgan Chamba HP. PW1 has admitted that Niranjan Singh father of tenant has died. PW1 has admitted that after death of Niranjan Singh his son non-revisionist Harinder Singh started working in stall No.3 at Chowgan Chamba HP. He has denied suggestion that demised premises is in exclusive possession of Narinder Singh. He has denied suggestion that Narinder Singh is manufacturing steel articles in demised premises. He has denied suggestion that there is no subletting in demised premises.

10.2 PW2 Om Parkash Patwari has tendered in evidence field map Ext PW2/A. He has stated that field map is correct as per factual position and the same was prepared by him.

10.3 PW3 Umesh Kumar has stated that he is working in Trackon courier. He has stated that he went to deliver courier Ext P1 to Ext P4 but same could not be delivered and he submitted his report. In examination-in-chief PW3 has stated that he did not go to serve courier personally but his son Balbir Singh went to deliver courier. PW3 has stated that his son Balbir Singh is alive and working along with him. PW3 has stated that report is in his handwriting and further stated that report is not in the handwriting of his son.

10.4 RW1 Ram Kumar has tendered in evidence affidavit Ext RW1/A in examination-in-chief. There is recital in affidavit that RW1 is working in bank as dealing clerk since four years. RW1 has stated in cross examination that record relating to Niranjan Singh has been destroyed in accordance with rules. RW1 has admitted that cheque book and pass book issued by bank in favour of Niranjan Singh are correct.

10.5 RW2 Ramesh Chand has tendered in evidence affidavit Ext RW2/A in examination-in-chief. There is recital in affidavit that RW2 is posted in fire department since fourteen years. There is recital in affidavit that in the year 1988 fire took place at Dogra market Chamba HP and many shops and articles kept in shop were destroyed in fire at Dogra market Chamba.

10.6 RW3 Narinder Singh has tendered in evidence affidavit Ext RW3/A in examination-in-chief. There is recital in affidavit that father of Narinder Singh used to work at Dogra market Chamba HP. There is further recital in affidavit that in the year 1988 fire incident took place in Dogra market Chamba and many shops destroyed in fire. There is further recital in affidavit that thereafter Himachal government allotted a stall at Chowgan No.3 Chamba HP to the father of Narinder Singh. There is further recital in affidavit that steel furniture was manufactured in demised premises and same was sold in the stall. There is further recital in affidavit that after death of father of tenant younger brother of tenant namely Harinder Singh started selling manufactured articles from stall No.3 Chowgan Chamba. There is further recital in affidavit that demised premises is in exclusive possession of Narinder Singh tenant. There is

further recital in affidavit that manufactured articles are sold at Chowgan No.3 by Harinder Singh. In cross examination RW3 has denied suggestion that when he shifted to Sultanpur then demised premises came in exclusive possession of his brother Harinder Singh. RW3 has denied suggestion that he has sublet demised premises to his brother Harinder Singh. RW3 has denied suggestion that he did not pay rent w.e.f. 1.3.1999 to 31.3.2010.

10.7 RW4 Harinder Singh has filed affidavit Ext RW4/A in examination-in-chief. There is recital in affidavit that demised premises is situated in upper Julakhari. There is further recital in affidavit that Narinder Singh is tenant of demised premises since 1980. There is further recital in affidavit that tenant Narinder Singh is manufacturing steel furniture in demised premises. There is further recital in affidavit that father of RW4 used to work at Dogra market Chamba. There is further recital in affidavit that in the year 1988 due to fire Dogra market was destroyed and thereafter Himachal government allotted stall at Chowgan Chamba. There is further recital in affidavit that father of tenant used to sale steel furniture in the stall. There is further recital in affidavit that after the death of father of tenant Sh Harinder Singh is selling manufactured steel furnitures in stall No.3. There is further recital in affidavit that Harinder Singh has no interest in demised premises. There is further recital in affidavit that demised premises is in the possession of tenant Narinder Singh. RW4 has denied suggestion that Narinder Singh has shifted to Sultanpur. RW4 has denied suggestion that he is running demised premises. RW4 has denied suggestion that he is in exclusive possession of demised premises. RW4 has denied suggestion that Narinder Singh has sublet demised premises to him.

11. Following documentaries evidence adduced by parties.(1) Ext. P1 is the notice. (2) Ext P2 to Ext P4 are envelopes. (3) Ext. PW2/A is field book. (4) Ext.P5 is jamabandi pertaining to the year 2005-06. (5) Ext P6 is the letter issued to General Manager by landlord. (6) Ext.P7 & P8 are reply of the letter to landlord by General Manager. (7) Ext.P9 & Ext P10 are letter issued to Labour Inspector by landlord. (8) Ext P11 is reply of letter to landlord by Labour Inspector. (9) Ext.P16 is rent deed. (10) Ext.R1 to Ext R83 are receipts of rent. (11) Ext.R84 to Ext R86 are copies of passbooks. (12) Ext.R87 to Ext.R91 are copies of cheque books.

12. Submission of learned Advocate appearing on behalf of revisionist that it is proved on record as per testimony of RW3 Narinder Singh that demised premises was subletted to Harinder Singh and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that Sh Narinder Singh and Harinder Singh are real brothers. Court has carefully perused testimony of RW3 Narinder Singh recorded by learned Rent Controller. It is well settled law that testimony of witnesses recorded in judicial proceedings should be read as a whole and should not be read in isolation in order to determine the disputed facts. RW3 Narinder Singh has specifically stated in positive manner when he appeared in witness box that demised premises is in his possession and he is running demised premises. RW3 Narinder Singh has specifically stated in positive manner that he is proprietor of business running in demised premises. RW3 Narinder Singh has denied suggestion that he has sublet demised premises to his brother Sh Harinder Singh. It is well settled law that in order to prove subletting initial onus is upon landlord to prove subletting. It is well settled law that in order to prove subletting the relationship of lessor and lessee between tenant and sub tenant should be proved in accordance with law. It is well settled law that under section 105 of Transfer of Property Act 1882 the transferor is called the lessor, transferee is called lessee, price is called the premium and the money, share, service or other thing to be so rendered is called the rent. In the present case landlord did not prove relation of lessor and lessee between Narinder Singh and Harinder Singh. There is no evidence of payment of premium between Narinder Singh and Harinder Singh. In the present case there is no evidence of payment of any rent by Harinder Singh to Narinder Singh. Landlord did not adduce any eye witness of subletting from locality in present case. There is no document of subletting placed on record on behalf of landlord in the present case executed by Narinder Singh and Harinder Singh. Hence it is held that ingredients of subletting of demised premises are not proved on record in present case between Narinder Singh and Harinder Singh. It is proved on record that Harinder Singh is real brother of tenant Narinder Singh. It is well settled law that assisting brother in business did not fall within definition of

subletting. See AIR 1998 SC 2773 title Kala and another Vs. Madho Parshad Vaidya. See AIR 1999 SC 3087 title Resham Singh Vs. Raghbir Singh and another. See 1998 (9) SCC 688 title Benjamin Premanand Rawade Vs. Anil Joseph Rawade.

13. Submission of learned Advocate appearing on behalf of revisionist that revisionist filed application under order 41 rule 27 CPC for placing on record additional evidence and learned Appellate Authority did not allow application for additional evidence which cause miscarriage of justice to revisionist and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court has perused record of learned Appellate Authority carefully. Learned Appellate Authority has allowed application filed under order 41 rule 27 CPC by landlord vide order dated 21.3.2014 and letter No. 1070 and 1071 have been allowed to be exhibited and have been exhibited as Ext PX and PY subject to cost of Rs.200/-. Hence plea of learned Advocate appearing on behalf of revisionist that learned Appellate Authority did not allow application under order 41 rule 27 CPC is devoid of any force.

14. Submission of learned Advocate appearing on behalf of revisionist that learned Rent Controller did not frame proper issues as per pleadings of parties and on this ground revision petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. Learned Rent Controller framed issues on 1.12.2010 in the presence of learned Advocates and there is recital in order sheet that issues were read over and explained to the parties. Landlord did not claim additional issue before learned Rent Controller. Even landlord did not file any application before learned Rent Controller for framing additional issues. In the present case parties went to trial fully knowing the rival case and led all evidence not only in support of their contentions but also in refutation of other parties. It is held that non framing of issue is not fatal to landlord in the present case. See AIR 1963 SC 884 (Full bench) title Nedunuri Kameswaramma Vs. Sampati Subba Rao.

15. Submission of learned Advocate appearing on behalf of revisionist that it is proved on record that Sh Narinder Singh is exclusive proprietor of M/s Madhur Steel Furniture Udyog in Sultanpur locality and Sh Harinder Singh is exclusive proprietor of M/s Niranjan Singh and Sons in demised premises as per documents furnished before Sale Tax office and Labour department and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Landlord did not examine any official from Sale Tax office and Labour department. In the present case landlord himself appeared as PW1 in witness box and examined PW2 Om Parkash patwari who proved only tatima (Field map) Ext PW2/A placed on record and examined PW3 Umesh who is posted in courier service. Landlord did not examine any official from Sale Tax office and Labour department in order to prove subletting of demised premises. Hence adverse inference under section 114(G) of Indian Evidence Act 1872 is drawn against landlord in present case.

16. Submission of learned Advocate appearing on behalf of revisionist that learned Rent Controller has ignored documents Ext P7 and Ext P8 placed on record and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court has perused document Ext P7 carefully. Document Ext P7 has signed by General Manager District Industries Centre Chamba HP. Landlord did not examine General Manager District Industries Centre Chamba in Court who has signed document Ext P7 placed on record. It is well settled law that contents of document can be proved by way of witness who is signatory to the document as per Indian Evidence Act 1872. It is held that document Ext P7 did not prove subletting of demised premises between Narinder Singh and Harinder Singh. Court has also perused document Ext P8 placed on record. Document Ext P8 is certificate issued by General Manager District Industries Centre relating to registration of M/s Madhur Steel Furniture Udyog Julakhari Chamba HP. Document Ext P8 did not prove subletting of demised premises in favour of Harinder Singh by Narinder Singh.

17. Submission of learned Advocate appearing on behalf of revisionist that learned Rent Controller and learned Appellate Authority has committed grave error by ignoring the fact that landlord had served number of notice upon tenant regarding subletting and tenant did not

rebut the allegation of subletting and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court is of the opinion that non-filing of reply to notice issued by landlord prior to litigation in court did not mean that subletting of demised premises is admitted by tenant in judicial proceedings. There is no document on record in order to prove that tenant has admitted subletting in favour of Harinder Singh qua demised premises in judicial proceedings. It is well settled law that when response is not filed by adverse party to notice issued prior to litigation then aggrieved party can claim costs of entire litigations from adverse party.

18. It is well settled law that concurrent findings of fact of learned Rent Controller and learned Appellate Authority should not be disturbed by High Court unless findings of learned Rent Controller and learned Appellate Authority are perverse. In the present case it is held that findings of learned Rent Controller and learned Appellate Authority are not perverse but are based upon oral as well as documentary evidence placed on record. See AIR 1991 SC 455 title Masjid Kacha Tank Nahan Vs. Tuffail Mohammed. See AIR 1969 SC 580 title Indore Municipality Vs. K.N.Palsikar. See AIR 1995 SC 1357 title P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao. See AIR 2002 SC 1004 title Gurdial Singh Vs. Raj Kumar Aneja. In view above stated facts and case law supra point No.1 is answered in negative.

Point No.2 (Relief).

19. In view of findings on point No.1 revision petition is dismissed. Orders of learned Rent Controller and learned Appellate Authority affirmed. Parties are left to bear their own costs. File of learned Rent Controller and learned Appellate Authority along with certify copy of order be sent back forthwith. Revision petition is disposed of. Pending application(s) if any also disposed of.

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

Dinesh Kumar .....Petitioner

Versus

Jyoti Prakash and others .....Respondents.

CMPMO No. 308 of 2016.
Reserved on: 4.11.2016
Date of decision : November 8th, 2016

Code of Civil Procedure, 1908- Order 9 Rule 4- The suit of the plaintiff was decreed ex-parte – an application for setting aside ex-parte order was filed, which was allowed – aggrieved from the order, present petition has been filed – held, that the defendant had taken a false plea in the application for setting aside exparte order- false claims and defences are serious problems with the litigation – the judicial system has been abused and virtually brought to its knees by the litigants like the defendants No. 1 to 4- one who comes to the Court must come with clean hands – the plea of the defendants was belied by the report on the summons that were received after the service of defendants 1 to 4- petition allowed. (Para-6 to 16)

Cases referred:

Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370
Dalip Singh v. State of U.P., (2010) 2 SCC 114
Satyender Singh v. Gulab Singh, 2012 (129) DRJ, 128
Sky Land International Pvt. Ltd. v. Kavita P. Lalwani, (2012) 191 DLT 594
A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam and ors. (2012) 6 SCC 430
Kishore Samrite Vs. State Of Uttar Pradesh and ors. (2013) 2 SCC 398

For the Petitioner : Mr. Hamender Singh Chandel, Advocate.
For the Respondents : Mr. Maan Singh, Advocate, for respondent No.1 and 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge .

This petition under Article 227 of the Constitution of India is directed against the order passed by the learned trial Court on 15.3.2016 whereby the applications filed by the respondents No.1 and 4 under Order 9 Rule 4 CPC have been allowed and orders dated 19.3.2011 and 21.11.2012 whereby these respondents had been proceeded ex-parte has been ordered to be set aside.

The facts in brief may be noticed thus.

2. The petitioner has filed suit for recovery against the respondents which is pending before the Learned trial Court. The respondents No.1 and 4 were duly served and did not contest the suit for 4-5 years and it is only thereafter that they filed applications for setting aside exparte order, which applications as observed above has been ordered to be allowed by the Learned trial Court.

3. The grievance of the petitioner is that the application(s) filed by respondents No.1 and 4 could not have been allowed as the same was based on falsehood. He has invited my attention to the application firstly filed by respondent No.1 wherein it is averred that the respondent has been serving in the Indian Army for the last 3 years and remained posted in the most sensitive areas. In addition to that he also remained on deputation with VIPs and as such did not receive any notice from the Court and was proceeded exparte on 19.3.2011. He further invited my attention to the summons issued to respondent No.1 which were infact duly received by his wife and at the time the respondent No.1 himself was available at home.

4 As regards, the respondent No.4, the application filed for setting aside the ex parte order discloses that the only reason given for non-appearance is that she was residing at Ludhiana and came to know about the pendency of the case when she visited her native place. Where as, the notice issued to respondent No.4 which has been appended as Annexure P-1 with the petition discloses that the petitioner had personally received the summons on 16.2.2011 and therefore the explanation offered by her, like the one offered by the respondent no.1, is totally false.

5. Ordinarily, this Court would not interfere with matters which pertain to setting aside of exparte orders as it is more than settled that when technicalities are pitted against substantive justice, then obviously substantive justice has to prevail. However, the said principle would not apply to a case where a party does not approach the Court with clean hands, clean mind and a clean heart.

6. It is proved on record that the defence set up by the appellant was absolutely false. ***In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370,*** the Hon'ble Supreme Court held that false claims and defences are serious problems with the litigation. The Hon'ble Supreme Court held as under:-

> *84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent."*

7. In ***Dalip Singh v. State of U.P., (2010) 2 SCC 114***, the Hon'ble Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any

respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:-

> *"1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.*
>
> *2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."*

8. In ***Satyender Singh v. Gulab Singh, 2012 (129) DRJ, 128***, the Division Bench of Delhi High Court following Dalip Singh v. State of U.P. (supra) observed that the Courts are flooded with litigation with false and incoherent pleas and tainted evidence led by the parties due to which the judicial system in the country is choked and such litigants are consuming Courts" time for a wrong cause."

The observations of Court are as under:-

> *"2. As rightly observed by the Supreme Court, Satya is a basic value of life which was required to be followed by everybody and is recognized since many centuries. In spite of caution, courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts„ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court. Indeed, it is a nightmare faced by a Trier of Facts; required to stitch a garment, when confronted with a fabric where the weft, shuttling back and forth across the warp in weaving, is nothing but lies. As the threads of the weft fall, the yarn of the warp also collapses; and there is no fabric left."*

9. In **Sky Land International Pvt. Ltd. v. Kavita P. Lalwani,** (2012) 191 DLT 594, Delhi High Court held as under:-

> *"26.20 Dishonest and unnecessary litigations are a huge strain on the judicial system. The Courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts„ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court.*
>
> *xxx xxx xxx*
>
> *26.22 Unless the Courts ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that the Courts" scarce and valuable time is consumed or more*

appropriately wasted in a large number of uncalled for cases. It becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation, ultimately they must suffer the costs. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that the dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

10. The judicial system has been abused and virtually brought to its knees by unscrupulous litigants like the respondents No.1 and 4.. It has to be remembered that Court's proceedings are sacrosanct and should not be polluted by unscrupulous litigants.

11. In **A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam and ors. (2012) 6 SCC 430**, the Hon'ble Supreme Court held as under:-

"27. The pleadings must set forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the court must carefully look into it while deciding a case and insist that those who approach the court must approach it with clean hands."

12. In **Kishore Samrite Vs. State Of Uttar Pradesh and ors. (2013) 2 SCC 398**, the Hon'ble Supreme Court observed as under:

"32.The cases of abuse of process of court and such allied matters have been arising before the courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

32.1. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

32.2. The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

32.3. The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

32.4. Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

32.5. A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

32.6. The Court must ensure that its process is not abused and in order to prevent abuse of process of court, it would be justified even in insisting on furnishing of

security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

32.7. Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

32.8. The Court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well-justifies it. [Refer : Dalip Singh v. State of U.P. & Ors. (2010) 2 SCC 114; Amar Singh v. Union of India & Ors. (2011) 7 SCC 69 and State of Uttaranchal v Balwant Singh Chaufal & Ors. (2010) 3 SCC 402].

33. Access jurisprudence requires Courts to deal with the legitimate litigation whatever be its form but decline to exercise jurisdiction, if such litigation is an abuse of the process of the Court. In P.S.R. Sadhanantham v. Arunachalam & Anr. (1980) 3 SCC 141, the Court held:

> *"15. The crucial significance of access jurisprudence has been best expressed by Cappelletti:*
>
> > *"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured be a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement the most basic 'human-right' of a system which purports to guarantee legal rights."*
>
> *16. We are thus satisfied that the bogey of busybodies blackmailing adversaries through frivolous invocation of Article 136 is chimerical. Access to justice to every bona fide seeker is a democratic dimension of remedial jurisprudence even as public interest litigation, class action, pro bono proceedings, are. We cannot dwell in the home of processual obsolescence when our Constitution highlights social justice as a goal. We hold that there is no merit in the contentions of the writ petitioner and dismiss the petition."*

13. There is a legal duty cast upon a party to come to the Court with the true case or defence and prove it by true evidence. The Court of law is meant for imparting justice between the parties. One who comes to the Court, must come with clean hands and a person whose case is based on falsehood has no right to approach the Court and can be summarily thrown out at any stage of the litigation.

14. Adverting to the impugned order, it would be noticed that the learned Court has simply chosen to rely upon the contents of the application only because the same was supported by the affidavit of the respondents. Despite the factual aspects being disputed, it did not care to verify the factual position from the records and proceeded to allow the application by observing that expression sufficient cause should be construed to advance substantial justice and the Court should not take strict and pedantic approach and that the petitioner could conveniently be compensated by imposing cost and then proceeded to award Rs.1,500/- as cost.

15. Obviously, learned trial Court has fallen in error in relying upon the contents of the averment which were clearly belied by the documents placed on record more particularly the summons that have been received back after the service of respondents No.1 and 4. Therefore, the ultimate award of costs would be no panacea in such cases, since the mischief cannot be

repaired. The order passed by the learned Court below is clearly unsustainable and is therefore set aside.

16. Consequently, the petition is allowed in the aforesaid terms, leaving the parties to bear their cost. Pending application, if any, also stands disposed of.

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

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

CWP No.338 of 2015.
Reserved on : 25.10.2016.
Date of Judgment: 08.11.2016.

Constitution of India, 1950- Article 226- Land was allotted in consolidation – aggrieved from the allotment, proceedings were initiated before Consolidation Authority – writ petition was filed against the order passed by Consolidation Authority- held, that the land adjoining to the road is commercial- petitioner is claiming land adjoining to the road – the Consolidation Authorities had not taken commercial nature of the land into consideration while passing the order- writ petition allowed- matter remanded with a direction to re-hear the parties and to decide the same afresh.
(Para- 6 to 8)

For the petitioner Mr. G.R. Palsra, Advocate.
For the respondents Mr. Virender Kumar Verma, Addl. Advocate General with Mr. Pushpinder Singh Jaswal, Dy. Advocate General, for respondents No.1 and 2.
Mr. Lovneesh Kanwar, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present writ petition is maintained by the petitioner against the respondents praying therein for the following substantive relief :

> "That the orders dated 25.3.2000 (Annexure P-2), 23.2.2001 (Annexure P-4) and 20.12.2014 (Annexure P-9), may kindly be quashed and set aside by issuing a writ of certiorari."

2. As per the petitioner, the consolidation proceedings were initiated in Muhal Chail/51 by the consolidation staff in the year 1988 and the same was completed in the year, 1992. The petitioner and respondent No.3 are entitled to equal shares in the property of Shri Karam Singh. Prior to consolidation Khasra Nos.237 and 242 old, which were situated near the road side were given new Khasra No.237 are 190 and 191. Old Khasra No.242 is given new Khasra numbers i.e. 195 and 196. Khasra No.191 and 195 were allotted to the petitioner and Khasra No.190 and 196 were allotted to respondent No.3. The front side area of Khasra No.191 is 28 karam and front side area of Khasra No.195 is 11 karam, similarly the front side area of Khasra No.190 is 10 karam and Khasra No.196 is 30 karam. Total 40 karam front side area was allotted to respondent No.3 and total front side area of 39 karam was allotted to the petitioner. Respondent No.3 with malafide intention and ulterior motive without filing any objection and appeal directly filed revision under Section 54 of the Consolidation Act before the Director of Consolidation, Shimla, on 6.11.1999 after more than seven years. The Director of Consolidation, Mandi, remanded back the case to the Consolidation Officer, Mandi, to decide the case after verifying the spot and hearing the necessary parties, vide order dated 25.3.2000. It is further

averred that respondent No.3 has sold her front side area allotted to her in Khasra No.190 to Smt. Chamba Devi and others through sale deed No.29 dated 1.2.1993. Respondent No.3 has further sold Khasra No.196 to Mitar Dev and others through sale deeds No.158 dated 19.4.1995, 102 dated 3.3.1994, 134 dated 8.6.1993 and 54 dated 6.2.2001 and mutation No.273, 381, 290, 292 and 452 have been attested after the sale of Khasra No.190 and 196, as a whole to Smt. Champa Devi and others. The Consolidation Officer, Mandi, without verifying the spot and considering the directions issued by the Director Consolidation dated 25.3.2000, allowed the case of respondent No.3 on 23.2.2001 and cancelled the area of Khasra No.191 measuring 0-2-6 and 195 measuring 0-5-5 total area measuring 0-7-11 bigha, which was allotted to the petitioner and allotted the same to respondent No.3 in lieu of Khasra No.38/1 measuring 0-7-11 bigha. The petitioner and respondent No.3 are entitled to equal shares in Khasra No.242 old, new Khasra Nos.195 and 196. Thereafter, the petitioner filed an appeal under Section 30 (3) of Consolidation Act, before the Settlement Officer (Consolidation), Bilaspur, H.P, against the order of Consolidation Officer, Mandi, dated 23.2.2001, the same was allowed, vide order dated 28.11.2001, in which the order dated 23.2.2001, was set aside by holding that respondent No.3 has already allotted 40 Karam land on the front towards road side, as there is total area of front 79 karam of the petitioner and respondent No.3, which was jointly owned and possessed by them before the consolidation proceedings. Thereafter, respondent No.3 filed an appeal under Section 30 (4) of the Consolidation Act, against the order dated 28.11.2001, which was dismissed by Additional Deputy Commissioner, Mandi, on 19.7.2013 confirming the order dated 28.11.2001. Respondent No.3 challenged the order dated 19.7.2013 by filing revision petition before respondent No.2, the same was allowed, vide order dated 20.12.2014.

3. Respondents No.1 and 2 has not been filed reply to the petition.

4. In reply on behalf of respondent No.3, it is averred that the consolidation proceedings were carried out in the area, during the year 1992-93 and the Consolidation staff had prepared a scheme for carrying out the consolidation, wherein it has been provided that the land adjacent to the road would be allotted to the persons, who are in its possession. Replying respondent was in possession of the land adjacent to the road, as such the same was to be allotted to the replying respondent, but the same was wrongly allotted to the petitioner. Khasra No.196 is not a part of Khasra No.242 and in fact is an independent number, which was exclusively in possession of the replying respondent, as such the same was allotted to the replying respondent. Khasra No.237 (old) is measuring 0-4-17 bigha and khasra No.242 (old) is measuring 0-13-10 bigha. After completion of the consolidation proceedings Khasra No.237 was renumbered as Khasra No.190 and 191. After consolidation proceedings Khasra No.242 was renumbered as Khasra numbers 194 and 195. From the perusal of *Aks Musabi,* it revealed that the front of Khasra No.190 is 10 Kara and the front of Khasra No.191 is 28 Karam. Similarly front of Khasra No.195 is 11 Karam. Khasra No.196 was in exclusive possession of the replying respondent and the front of Khasra No.29 karam. Before consolidation proceedings replying respondent was in possession of 23 Karam of land in front of the road in Khasra No.237 (190 & 191 new) and 11 karam of land in front of the road in Khasra No.242 (194 & 195 new). During consolidation proceedings, replying respondent was only allotted 10 karam of land, on the road front in Khasra No.237, as such there was a deficiency of 13 karam in the share of replying respondent of the land on the front of the road in Khasra No.237. Similarly, no land on the road head was allotted to the replying respondent in Khasra No.242, despite the fact that the replying respondent was in possession of 11 karam of land in this khasra number on the front of the road prior to the consolidation. Replying respondent was in actual physical possession of the land and even after completion of the consolidation proceedings, the petitioner does not interfere in the possession. Replying respondent remained under bonafide belief that since the scheme provided for the allotment of land in front of the road of the persons, who are in its possession, as such the same would have been given to her. The petitioner for the first time interfered in the peaceful possession of the replying respondent in the year 1999, at that time the replying respondent inspected the revenue record and she was surprised to know that the wrong entries have been made in the revenue papers with regard to her possession in Khasra No.191 (new) and Khasra

No.195 (new). Respondent No.3 is an illiterate lady and was not aware about the entries changed during the consolidation proceedings and she came to know about the same only in the year 1999, when the petitioner interfered in her peaceful possession. Respondent No.3 was not aware about the illegality committed by the officials, as she remained under the bonafide belief that the possession on the road front would not be disturbed, as such the replying respondent was not filed objections under Section 30 (2) of the Consolidation Act. The possession of the land was with the replying respondent, but due to the fault of the officials of the consolidation department the entries in the revenue record were wrongly made, as such the replying respondent filed a revision petition before the Director, Consolidation of Holdings in the year 1999, the same was allowed, vide order dated 25.3.2000 and remanded the matter to the Consolidation Officer, Mandi. The petitioner never challenged the order dated 25.3.2000 before any Court and the same became final between the parties. The Learned Consolidation Officer, Mandi, visited the spot on 23.2.2001 in the presence of the parties and it was found that the replying respondent has been allotted 13 karam of less land in Khasra No.191 and 11 karam of less land in Khasra No.195 despite the fact that the replying respondent was in exclusive possession of the said land and she was entitled for the allotment of the same, as per the scheme. The present writ petition is not maintainable because the replying respondent has been allotted the share to which she was entitled, as per the scheme. The consolidation staff while carrying out the consolidation proceedings had made a mistake which had resulted in loss of share to the replying respondent on the road head and the mistake of the Consolidation staff has been corrected by the Consolidation Officer, Mandi, while passing the order dated 23.2.2001.

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

6. At this stage, the only dispute is with respect to the land to be allotted to the parties only on the basis of the value of the land adjoining to the road and not on the basis of production out of the land. It cannot be disputed these days that the land adjoining to the road is commercial land and the categories of the land, as in the earlier times of consolidation/partition were *'आठआना', 'बाराआना', 'छेहआना'* and *'one rupee'*, even when the land was adjoining to the road. In the present case, the petitioner is claiming the land adjoining the road near to the land allotted to respondent No.3.

7. After going through the order dated 20.12.2014 passed by the learned Revisional Court, this Court finds that the learned Revisional Court has not taken into consideration these facts. It is true that at the time of allotment of the land in the partition or consolidation, the possession of the parties is to be protected. At the same point of time, if the scheme doesn't provides for the protection of the possession, the petitioner is entitled to the equal shares alongwith the road side. So, I find that the learned Revisional Court while answering the findings has not taken into consideration the scheme, which was prepared prior to the consolidation, but the said scheme has neither referred nor discussed in the judgment. When the rights of the parties decided on the basis of some document, it was incumbent upon the learned Revisional Court, to have discussed the scheme in brief, which was prepared. At this stage, this Court finds that it is for the Revisional Court to come to the conclusion after reappreciating the scheme and the fact that in case, the scheme doesn't provide, the land of equal quantity i.e. the land near the road is required to be given to the parties equally, as has been done by the consolidation authorities at the additional stage and if there is scheme the learned Revisional Court is required to discuss the scheme in brief. At this stage, the matter requires appreciation of the document, as the parties looses his right to come to this Court by way of writ petition, this Court finds that the only order which can be passed at this stage is to direct the learned Divisional Commissioner, Mandi, to reconsider the case of petitioner and respondent No.3 afresh in view of the observation made hereinabove.

8. Resultantly, the impugned order dated 20.12.2014 passed by the learned Divisional Commissioner, Mandi, H.P, is ordered to be quashed and set aside with a direction to rehear the parties and to decide the revision petition afresh. Parties are directed to appear before

the learned Divisional Commissioner, Mandi, H.P, on ***5th December, 2016.*** Let a copy of this judgment be sent to the learned Divisional Commissioner, Mandi, for compliance.

9. In view of the above, the petition is disposed of, so also the pending application (s), if any. In the peculiar facts and circumstances of the case, parties are left to bear their own costs.

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

Manav Kalyan Sanstha ….Petitioner.

Versus

State of Himachal Pradesh and others …..Respondents.

CMPs No.2040 & 8367 of 2016 in CWP No.529 of 2015.
Reserved on: 22.10.2016.
Date of decision: November 08, 2016.

Constitution of India, 1950- Article 226- A writ petition was filed against the setting up of biomedical waste plant pleading that it would affect the environment – a status quo order was passed by the Court- the application was filed to vary the order – held, that Executive Engineer, I & PH had issued NOC subject to the condition that existing/proposed water supply scheme and irrigation scheme shall not be disturbed – 33 conditions were also imposed – held that petitioner had not shown violation of any mandatory requirement of law, whereas, NOCs had been obtained from all the statutory authorities- in case of failure to abide by the conditions, respondent No. 8 would be liable in accordance with law- Application allowed and interim order vacated with liberty to authority to take action for violation of the condition, if any. (Para- 12 to 14)

For the Petitioner : Mr. Ravinder Singh Jaswal, Advocate.
For the Respondents: Mr.Shrawan Dogra, Advocate, General with Mr. Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No.1, 3 and 5 to 7.
Nemo for respondent No.2.
Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Ajay Chauhan, Advocate, for respondent No.4.
Mr.K.D.Shreedhar, Senior Advocate with Mr. Yudhbir Singh Thakur, Advocate, for respondent No.8.

The following judgment of the Court was delivered:

<u>Tarlok Singh Chauhan, Judge.</u>

<u>CMP No.2040 of 2016.</u>

The petitioner/applicant has moved this application for producing on record additional documents which according to it are necessary for just and proper decision of the case.

2. Only respondent No.8 has contested the application and in turn placed on record plethora of documents.

3. The writ petition is only at the stage of completion of pleadings and, therefore, the application is allowed and documents accompanying the application as also the reply are taken on record and the parties shall be free to refer to them during the course of final hearing. Application stands disposed of.

CMP No.8367 of 2016.

4. This application has been filed by applicant/respondent No.8 for vacation of the interim orders dated 31.03.2016 (should be 30.03.2016) whereby this Court stopped the functioning of respondent No.8 Unit.

5. The instant writ petition has been filed in so-called public interest by 'Manav Kalyan Sanstha' which is a registered Society under the Societies Registration Act and appeared to be aggrieved by the setting up of a Bio Medical Waste Plant by respondent No.8 at Village and Post Office, Dugiari, Tehsil and District, Kangra, H.P. The establishment of the Unit, according to the petitioner, is proposed along the Manjhi Khad and, as a result thereof, the water sources in and around Manjhi Khad would be contaminated, the ambiance and quality of air as a result of discharge of toxic smoke would be affected from the discharge out of the 30 feet chimney erected in the plant. It is averred that the Bio Medical Waste Treatment Plant is being established without proper inspection of the site and the petitioner apprehends that the provisions of Act, Rules and Guidelines governing such Bio Medical Waste will be thrown to the winds and ultimately affect the health of residents of the area, who will have to bear the brunt only because of the inaction on the part of the official respondents.

6. The petitioner alongwith the main petition filed CMP No.908 of 2015 wherein directions were sought to the effect that respondent No.8 be directed to stop the operation of the Bio Medical Waste Treatment Plant (for short 'Plant') during the pendency of the petition.

7. The case appears to have been placed before the learned Vacation Judge and the following order came to be passed on 14.01.2015:-

> ***"CWP No.529 of 2015-C***
>
> Notice returnable within six weeks. List thereafter.
>
> ***CMP No.908 of 2015.***
>
> *Notice in the above terms. It is made clear that while constructing the Bio Medical Waste Treatment Plant, all the mandatory requirements shall be scrupulously followed. The persons responsible for construction work shall be personally liable for any breach of The Environment (Protection) Act, 1986 and the Rules framed thereunder. It is also made clear that water sources near the place of construction, shall not be polluted."*

8. Despite the aforesaid order, the petitioner during the vacations filed another miscellaneous application being CMP No.1500 of 2015 wherein the petitioner again made a similar request for directing respondent No.8 to stop the construction work of the plant. However, in view of the earlier order dated 14.01.2015, the subsequent application i.e. CMP No.1500 of 2015 was held to be not maintainable, as is evident from the order dated 16.02.2015 which reads thus:-

> ***"CMP No.1500/2015.***
>
> *In view of earlier order dated 14.1.2015, passed in CMP No.908/2015, the present application is not maintainable. The same is dismissed."*

9. The matter thereafter came up for consideration on 24.04.2015 and the Court directed that the pleadings be completed within four weeks. On 28.05.2015, the petition was admitted. However, despite the matter having already been admitted, it was again listed on 01.01.2016 under the head "*Admission Matters After Notice*". By this time, the only changed circumstance was that respondents No. 1, 3, 5, 6, 7 and 8 had already filed their replies wherein they had opposed the petition. However, despite this the petitioner obtained order of status quo which as observed earlier had already been denied to it at the initial stage. Eventually, the case was listed on 30.03.2016 on which date respondent No.8 was restrained from operating its Unit.

10. What is material at this point of time is the reply of respondent No.6, Executive Engineer, Irrigation and Public Health Department, Shahpur Division, wherein it has

categorically been averred that the 'No Objection Certificate' to set up a Servicing-Destroy of Bio Medical Waste had been issued by it subject to the condition that existing/proposed water supply schemes and irrigation schemes will not be disturbed. It is further averred that the existing Lift Irrigation Scheme, Dehrian and LWSS, Samirpur Tiara, Phase-I, are situated approximately 1 Km. and 1.5 Km. away from the plant. It is further submitted that while granting 'NOC' for setting up of the above Unit as many as 33 conditions have been imposed which are required to be strictly adhered to and complied with by respondent No.8 and in case of breach, respondent No.8 would be liable for civil and criminal action or both. It is also pointed out that the Pollution Control Board has also issued 'No Objection Certificate' which again is subject to certain mandatory conditions which have to be complied with by respondent No.8.

11. Respondent No.8, who is the Project proponent while filing reply to the writ petition has raised preliminary submissions specifically stating therein that the project being set up by it would in no manner affect the ecology and environment of the area as the project is using highly advanced technology whereby it will destroy the bio medical waste. It is also pointed out that a lot of investment has been put into the plant and the petition has been filed only on the basis of the apprehension which stands dispelled by the inquiry ordered by the Deputy Commissioner on the complaint filed by the petitioner, copy whereof has been annexed as Annexure R-8/2 with the reply. It is further averred that it was only after obtaining all the requisite permissions and 'No Objection Certificates' from all the concerned authorities that respondent No.8 established the Unit and thereafter invested huge money on this plant. Further, the work of the plant had been completed before filing of the writ petition and all the equipments, machinery and D.G. Set which are necessary for setting up the plant have already been installed in the plant and the same had been running smoothly.

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

12. Applicant/respondent No.8 has sought vacation of the interim orders on the ground that the petitioner has failed to point out any violation of any mandatory requirement of law. Whereas, on the other hand, applicant/respondent No.8 has obtained all the permissions, NOCs and other statutory and non-statutory clearances and after investing approximately one crore, out of which Rs. 70 lacs have been obtained by way of loan and had thereafter installed the plant. It has further been claimed that the life of the plant is hardly 5 years and had already started functioning on 26.12.2015, but had to stop its operation in view of the interim orders passed by this Court on 30.03.2016. Not only this, the monthly installment payable by applicant/respondent No.8 is Rs. 2,73,000/- per month.

13. We have gone through the contents of the writ petition and are prima facie of the view that the petitioner has not even remotely pleaded any violation of any statutory or non-statutory provisions and most of the pleas raised by it are far too general and more in the realm of speculation. Whereas, on the other hand, the specific case of the respondents, more particularly, respondent No.8 is that it had already obtained statutory and non-statutory clearances, NOCs and other requisite documents which are essential for making the Unit functional. That apart, we find that the 'NOC' granted by the Pollution Control Board is subject to as many as 33 conditions and we see no reason that in case respondent No.8 violates or chooses not to comply with any of these conditions, it would definitely invite action as permissible under the law. In addition to that, since we are keeping the petition pending, the petitioner would always be at liberty to approach this Court in case of violation of any condition (s) of the NOCs/clearances, or the provisions of the various legislations or rules framed thereunder. But, for the present, we are not inclined to restrain respondent No.8 from operating the Unit, particularly, when it has obtained statutory and non-statutory clearances, NOCs etc. and also invested an amount of nearly one crore rupees.

14. Accordingly, the application is allowed and the interim order dated 30.03.2016 is vacated. However, the petitioner/non-applicant is at liberty to approach this Court in case there is serious violation on the part of respondent No.8 of any of the conditions subject to which the

NOCs/clearances have been granted in its favour or in case there is violation of any statutory enactment or rules framed thereunder governing the field. Even otherwise, the permission to run the Unit shall be subject to the final outcome of this petition. The application is accordingly disposed of in the aforesaid terms.

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

M/s United Electronics (India) Ltd. and another …Appellants.

Versus

Ajay Kumar and others …Respondents.

OSA No. 8 of 2015
Reserved on: 22.10.2016
Decided on: 08.11.2016

Code of Civil Procedure, 1908- Order 43 Rule 1- An execution petition was filed, in which an order of sale was passed by the Court – the sale could not be held on the ground that no bids were received in spite of wide publicity – permission was granted to D.H. to get survey zoning and planning of the property done- fresh sale was conducted – six bank drafts were received – efforts were made for re-conciliation, which failed – time was granted to find better buyers- it was ordered that in case of failure the sale would stand confirmed automatically and execution petition will be closed- held, that Judgment Debtors had not questioned the sale – objections were filed subsequently, but they were not pressed- the order dismissing the application for recalling the order is not appealable – judgment debtors are caught by estoppel- inadequacy of consideration is no ground for setting aside the sale- appeal is not maintainable and is dismissed. (Para-31 to 54)

Cases referred:

Gopilal and another versus Sitaram and others, AIR 1968 Madhya Pradesh 196
Bakhsho versus Pakhar Singh and another, AIR 1985 Punjab and Haryana 322
L. Balu versus Periasami and others, AIR 1988 Madras 114
Shanti Devi versus H.P. Financial Corporation and others, 1997 (3) Sim. L.C. 256
Raja Shyam Sunder Singh and others versus Kaluram Agarala and others, AIR 1938 Privy Council 230
Vidya Bhan Prakash versus The Second Additional District Judge, Mathura and others, AIR 1988 Allahabad 204
Jaswantlal Natvarlal Thakkar versus Sushilaben Manilal Dangarwala and others, AIR 1991 Supreme Court 770
Janak Raj versus Gurdial Singh and another, AIR 1967 Supreme Court 608
Hukumchand versus Bansilal and others, AIR 1968 Supreme Court 86
M/s. Kayjay Industries (P) Ltd. versus M/s. Asnew Drums (P) Ltd. and others, (1974) 2 Supreme Court Cases 213

For the appellants: Mr. B.C. Negi, Senior Advocate, with Mr. Raj Negi, Advocate.

For the respondents: Mr. Ramakant Sharma, Senior Advocate, with Mr. Basant Thakur, Advocate, for respondent No. 1.
Mr. Ajay Kumar Dhiman, Advocate, vice Mr. Balwant Kukreja, Advocate, for respondent No. 2.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This appeal is directed against orders, dated 27th March, 2015, 28th April, 2015, and 27th July, 2015, passed by the learned Single Judge in Execution Petition No. 1 of 2005, tilted as H.P. State Industrial Development Corporation versus M/s United Electronics (India) Ltd. and others (for short "the impugned orders").

2. At the very outset, we deem it proper to record herein that the appellants have filed this appeal while invoking the jurisdiction of this Court in terms of Order 43 Rule 1 (j) of the Code of Civil Procedure (for short "CPC") and is not an appeal as per the mandate of Section 96 of the CPC, as recorded in the cause title.

3. Learned counsel for the parties argued the case at length.

4. It is profitable to give a brief resume of the facts of the case, which have given birth to the instant appeal.

5. Decree Holder-Himachal Pradesh State Industrial Development Corporation (for short "HPSIDC") earned decree in Civil Suit No. 8 of 1999, titled as Himachal Pradesh State Industrial Development Corporation Limited versus M/s United Electronics (India) Ltd. and others, was constrained to file Execution Petition in the year 2004, i.e. on 31st December, 2004. Notice was issued on 4th January, 2005, remained on the dockets of the Court without service and ultimately OMP No. 138 of 2008 was filed by the Decree Holder-HPSIDC on 9th April, 2008 for attachment of the immovable property of Judgment Debtor No. 1, i.e. M/s United Electronics (India) Ltd. (for short "Company"), as described in para 3 of the said application. Thereafter, another application, being OMP No. 451 of 2008, was filed by the Decree Holder-HPSIDC under Order 21 Rule 54 read with Section 151 CPC. Warrant of attachment was ordered to be issued vide order dated 17th September, 2008.

6. OMP No. 315 of 2009 came to be filed by the Decree Holder-HPSIDC under Order 21 Rules 66 and 67 CPC read with Section 151 CPC on 9th July, 2009, for issuing advertisement qua sale of the attached property. The learned Single Judge directed to issue the proclamation vide order, dated 15th July, 2009.

7. The Judgment Debtor-Company moved OMP No. 413 of 2009 under Order 21 Rules 58 and 59 CPC read with Section 151 CPC on 18th August, 2009, for settling the process of auctioning the property afresh. It is apt to reproduce the relief sought for in the said application herein:

> *"That it would be in the interest of justice and fairness of law to allow the present application and settle the process of auctioning of the property afresh so that the Judgment Debtor is able to once and for all settle the alleged dues of the HPFC and PNB the other two secured creditors."*

8. The learned Single Judge, vide order, dated 25th August, 2009, passed in OMP No. 413 of 2009 (supra), ordered that sale of proclamation would disclose the value of the property as assessed by the Decree Holder and details of all encumbrances attached thereto. It was also provided that the sale would be subject to confirmation by the Court.

9. The Decree Holder-HPSIDC filed reply to the said application, i.e. OMP No. 413 of 2009, on 2nd September, 2009. Rejoinder thereto came to be field on 9th October, 2009. The application was disposed of vide order, dated 22nd October, 2009, by providing that no further orders were required to be passed in view of order, dated 25th August, 2009.

10. On 8th July, 2011, the Decree Holder-HPSIDC moved OMP No. 241 of 2011 seeking permission of the Court to carry out fresh evaluation of the assets, which was allowed by the learned Single Judge on 23rd August, 2011, and a direction was issued to the Decree Holder-HPSIDC to carry out fresh evaluation of the movable and immovable property. Fresh valuation

report was ordered to be taken on record vide order, dated 19th October, 2011 in OMP No. 373 of 2011, with a further direction to sell the attached property by way of public auction after drawing the proclamation of sale. The Collector, Solan, was directed to ensure that an officer not below the rank of Tehsildar would conduct the auction. It is profitable to reproduce relevant portion of order, dated 19th October, 2011, herein:

> *"Attachment of the property was ordered on 31.08.2007. The attached property, i.e. the immovable property comprised in Plots No. 12, 13, 20, 21, 22, 23 and 24, Industrial Area, Barotiwala, District Solan, Himachal Pradesh, alongwith building and machinery standing thereon be sold by way of public auction. Proclamation of sale be published in* ***the Tribune*** *(Chandigarh Edition),* ***Amar Ujala*** *(Chandigarh Edition) and* ***the Economic Times*** *(Delhi Edition). Proclamation of sale be drawn up by the Registry and proclamation be published on or before* ***19th December, 2011,*** *and sale shall take place on* ***7th January, 2012.*** *The Collector, Solan, shall ensure that an officer not below the rank of Tehsildar shall conduct the auction.*
>
> *As per the valuation report, the total value of the land is ₹ 356.63 lacs and the value of the building is ₹ 18.19 lacs, i.e. the total value of the property is ₹ 374.92 lacs. It is, however, made clear that there is no upset price fixed in the auction, though, according to the Decree Holder, the distress value of the total property is ₹ 208.02 lacs. The HPSIDC shall take necessary steps and furnish the proclamation charges within two weeks from today."*

11. The said order was not complied with and on 19th December, 2011, fresh direction was issued for proclamation of the sale and the sale of the property.

12. The Decree Holder-HPSIDC filed OMP No. 62 of 2012 on 21st March, 2012, for the survey, zoning and planning of the property on the ground that no bids were received in spite of wide publicity and to explore the possibility of selling the property in question at higher price. It is worthwhile to reproduce the relief sought in the said application herein:

> *"In view of submissions made above the application may kindly be allowed and permission may kindly be granted to Decree Holder Corporation to get the survey, zoning and planning of the property done and direction may also be issued to the Judgement Debtors to extend necessary cooperation in the matter."*

13. Vide order, dated 2nd April, 2012, OMP No. 62 of 2012 was granted with a direction to the Decree Holder-HPSIDC to go for the survey, zoning and planning of the property and the Judgment Debtors were also directed to extend necessary cooperation in view of the fact that nobody turned up for auction. Order, dated 2nd April, 2012, reads as under:

> *"Report of the Collector received. As per report nobody turned up for auction.*
>
> *The present application has been moved for seeking permission to allow the decree holder to get survey, zoning and planning of the property. Further for seeking direction to the JDs to extend necessary cooperation in the matter. In view of the fact that no one had turned up at the time of auction, decree holder is also interested to take part in the ensuing bid as such it intends to survey the property for the purpose of bid. As such, the application is allowed. Decree holder may get the survey, zoning and planning of the property done and JDs shall extend necessary cooperation in the matter. The application stands disposed of.* ***Dasti*** *copy. List on* ***24.5.2012."***

14. Thereafter, time was sought on various dates/ hearings to comply with order, dated 2nd April, 2012, quoted hereinabove.

15. On 1st May, 2013, an application, being OMP No. 190 of 2013, under Section 151 CPC came to be filed by the Decree Holder-HPSIDC for fixation of the date for auction of the attached property.

16. The Judgment Debtor-Company filed reply to the said application on 14th May, 2013. Rejoinder was filed on 13th June, 2013, and the application was disposed of vide order, dated 3rd July, 2013, the operative portion of which reads as under:

> *"In view of the above, the application is allowed and the attached property, as aforesaid, is ordered to be put to sale as per schedule of sale to be fixed by the Addl. Registrar (Judicial) and intimated to the contesting parties through their learned counsel, on taking requisite steps by the petitioner/DH within two weeks from today. It is further ordered that in order to identify the aforesaid Plot No. 42, with a view to segregate the same from the attached property, a panel of local commissioners comprising of Ms. Charu Gupta and Ms. Meena Thakur, Advocates, is appointed, who shall carry out the requisite demarcation before the attached property is put to sale, on a date to be fixed mutually in consultation with the learned counsel for the contesting parties. In this exercise, the panel of local commissioners would be assisted by the Tehsildar, Barotiwala alongwith the field revenue staff and the Executive Officer, Baddi Barotiwala Nalagarh Development Agency (BBNDA), Baddi at Jharmajri, or any other senior officer appointed by him for this purpose, so that there is no difficulty in identification and demarcation of the aforesaid Plot No. 42. Fee of the Members of the panel of local commissioners is fixed at ₹ 25,000/- (rupees twenty five thousand only) each, inclusive of conveyance charges etc., which shall be payable by the contesting respondents/JDs No. 1, 3 and 5. The panel of local commissioners shall submit their report to this court within 15 days from execution of the Commission, under intimation to the parties through their learned counsel. The parties through their learned counsel/authorized representatives shall be free to assist the panel of local commissioners in execution of the Commission. Let copies of this order be sent by the Registry to the Tehsildar, Barotiwala and Executive Officer, BBNDA for information and compliance.*
>
> *The application stands disposed of in the above terms."*

17. The warrant of sale after execution was received alongwith the report of the Local Commissioner and six bank drafts, the mention of which has been made in order, dated 3rd October, 2013. It is apt to reproduce the relevant portion of order, dated 3rd October, 2013, herein:

> *"As per report of the Registry, warrant of sale has been received back after execution along with the report of the Local Commissioner and six bank drafts, amounting to ₹ 1,13,65,000/- (one crore, thirteen lacs, sixty five thousand only), being the sale proceeds, which be invested by the Registry in a Fixed Deposit on usual terms..........."*

18. On the request of the learned counsel for the parties, the matter was ordered to be listed on 7th November, 2013, with a direction to the parties to file objections against the sale, if any.

19. OMP No. 4266 of 2013, filed on 24th October, 2013, under Order 21 Rules 58 and 59 CPC read with Section 151 CPC, are, in fact, objections to the sale filed by the Judgment Debtors-Company. We deem it proper to reproduce para 8 of the application/objections herein:

> *"8. That it would be in the interest of justice and fairness of law to allow the present application and settle the process of auctioning of the property afresh so that the Judgment Debtor is able to once and for all settle the alleged dues of the HPFC and PNB the other two secured creditors."*

20. The Decree Holder-HPSIDC filed reply to the said application/objections on 26th November, 2013. It is apt to reproduce para 8 of the reply herein:

"8. In reply to para 8 is submitted that the JD's may be directed to produce better buyer as earlier the property was auctioned more than 9 times but no bids were received."

21. Thereafter, on 12th December, 2013, the auction purchaser filed OMP No. 4341 of 2013 under Order 21 Rules 94 and 95 CPC read with Section 151 CPC for issuance of sale certificate after confirmation of sale. Parties were directed to file reply vide order, dated 18th December, 2013. Both the applications, i.e. OMP No. 4266 of 2013 and 4341 of 2013, came up for consideration on 8th January, 2014, were ordered to be listed on 19th March, 2014.

22. The Execution Petition was ordered to be listed for settlement on 23rd April, 2014, in view of the agreement arrived at between the parties, as is recorded in order, dated 19th March, 2014. The case was adjourned on 23rd April, 2014, 20th May, 2014, 23rd June, 2014 and 14th July, 2014, for settlement. Thereafter, on 13th August, 2014, the Judgment Debtors-Company moved OMP No. 349 of 2014 under Section 151 CPC for settlement. It is apt to reproduce the relief sought in the said application herein:

"It is, therefore, respectfully prayed that the present application be allowed and the next documents be taken on record and appropriate orders may kindly be passed by this honourable High Court, keeping in view the facts and circumstances of the matter and direct the Judgement Holder/Corporation to settle the dispute under one time settlement, keeping in view the precedence on this issue.

b. It is humbly further prayed that any other direction or order may kindly be issued by this Hon'ble High Court keeping with the orders passed on 3rd of July 2013 on account of the legal implications of the same."

23. On 22nd October, 2014, a letter was produced before the learned Single Judge by the learned counsel for the Decree Holder-HPSIDC, in terms of which the Judgment Debtors were called upon for discussion qua one time settlement. The Judgment Debtors were directed to attend the office of the Decree Holder- HPSIDC during the course of that day with a further direction to the Decree Holder- HPSIDC to file objections in case the negotiation was not acceptable and the matter was ordered to be posted on 19th November, 2014.

24. The perusal of order, dated 19th November, 2014, does disclose that the Judgment Debtors failed to comply with the directions made by the learned Single Judge vide order, dated 22nd October, 2014, and the Judgment Debtors were directed to deposit the outstanding decretal amount within three weeks, failing which the Decree Holder- HPSIDC was directed to take appropriate steps including qua detention of the Judgment Debtors in civil imprisonment. It is profitable to reproduce order, dated 19th November, 2014, herein:

*"**<u>OMP No. 349 of 2014</u>***

*The affidavit filed on behalf of the petitioner-DH reveals that consequent upon the order passed on the previous date, the authorized representatives of JDs, present in the Court on the previous date, did not visit the office of the DH as directed by this Court. It being so, JDs to deposit the outstanding decretal amount within three weeks, failing which the petitioner-DH to take appropriate steps, in accordance with law, including qua detention of the JDs in civil imprisonment. List on **15th December, 2014.**"*

25. The Judgment Debtors failed to deposit the decretal amount, but, a statement was made by the learned counsel for the Judgment Debtors before the Court on 15th December, 2014, that they intend to settle the matter. The matter was referred for mediation, which failed, as has been recorded in order, dated 13th March, 2015. In the said order, it has also been recorded that the attached property stood already sold in an open auction for the consideration of ₹ 1,13,65,000/- and the parties were directed to produce a better buyer, who would be ready and willing to purchase the attached property in a sum over and above the one in which the same had been purchased by the auction purchaser.

26. In terms of order, dated 27th March, 2015 (impugned order-I), Decree Holder and Judgment Debtors had not filed the objections to the sale, but had sought one more opportunity to find out better buyer(s), if any, available, was granted with the command that in case the parties fail to do so, the sale of the property shall stand confirmed automatically in favour of the auction purchaser without reference to the Court and the matter was posted for 28th April, 2015. Order, dated 28th April, 2015, (impugned order-II) provides that the Decree Holder as well as the Judgment Debtors failed to produce the better buyer and the execution petition was ordered to be closed in terms of order, dated 27th March, 2015.

27. Thereafter, on 26th May, 2015, Judgment Debtors filed OMP No. 156 of 2015 under Section 151 CPC for recalling orders, dated 27th March, 2015 and 28th April, 2015, which came to be dismissed vide order, dated 27th July, 2015 (impugned order-III).

28. Being dissatisfied, the Judgment Debtors have filed the instant appeal thereby calling in question the impugned orders, on the grounds taken in the memo of the appeal.

29. Learned counsel for the Judgment Debtors-appellants was asked to justify the maintainability of the appeal. It was argued that the impugned orders have been passed by the learned Single Judge on the applications in terms of Order 21 Rule 92 CPC, thus, are appealable in terms of Order 43 Rule 1 (j) CPC.

30. Learned counsel for the respondents argued that the impugned orders do not fall within the scope and ambit of Order 43 Rule 1 (j) CPC. Further argued that the appeal is not maintainable, the Judgment Debtors are caught by law of waiver and have virtually objected to the sale proceedings.

31. It is profitable to reproduce Order 21 Rule 92 CPC herein:

> ***"ORDER XXI***
>
> ***EXECUTION OF DECREES AND ORDERS***
>
> *................*
>
> ***92. Sale when to become absolute or be set aside.*** *- (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute:*
>
> *Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection.*
>
> *(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within sixty days from the date of sale, or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the Court, the Court shall make an order setting aside the sale:*
>
> *Provided that no order shall be made unless notice of the application has been given to all persons affected thereby:*
>
> *Provided further that the deposit under this sub-rule may be made within sixty days in all such cases where the period of thirty days, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.*
>
> *(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.*
>
> *(4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.*

(5) If the suit referred to in sub-rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered."

32. The said provision of law mandates that when the application is not made under Rules 89, 90 or 91 CPC or when such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale becomes absolute.

33. The order must contain the following ingredients:

(i) that the sale can be made absolute when no application under Rules 89, 90 or 91 CPC has been filed; or

(ii) when such application is made and disallowed; and the sale has to be confirmed.

34. As discussed hereinabove, the Judgment Debtors, though, had moved an application, being OMP No. 413 of 2009, for settling the process of auction afresh, which was not granted, but the sale was ordered to be kept subject to the confirmation by the Court, vide order, dated 22nd October, 2009. The said order has not been questioned. Thus, the Judgment Debtors are estopped from questioning the process of attachment and auction of the property.

35. The Judgment Debtors have also not questioned the orders made by the learned Single Judge on the applications moved by the Decree Holder-HPSIDC, the details of which are given hereinabove, thus, cannot now question the process of attachment and auction of the property.

36. OMP No. 4266 of 2013 filed by the Judgment Debtors, are, in fact, objections to the sale, but the same have not been pressed by them by seeking adjournment for settlement and obtaining best buyer, i.e. a buyer, who would be ready to pay the price over and above the amount paid by the auction purchaser, is suggestive of the fact that the Judgment Debtors have not questioned the process of attachment or sale/auction on any grounds contained in Order 21 Rule 90 CPC or any other Rule. Thus, the Judgment Debtors are precluded from questioning the impugned orders.

37. Order, dated 27th March, 2015 (impugned order-I) is only an order of confirmation of sale. This order nowhere discloses that any application was made and it was disallowed, thus, the same does not fall within the scope and ambit of Order 21 Rule 92 CPC and is not appealable.

38. It is profitable to record herein that the Judgment Debtors did not question order, dated 27th March, 2015, though it

was a default order. They failed to take steps in terms of order, dated 27th March, 2015, and order, dated 28th April, 2015 (impugned order-II), came to be passed by the learned Single Judge in terms of which the Execution Petition was disposed of as party satisfied. In fact, the confirmation order has been made in terms of order, dated 27th March, 2015.

39. Order, dated 27th July, 2015 (impugned order-III), in terms of which OMP No. 156 of 2015 came to be dismissed, is not an order of review. No review petition was filed. The application was filed under Section 151 CPC for re-calling orders, dated 27th March, 2015 and 28th April, 2015.

40. We wonder when the remedy of review was available, why application for re-calling the orders was made. The dismissal of such application does not fall within the ambit and scope of Order 21 Rule 92 CPC.

41. Our this view is fortified by the judgment rendered by the High Court of Madhya Pradesh in the case titled as **Gopilal and another versus Sitaram and others,** reported in **AIR 1968 Madhya Pradesh 196.** It is apt to reproduce paras 6 and 7 of the judgment herein:

"6. No appeal lies under Order 43, Rule 1(j) from an order dismissing an application under Order 21, Rule 90 or an order dismissing an application for restoring the application under Order 21, Rule 90. Under Order 43, Rule 1(j) an appeal lies from an order under Rule 92 of Order 21 "setting aside or refusing to set aside a sale". Now, when no application is made under Order 21, Rule 90 or where such an application is made and disallowed, the Court is required to make an order confirming the sale. If the application made is allowed, then the Court has to make an order setting aside the sale. When no application is made under Order 21, Rule 90, there is no question of appeal against an order confirming the sale. Clause (j) of Order 43, Rule 1 does not provide for an appeal against an order confirming the sale. Under that clause, an appeal lies against an order under Order 21, Rule 92 setting aside or refusing to set aside a sale. When an application under Order 21, Rule 90 is made, and is dismissed for default or is not pressed by the applicant, it may be taken for the purpose of Rule 92 of Order 21 that it has been disallowed and the result of disallowing is that the sale is confirmed But it cannot be held that when the application is dismissed for default of appearance or when it is not pressed then there is a refusal on the part of the Court to set aside the sale The word "refusal" means "a denial or rejection of something demanded or offered" There can be no "refusal" unless there is a request or demand When, an application under Order 21. Rule 90 is dismissed for default or when it is not pressed, there is no demand on the part of the person applying for setting aside the sale and the Court is not required to consider whether the sale should be set aside or not. Thus, when an application under Order 21, Rule 90 is dismissed for default of appearance and the sale is confirmed, there is no refusal to set aside the sale and such an order is not appealable under Order 43, Rule 1(j). A fortiori, an order dismissing an application for restoring the application under Order 21, Rule 90 dismissed for default of appearance is also not appealable.

7. On the question whether an appeal lies from order dismissing an application under Order 21, Rule 90 for default or from an order dismissing an application for restoring the application under Order 21, Rule 90, the decisions are conflicting. In Kali Kanta Chuckerbutty v. Shyam Lal, AIR 1917 Cal 815(2) it has been held that the language of Order 43, Rule 1(j) is wide enough to cover a case of an application to have a sale set aside dismissed for default. The reasoning given in this case was that the effect of such an order is to confirm the sale under Rule 92. But, as pointed out earlier, under Clause (j) of Order 43, Rule 1, an appeal lies against an order refusing to set aside a sale and not against an order confirming the sale. This decision was followed in Narendra Nath v. Rakhal Das, AIR 1925 Cal 510 where also it was ruled that the effect of the dismissal of an application under Rule 90 is to confirm the sale under Rule 92 and hence an appeal lies against the order. But in a later case, namely, Basaratulla v. Reazuddin, AIR 1926 Cal 773, it was held that an order of dismissal for default is not a confirmation of the sale and does not preclude the party from making a fresh application and that such an order is not appealable under Order 43, Rule 1(j). In that case Page J. observed that :--

> *". . . . .in dismissing the application for default when neither party appears on the case being called for hearing, the Court does not refuse to set aside the sale, but in the absence of the parties refuses to consider whether the sale should be set aside or not."*

Page J. however, reached the conclusion in Basanta Kumar v. Khirode Chandra, AIR 1928 Cal 25 that where a person applies under Order 21. Rule 90 but the application is dismissed for his non-appearance and the opposite party is present and ready to contest, the order dismissing the application is an order under Order 43. Rule 1(j) and is, therefore appealable To us it seems that in principle there is no distinction between an order passed on an application under Order 21, Rule 90

dismissing it for default for non-appearance if one party and an order dismissing it for non-appearance of both the parties. The decision in AIR 1926 Cal 773 (supra) was not followed by the Calcutta High Court in Ansarali v. Bhim Sankar, AIR 1929 Cal 407(2). In that case it was held that when an application under Order 21. Rule 90 is dismissed for default, whether for non-appearance of one or for non-appearance of both the parties, it is disallowed under Rule 92 and that it is the disallowing of the application under Order 21, Rule 90 which corresponds to the order refusing to set aside a sale within the meaning of Order 43, Rule 1(j), and, therefore, such an order is appealable. In our judgment, the expression "where such an application is made and disallowed" occurring in Rule 92 means that where such an application is made and rejected. But it is not every order of rejection that has been made appealable under Order 43, Rule 1 (i) but only that Order of rejection by which the Court on a demand being made by a person to set aside a sale refuses to set aside the sale. This stands to reason as a party who has allowed his application to be rejected by default or for non-prosecution cannot really complain that the Court has refused to set aside the sale on a prayer being made by him. The Patna High Court has in Rampratap v. Triloknath, AIR 1957 Pat 465, following AIR 1928 Cal25 (supra) and AIR 1929 Cal 407(2) (supra), held that an order dismissing an application under Order 21, Rule 90 for non-prosecution is appealable under Order 43, Rule 1(j), the reason given being that if the application is disposed of on merits and is dismissed, the result is that the sale is confirmed; likewise if the application is dismissed for non-prosecution, the result is the same, namely, that the sale is confirmed. As we have stated earlier, the question of appealability under Order 43, Rule 1(j) does not depend upon whether the order under Order 21, Rule 92 results in the confirmation of the sale but on the fact whether the order is one refusing to set aside the sale or setting aside the sale. It is not necessary to note the decisions of other High Courts which are in similar vein. The reasonings given in these decisions, with all respect to the learned Judges deciding the cases, do not appear to us to be reconcilable with one another. We would respectfully say that Page J. rightly observed in AIR 1926 Cal 773 (supra) that when an application under Order 21, Rule 90 is dismissed for default, the Court does not refuse to set aside the sale. In our view, an order dismissing an application under Order 21, Rule 90 for default or an order dismissing an application for restoring the original application under Order 21. Rule 90 is not appealable under Order 43. Rule 1 (j)."

42. The High Court of Punjab and Haryana in the case titled as **Bakhsho versus Pakhar Singh and another,** reported in **AIR 1985 Punjab and Haryana 322,** held that the order passed by the executing Court confirming the sale is not appealable under Clause (j) of Order 43 Rule 1 CPC in absence of the objections under Order 21 Rule 90 CPC. It is profitable to reproduce para 6 of the judgment herein:

"6. The learned counsel for the petitioner has contended that the sale in favour of the auction-purchaser was confirmed by the executing Court on 22-12-1983. The petitioner did not file objection under S. 21, R. 90, as she did not come to know about the auction for want of proclamation of sale in terms of O. 21 R. 66 of the Code. The sale in favour of the auction-purchaser stood confirmed by the time the petitioner came to know of it. The petitioner did not approach the executing Court for relief, because the sale already stood confirmed. It is under these circumstances that the petitioner has filed the present revision wherein the prayer made is that the sale by auction in favour of Balbir Singh respondent be set aside for want of proclamation under O. 21, R. 66 of the Code. This contention is also without any merit. The petitioner has not sought the relief of getting the sale set aside from the executing Court so far. It is incorrect that the petitioner could not seek relief in this respect from the executing Court, because the sale in favour of the auction-

purchaser stood confirmed. If the petitioner had filed objections for getting the sale set aside, the order passed would have been appealable under Clause (j) of O. 43, R. 1 of the Code. The present revision against the order of the executing Court, confirming the sale in favour of the auction-purchaser in the absence of objection under O. 21, R. 90 of the Code is rather misconceived."

43. In the case titled as **L. Balu versus Periasami and others,** reported in **AIR 1988 Madras 114,** it has been held, in para 7, that an order, passed under Order 21 Rule 92 CPC, confirming the sale on the ground that no application to set aside the sale has been made, would not come within the purview of Order 43 Rule 1(j) CPC and would not be appealable.

44. The same principle has been laid down by this Court in the case titled as **Smt. Shanti Devi versus H.P. Financial Corporation and others,** reported in **1997 (3) Sim. L.C. 256.** It is profitable to reproduce para 3 of the judgment herein:

"3. The language in the Rule 1(j) of Order 43, is very significant. The rule talks only of an order setting aside the sale or refusing to set aside the sale. In this case, the order refusing to set aside the sale was separately passed on the application filed by the Appellant under Order 21, Rule 90, Code of Civil Procedure, The order has become final as there is no appeal against the said order by the Appellant. The present appeal, which is now filed, is against an order confirming the sale. That is not mentioned in Rule 1(j), as set out above. This order cannot be called an order setting aside or refusing to set aside the sale. Hence, the appeal is not maintainable."

45. The sale of property on low price in view of the fact that the Decree Holder and the Judgment Debtors failed to bring a best buyer, who would have paid the amount more than what the highest auction purchaser had paid, despite granting several opportunities, cannot be said to be a material irregularity and the objections raised by way of OMP No. 4266 of 2013, which too was virtually not pressed by seeking adjournment for settlement and obtaining best buyer, are of no consequence.

46. Keeping in view the facts of the case, the appellants-Judgment Debtors are caught by estoppel and waiver.

47. Our this view is fortified by the judgment rendered by the Privy Council in the case titled **Raja Shyam Sunder Singh and others versus Kaluram Agarala and others,** reported in **AIR 1938 Privy Council 230,** the relevant portion of which reads as under:

"As regards the appellants' objection to the sale proclamation, their Lordships consider that the waiver of the necessity for a fresh proclamation necessarily implied a waiver of objection to any defect appearing on the face of the sale proclamation, as appellant 1 must have been fully aware of its terms in view of his miscellaneous appeal to the High Court. The facts in this case are stronger against the said appellant than those in Girdhari Singh v. Hurdeo Narain Singh, 1876 3 IndApp 230 in which this Board held that the waiver covered any objection to an error in the statement of the Government revenue, as the judgment-debtor must have had the opportunity of seeing the copy affixed in the Court House. This objection of the appellants accordingly fails.

As regards the appellants' three objections to the attachment, their Lordships find it unnecessary to consider the correctness of the findings of the Subordinate Judge, and they have not heard the respondents on this question. Their Lordships do not consider that the waiver of any necessity for a fresh sale proclamation would imply a waiver of the right to object to any of the three irregularities in the attachment found by the Subordinate Judge."

48. In the case titled as **Vidya Bhan Prakash versus The Second Additional District Judge, Mathura and others,** reported in **AIR 1988 Allahabad 204,** it has been held

that unless there is nexus between the inadequacy of price fetched and the irregularity or fraud in conducting the sale, the sale cannot be set aside. Further held that where the inadequacy of price was the result of factors other than material irregularities or fraud, proviso to Order 21 CPC did not come into force. It is apt to reproduce paras 17 and 18 of the judgment herein:

> *"17. Sri S.R. Misra, Advocate appearing for the judgment-debtor, has during the course of his arguments relied upon a decision of the Andhra Praidesh High Court in the case of Satyanarayana Soni v. State of Andhra Pradesh (1987) 2 Cur CC 118. It has been held in this case that unless there is nexus between the inadequacy of price fetched and the, irregularity or fraud in conducting the sale, the sale cannot be set aside. It has further been held that,*
>
> *"Therefore, if a party, who has an interest in the property sold in execution of the decree is affected by such sale, he has to establish on facts proved to the satisfaction of the executing court that by reason of irregularity or fraud he sustained substantial injury and that injury has been resulted on grounds of material irregularity or fraud either in publishing the sale proclamation or conducting the sale."*
>
> *During the course of its judgment, the Andhra Pradesh High Court has relied upon the aforesaid earlier decision of its own Court in Ramdasjee's case AIR 1965 Andh Pra 334. It has held that any material irregularities per se will not invalidate a sale. Such irregularities will have the effect of a voiding the sale only if the connection is established between them and the inadequacy of price realised at the sale". It was further held that inadequacy of price proprio vigpre would not result in avoiding the sales. There must be correlation between the damage suffered by the judgment-debtor and the material irregularity complained of if the inadequacy of the price is the result of factors other than the material irregularities complained of the proviso to Order 21 Rule 90(1) cannot come into operation." As stated earlier the same is also the view taken by the Supreme Court in the case of Radhey Shyam (AIR 1971 SC 2337) (supra).*
>
> *18. On the findings recorded in the present case by the courts below, the decision cited on behalf of the respondents in the case of Satyanarayana Soni (1987-2 Cur CC 118) (Andh Pra) (supra), in my opinion does support the case of the petitioner. In our case, the execution court had dismissed the objections of the judgment-debtor and the lower appellate court had recorded a finding that no substantial injury had occurred to the judgment-debtor by reason of irregularity or fraud contemplated by the provisions of Sub-clause (2) of Order XXI Rule 90 of the Code of Civil Procedure."*

49. The same principle has been laid down by the Apex Court in the case titled as **Jaswantlal Natvarlal Thakkar versus Sushilaben Manilal Dangarwala and others,** reported in **AIR 1991 Supreme Court 770.**

50. Keeping in view the merits of the case and the orders passed from time to time, the mention of which has been made hereinabove, we are of the opinion that the impugned orders are the best orders, which could have been passed by the learned Single Judge.

51. Our this opinion is supported by the judgment rendered by the Apex Court in the case titled as **Janak Raj versus Gurdial Singh and another,** reported in **AIR 1967 Supreme Court 608.** It is apt to reproduce para 4, relevant portion of para 8 and para 24 of the judgment herein:

> *"4. Before referring to the various decisions cited at the Bar and noted in judgment appealed from, it may be useful to take into consideration n the relevant provisions of the Code of Civil Procedure. So far as sales of immovable property are concerned there are some specie provisions in O. XXI beginning with R. 82 and ending with R. 103. If a sale had been validly held, an application for setting the same aside can*

only be made under the provisions of Rr. 89 to 91 of O. XXI. As is well known, R. 89 gives a judgment-debtor the right to have the sale set aside on his depositing in Court a sum equal to five per cent of the purchase money fetched at the sale besides the amount specified in the proclamation of sale as that for the recovery which the sale was ordered, less any amount which may, since the date of sale, have been received by the decree-holder. Under sub-r . (2) of R.92 the Court is obliged to make an order setting aside the sale if a proper application under R. 89 is made accompanied by a deposit within 30 days from the date of sale. Apart from the provision of R. 89, the judgment-debtor has the right to apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it provided he can satisfy the Court that he has sustained substantial injury by reason of such irregularity or fraud. Under R. 91 it is open to the purchaser to apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. Rule 92 provides that where no application is made under any of the rules just now mentioned or where such application is made and disallowed the Court shall make an order confirming the sale and thereupon the sale shall become absolute. Rule 94 provides that where the sale of immovable property has become absolute, the Court must grant a certificate specifying the property sold and the name of the person who at the time of sale was declared to be the purchaser. Such certificate is to bear date the day on which the sale becomes absolute. Section 65 of the Code of Civil Procedure lays down that where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when it is sold and not from the time when the sale becomes absolute. The result is that the purchaser's title relates back to the date of sale and not the confirmation of sale. There is no provision in the Code of Civil Procedure of 1908 either under O. XXI or elsewhere which provides that the sale is not to be confirmed if it be found that the decree under which the sale as ordered has been reversed before the confirmation of sale. It does not seem ever to have been doubted that once the sale is confirmed the judgment-debtor is not entitled to get back the property even if he succeeds thereafter in having the decree against him reversed. The question is, whether the same result ought to follow when the reversal of the decree takes place before the confirmation of sale.

5. ....

6. ....

7. ....

8. .... Nothing has been urged before us which would lead us to take a contrary view. Under the present Code of Civil Procedure, the Court is bound to confirm the sale and direct the grant of a certificate vesting the title in the purchaser as from the date of sale when no application as is referred to in R. 92 is made or when such application is made and disallowed.

xxx xxx xxx

24. For the reasons already given and the decisions noticed, it must be held that the appellant-auction purchaser was entitled to a confirmation of the sale notwithstanding the fact that after the holding of the sale the decree had been set aside. The policy of the Legislature seems to be that unless a stranger auction purchaser is protected against the vicissitudes of the fortunes of the suit, sales in execution would not attract customers and it would be to the detriment of the interest of the borrower and the credition alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified. The Code of Civil Procedure of 1908 make ample provision for the protection of the interest of the judgment-debtor who feels that the decree ought not to have been

passed against him. On the facts of this case, it is difficult to see why the judgment debtor did not take resort to the provision of O. XXI, R. 89.The decree was for small amount and he could have easily deposited the decretal amount besides 5 per cent of the purchase money and thus have the sale set aside. For reasons which are not known to us he did not do so."

52. The same principle has been laid down by the Apex Court in the case titled as **Hukumchand versus Bansilal and others,** reported in **AIR 1968 Supreme Court 86.** It is worthwhile to reproduce paras 8 and 9 of the judgment herein:

"8. It is on these principles that we have to decide whether the trial court was correct. We have already indicated that the sale was held on April 7, 1958, and in the normal course it would have been confirmed after 30 days unless an application under R. 89, R. 90 or Rule 91 of Order XXI was made. Besides this case is, as we have already assumed, analogous to the case of a final mortgage decree. The judgment-debtor mortgagor had the right to deposit the amount at any time before confirmation of sale within 30 days after the sale or even more than 30 days after the sale under Order XXXIV, Rule 5 (1) so long as the sale was not confirmed. If the amount had been deposited before the confirmation of sale, the judgment-debtors had the right to ask for an order in terms of Order XXXIV, Rule 5 (1) in their favour. In this case an application under O.XXI R. 90 had been made and therefore the sale could not be confirmed immediately after 30 days which would be the normal course; the confirmation had to await the disposal of the application under Order XXI, Rule 90. That application was disposed of on October 7, 1958 and was dismissed. It is obvious from the order sheet of October 7, 1938 that an oral compromise was arrived at between the parties in court on that day. By that compromise time was granted to the respondents to deposit the entire amount due to the decree-holder and the auction-purchaser by November 21, 1958. Obviously, the basis of the compromise was that the respondents withdrew their application under O. XXI, Rule 90 while the decree-holder society and the auction-purchaser appellant agreed that time might be given to deposit the amount upto November 21, 1958. If this agreement had not been arrived at and if the application under Order XXI, Rule 90 had been dismissed (for example, on merits) on October 7, 1958, the court was bound under O. XXI, Rule 92 (1) to confirm the sale at once. But because of the compromise between the parties by which the respondents were given time upto November 21, 1958 the court rightly postponed the question of confirmation of sale till that date by consent of parties. But the fact remains that the application under Order XXI, Rule 90 had been dismissed on October 7, 1958 and thereafter, the court was bound to confirm the sale but for the compromise between the parties giving time upto November 21, 1958.

9. Now let us see what happened about November 21, 1958. On November 20, 1958, an application was made by the respondents praying that they might be given one day more as November 21, 1958 was holiday. No order was passed on that date, but it is remarkable that no money was deposited on November 20, 1958. When the matter came up before the court on November 22, 1958 no money was deposited even on that day. Now under Order XXXIV, Rule 5 it was open to the respondents to deposit the entire amount on November 22, 1958 before the sale was confirmed, but no such deposit was made on November 22, 1958. On the other hand, counsel for the respondents prayed to the executing court for extension of time by 14 days. The executing court refused that holding that time upto November 21, 1958 had been granted by consent and it was no longer open to it to extend that time. The executing court has not referred to Order XXI, Rule 92 in its order, but it is obvious that the executing court held that it could not grant time in the absence of an agreement between the parties, because Order XXI, Rule 92 required that as the application under Order XXI, R. 90 had been dismissed the sale must

be confirmed. We are of the view that in the circumstances it was not open to the executing court to extend time without consent of parties, for time between October 7, 1958 to November 21, 1958 was granted by consent of parties. Section 148 of the Code of Civil Procedure would not apply in these circumstances, and the executing court was right in holding that it could not extend time. Thereafter it rightly confirmed the sale as required under Order XXI, Rule 92 there being no question of the application of Order XXXIV, Rule 5 for the money had not been deposited on November 22, 1958 before the order of confirmation was passed. In this view of the matter, we are of opinion that the order of the executing court refusing grant of time and confirming the sale was correct."

53. In the case titled as **M/s. Kayjay Industries (P) Ltd. versus M/s. Asnew Drums (P) Ltd. and others,** reported in **(1974) 2 Supreme Court Cases 213,** the Apex Court has held that the Courts are not bound to adjourn the sale till a good price is got, it being a notorious fact that court sales and market prices are distant neighbours. Further held that mere inadequacy of price cannot demolish every court sale. It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

"7. Certain salient facts may be highlighted in this context. A Court sale is a forced sale and, notwithstanding the competitive element of a public auction, the best price is not often forthcoming. The judge must make a certain margin for this factor. A valuer's report, good as a basis, is not as good as an actual offer and variations within limits between such an estimate, however careful, and real bids by seasoned businessmen before the auctioneer are quite on cards. More so, when the subject-matter is a specialised industrial plant, which has been out of commission for a few years, as in this case, and buyers for cash are bound to be limited. The brooding fear of something out of the imported machinery going out of gear, the vague apprehensions of possible claims by the Dena Bank which had a huge claim and was not a party, and the litigious sequel at the judgment-debtor's instance, have 'scare' value in inhibiting intending buyers from coming forward with the best offers. Businessmen make uncanny calculations before striking a bargain and that circumstances must enter the judicial verdict before deciding whether a better price could be had by a postponement of the sale. Indeed, in the present case, the executing Court had admittedly declined to affirm the highest bids made on 16-5-1969, June 5, 1969 and August 28, 1969, its anxiety to secure a better price being the main reason. If Court sales are too frequently adjourned with a view to obtaining a still higher price it may prove a self-defeating exercise, for industrialists will lose faith in the actual sale taking place and may not care to travel up to the place of auction being uncertain that the sale would at all go through. The judgment-debtor's plea for postponement in the expectation of a higher price in the future may strain the credibility of the Court sale itself and may yield diminishing returns as was proved in this very case.

8. ....

9. The first respondent's counsel, Shri Parekh, drew our attention to condition No. 3 in the present proclamation of sale which is as follows :

> *The highest bidders for the two lots shall be declared to be the purchasers of the respective lots, provided always that he or they are legally qualified to bid, and provided that it shall be in the discretion of the undersigned Receiver holding the sale to decline acceptance of the highest bid for any lot when the price offered for any of the two lots appears so manifestly inadequate, as to make its acceptance inadvisable. The highest bid offered by any bidders for any of the two lots shall be subject to the sanction and approval of the District Judge, Thana.*

Form 29 prescribed in Appendix E to the Code contains condition No. 3 which is in like terms. The Court's activist obligation to exercise a discretion to make a fair sale out of a Court auction-and avert a distress sale - is underscored by this provision. In all public sales the authority must protect the interests of the parties and the rule is stated by this Court in Navalkha and Sons. v. Ramanya Das, (1970) 3 SCR 1 = (AIR 1970 SC 2037) thus :-

> *"The principles which should govern confirmation of sales are well established. Where the acceptance of the offer by the Commissioners is subject to confirmation of the Court the offerer does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the Court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is unreasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion."*

Be it by a receiver, commissioner, liquidator or Court this principle must govern. This proposition has been propounded in many rulings cited before us and summed up by the High Courts. The expressions 'material irregularity in the conduct of the sale' must be benignantly construed to cover the climax act of the Court accepting the highest bid. Indeed, under the Civil Procedure Code, it is the Court which conducts the sale its duty to apply its mind to the material actors bearing its mind to the material factors bearing on the reasonableness of the price offered is part of the process of obtaining a proper price in the course of the sale. Therefore, failure to apply its mind to this aspect of the conduct of the sale may amount to material irregularity Mere, substantial injury without material irregularity is not enough even as material irregularity not linked directly to inadequacy of the price is insufficient. And where a Court mechanically conducts the sale or routinely signs assent to the sale papers, not bothering to see if the offer is too low and a better price could have been obtained, and in fact the price is substantially inadequate, there is the presence of both the elements of irregularity and injury. But it is not as if the Court should go on adjourning the sale till a good price is got, it being a notorious fact that Court sales and market prices are distant neighbours. Otherwise, decree-holders can never get the property of the debtor sold. Nor is it right to judge the unfairness of the price by hindsight wisdom. May be, subsequent events, not within the ken of the executing Court when holding the sale, may prove that had the sale been adjourned a better price could have been had. What is expected of the Judge is not to be a prophet but a pragmatist and merely to make a realistic appraisal of the factors, and, if satisfied that, in the given circumstances, the bid is acceptable, conclude the sale. The Court may consider the fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation, and several other factors dependent on the facts of each case. Once that is done, the matter ends there. No speaking order is called for and no meticulous post mortem is proper. If the Court has fairly, even if silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible. Otherwise, a new threat to certainty of Court sales will be introduced.

10. So viewed we are satisfied that the district Court had exercised a conscientious and lively discretion in concluding the sale at Rs. 11.5 lakhs. If the market value

was over 17 lakhs, it is unfortunate that a lesser price was fetched. Mere inadequacy of price cannot demolish every Court sale. Here, the Court tried its best, time after time, to raise the price. Well-known industrialists in the public and private sectors knew about it and turned up. Offers reached a stationary off indefinitely in recovering its dues on baseless expectations and distant, prospects. The judgment-debtor himself, by his litigious exercises, would have contributed to the possible buyers being afraid of hurdles ahead. After all, producing around Rs. 11.4 lakhs openly to buy an industry is not easy even for apparently affluent businessmen. The sale proceedings had been pending too long and the first respondent could not, even when given the opportunity, produce buyers by private negotiation. Not even a valuer's report was produced by him. We are satisfied that the District Judge had committed no material irregularity in the conduct of the sale in accepting the highest offer of the appellant on September 3, 1969."

54. We have gone through the entire record and the proceedings drawn by the learned Single Judge/executing Court and are of the view that no irregularity has been committed in attaching the property, conducting the auction proceedings and confirming the sale.

55. Having said so, the appeal, on the face of it, is not maintainable. Even otherwise, on merits also, as discussed hereinabove, the appeal deserves to be dismissed and is dismissed accordingly alongwith all pending applications.

****

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

Sh. Rajinder Kumar Verma. ......Plaintiff.
Versus
Smt. Anita Verma & ors. .....Defendants.

Civil Suit No. 13 of 1997
Date of order: November 8, 2016.

Partition Act, **1893**- Section 4- A Local Commissioner was appointed to partition the property in accordance with the preliminary decree- another Local Commissioner was appointed to sell the property – Local Commissioner sold the property but the parties were not willing to pay 50% increase – property in Himachal could not be partitioned due to non-corporative attitude of the parties- a fresh Local Commissioner was appointed – objections were filed to his appointment- objections dismissed as baseless – Local Commissioner directed to partition the property in accordance with the preliminary decree. (Para-2 to 15)

For the plaintiff	Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashisth, Advocate.
For the defendants	Mr. N.S. Chandel Advocate with Mr. Dinesh Thakur, Advocate, for defendants No. 1 to 3. Mr. Anuj Gupta, Advocate, for defendant No. 4. Mr. N.K. Thakur, Sr. Advocate with Ms. Jamuna Kumari, Advocate, for defendant No. 6. Defendant No. 5 in person.

The following order of the Court was delivered:

Dharam Chand Chaudhary, J.

The present suit after passing preliminary decree for partition of the suit land is presently at the stage of partition thereof by a Local Commissioner to be appointed by this Court before the final decree is passed.

2. It is seen that vide order passed on 2.3.2004 in an application registered as CMP No. 440 of 2003 filed in this suit Mr. Bhupender Guprta, Senior Advocate was appointed as Local Commissioner to partition the suit property in accordance with the preliminary decree and submit the report to this Court. Mr. Gupta, however, failed to do so because as per the record the parties i.e. all co-sharers have not cooperated with him in getting the suit property situate within the territory of the State of Himachal Pradesh partitioned. As regards the suit property A-1/12 Safdarjung Enclave, New Delhi Mr. Naresh Sharma, Senior Advocate came to be appointed as Local Commissioner to put the same to auction. The Local Commissioner has sold that property in auction and auction purchaser had deposited the earnest money also in the Registry of this Court. However, the application registered as OMP No. 4229 of 2013 filed by the auction purchaser with a prayer to confirm the sale was dismissed because the same being lease hold could have only been sold in auction subject to the payment of 50% of the sale consideration to Delhi Development Authority towards unearned increase. The parties to the suit were not ready and willing to part with 50% sale consideration, therefore, the permission to confirm the sale as sought was declined and as the proceedings qua conversion of the property aforesaid from lease hold to free hold were already initiated, therefore, the parties were directed to pursue the same and ascertain the status thereof as well as apprise this Court also qua the same.

3. On 23.6.2015, when the matter came to be listed before this court, time was sought on behalf of the plaintiff to ascertain the current status of the proceedings qua conversion of the property i.e. A-1/12, Safdarjung Enclave, New Delhi. At the same time, learned Counsel on both sides had come forward with the proposal that the property situated within the territorial jurisdiction of this court can be partitioned with mutual understanding. Consequently, the following order came be passed in this matter on that day:-

> "Learned counsel representing the plaintiff seeks time to pursue the matter with Delhi Development Authority qua conversion of the property i.e. A-1/12, Safdarjung Enclave, New Delhi from lease hold to free hold. Allowed. Let the Court be informed about the current status on the next date.
>
> 2. Learned counsel on both sides further submit that so far as the property situated within the territorial jurisdiction of the State of Himachal Pradesh is concerned, the same can be partitioned with mutual understanding. They further submit that at the first instance this matter can be fixed for presence of the parties and thereafter if necessary to refer the same for compromise through mediated settlement. List for presence of parties on ***18th August, 2015."***

4. Consequent upon the order *ibid* the parties did not appear on 18.8.2015 and even on the next date i.e. 22.9.2015 also it is only the plaintiff who was present in person. On the joint request made by learned Counsel on both sides the dispute was referred to learned Mediator appointed with mutual consent for negotiate settlement. The order passed on that day reads as follows:

> "Only plaintiff is present in person. Defendants, however, are not present.
>
> Learned Counsel on both sides are hopeful qua partition of the property situated within the State of Himachal Pradesh with mutual understanding. They pray for referring this matter to a Mediator for settlement. On their joint request, Mr. Naresh Sood, Senior Advocate is appointed as Mediator to conduct negotiations between the parties in this matter. The date for trying conciliation is left open to be fixed by learned Mediator under intimation to learned Counsel representing the parties on both sides. Administrative Coordinator, main Mediator Centre, HP High Court to render all required assistance to learned Mediator in conducting the negotiations.
>
> List on 16th December, 2015."

5. However, the efforts to settle the dispute amicably were failed as the parties did not agree for the same. An order to this effect came to be passed on 6.4.2016, which reads as under:

> "Mediation failed. On the joint request of learned counsel representing the parties on both sides, list on 26th May, 2016."

6. The matter when came to be listed before this Court again on 26.5.2016 a detailed order taking note of the delay occurred in expediting the proceedings in the suit on account of non-cooperative attitude of the parties on both sides came to be passed and prima facie opinion formed to adjourn the same as sine-a-die. The prayer made to appoint someone as Local Commissioner to partition at least the suit property situate in the state of H.P. though was not found to be in order in view of the non-cooperative attitude of the parties on both sides and also that in the opinion of this Court the appointment of the Local Commissioner was also not likely to serve any purpose, however, this Court agreed to appoint Local Commissioner subject to the parties to file their respective affidavits indicating therein a common name to be appointed as Local Commissioner and also undertaking to render all assistance to the Commissioner so appointed during the course of partition proceedings initiated by him. The matter as such was adjourned for the purpose with further observation that if the steps as directed are not taken the Court may proceed to pass appropriate orders in the matter including its adjournment as Sine-a-die. The order passed on 26.5.2016 also reads as follow:

> "Plaintiff Rajinder Kumar Verma is present in person and Dhananjay Verma son of Shri Ashok Kumar Verma (defendant No.5), is also present.
>
> 2. It is seen from the record that Mr. Bhupender Gupta was appointed as Local Commissioner vide order passed on 2nd March, 2004 in OMP No.440 of 2003 to effect partition of the suit property consequent upon the preliminary decree passed in the suit. Learned Local Commissioner has submitted the report on 2.11.2005. He could suggest the manner in which the property namely A-1/12 Safdarjung Enclave, New Delhi could have been partitioned. As regards the other suit properties situate in the State of Himachal Pradesh, no proposal could be made perhaps on account of the parties did not cooperate during the course of the proceedings having taken place before learned Local Commissioner. The property at Delhi could also not be partitioned in the manner as suggested by the Local Commissioner, of course, the same, pursuant to the order passed by this Court, was put to auction by Shri Naresh Sharma, Advocate, who was appointed as Local Commissioner. The sale could not be confirmed as the parties on both sides raised objections to the report of the Local Commissioner. Subsequently, an application registered as OMP No. 4229 of 2013 came to be filed by auction purchaser for confirmation of the sale was dismissed on merits whereas OMP No.4319 of 2013 filed by the plaintiff for cancellation of the sale was dismissed being premature vide judgment dated 2.4.2015. The plaintiffs were directed to apprise the status of the proceedings qua conversion of the property A-1/12 Safdarjung Enclave, New Delhi from lease hold to free hold. The instructions as sought, however, have not yet seen the light of the day. No doubt, learned counsel on both sides are hopeful that the suit property situated within the State of Himachal Pradesh can be partitioned with mutual consent and it is for this reason the matter was referred for mediation, however, the mediation is also failed.
>
> 3. This matter is pending in this Court right from the year 1997. Preliminary decree was passed long back on 3.7.2003. It is on account of non-cooperative attitude of the parties on both sides, the partition of the suit property could not be effected. Learned counsel on both sides though pray for appointment of Local Commissioner, afresh, however, taking into consideration the past conduct of the parties, it may not be possible to the Local

> Commissioner, if appointed, again to effect partition, unless and until, a joint prayer is made in this Court by the parties on their respective affidavits in support thereof and there being consensus between them qua the person to be appointed as Local Commissioner. As prayed, the matter is adjourned to ***14th June, 2016*** for taking appropriate steps in the light of this order. If no steps are taken appropriate orders including adjourning this matter *sine-a-die* will be passed".

7. The plaintiff and defendants No. 1 to 4 have filed the affidavits as directed and consented for appointment of Mr. Naresh Sood, learned Senior Advocate as Local Commissioner. Defendants No. 5 and 6 who were exparte also appeared and filed application for setting aside the exparte order. The application OMP No. 262 of 2016 filed by defendant No. 5 was allowed vide order dated 10.8.2016 and while setting aside the exparte order passed against him he was permitted to join the proceedings in the suit from the stage as on 10.8.2016 onwards. Similar order came to be passed on 14.9.2016 in the application, OMP No. 342 of 2016 filed on behalf of defendant No. 6. On 10.8.2016 when defendants No. 5 and 6 appeared before this Court they both came forward with the submissions that the parties i.e. all co-sharers are permitted to settle the dispute amicably in an outside court settlement. They were allowed to do so and also to discuss the matter with the remaining co-sharers i.e. plaintiff and defendants No. 1 to 4. The following order came to be passed on 10.8.2016:

> "Affidavits on behalf of defendants No.1 to 3 is also stated to be filed during the course of the day. Defendant No.6, who was proceeded against exparte on the last date, is present in person. If so advised, he may file appropriate application for getting the exparte order set aside. Defendants No.5 and 6 submits that the issue pertaining to the partition of the joint property can be decided by all the co-sharers (parties to the suit) themselves in an outside Court settlement. Learned counsel representing the plaintiffs and defendants No.1 to 4 have, however, certain reservations in this regard as according to them the suit property can only be partitioned by a Local Commissioner appointed by the Court. Anyhow, defendants No.5 and 6, if so advised, may discuss the matter with the plaintiffs and other defendants and if possible to settle the issue qua partition of the suit property by way of negotiation and inform the Court on the next date. In case their proposal is not acceptable to the plaintiffs and defendants No.1 to 4, they may also file their respective affidavits, in terms of the orders passed on 21.6.2016 so that Local Commissioner to effect the partition of the suit property amongst all co-sharers can be appointed. List on ***14th September, 2016***."

8. When the matter came to be listed on 14.9.2016 this court was informed that defendants No. 5 and 6 have not discussed the matter with the plaintiff and defendants No. 1 to 4 in terms of the order *ibid* while defendant No. 5 was granted one more opportunity as last and final in this regard, the submissions made on behalf of defendant No. 6 that he is also not averse to the appointment of local commissioner and also filing an affidavit to this effect, were taken on record. The order passed on 14.9.2016 is also reproduced here as under:

> "This Court has been informed that defendants No. 5 and 6 have not discussed the matter with the plaintiffs and defendants No.1 to 4 in terms of the order passed on the previous date. Defendant No. 5 who is present in person has sought some more time for the purpose, which though is allowed, however, as a last and final opportunity. On behalf of defendant No. 6 Mr. N.K. Thakur, learned Senior Advocate on instructions from Ms. Jamuna Kumari, Advocate submits that the said defendant is not averse to the appointment of the Local Commissioner and also for filing an affidavit to this effect. However, some more time has been sought for the purpose, which is granted. Let defendants No. 5 and 6 now to file their respective affidavits in the light of the order passed on 26.5.2016 within four weeks. List on ***25.10.2016."***

9. Now the affidavit filed by defendant N6. 6 is also on record and he has also no objection in case Mr. Naresh Sood, Senior Advocate is appointed as Local Commissioner, however, defendant No. 5 in the affidavit he filed submits that he has objection to the appointment of Mr. Naresh Sood, Senior Advocate as Local Commissioner, however without assigning any reasons therefor.

10. The position explained hereinabove make it crystal clear that plaintiff, defendants No. 1 to 4 and 6 are in favour of appointment of Mr. Naresh Sood, Senior Advocate as Local Commissioner to effect the partition of the joint property situate within the territorial jurisdiction of the State of Himachal Pradesh amongst the co-sharers. The objection to such appointment on behalf of defendant No. 5 being without any reason and justification is uncalled for. The record reveals that the conduct and approach of the said defendant had been non-cooperative throughout during the course of proceedings in the suit. He allowed himself to be proceeded against exparte during the course of proceedings in the suit. The date i.e. 26.5.2016 when the parties on both sides sought time to file their affidavits and agreeing therein for the appointment of some common person as Local Commissioner, defendant No. 5 was exparte. The exparte order was set aside vide order dated 10.8.2016 passed in OMP No. 262 of 2016 and he was permitted to join proceedings in this suit from that day onwards. Therefore, objection to the appointment of Local Commissioner he raised otherwise is also meaningless. One person cannot be allowed to hamper proceedings in the suit that too without any justifiable cause therefor. He even failed to make the other co-sharers agree for settlement of the dispute in an outside court settlement despite opportunities including last and final granted in this regard. The objection he raised as such is rejected. However, taking a lenient view this Court defers the penal action i.e. burdening him with exemplary costs at this stage.

11. In view of the above, I appoint Mr. Naresh Sood, learned Senior Advocate as Local Commissioner to effect the partition of the suit property situate in the State of Himachal Pradesh in terms of the preliminary decree passed in this suit. Mr. Sood while executing the partition shall be at liberty to seek expert assistance. The parties on both sides are directed to render all assistance to learned Local Commissioner as mutually agreed upon and undertaken by them in their respective affidavits. Liberty to defendant No. 5 also to join the proceedings before the Local Commissioner, if so advised. However, in view of the reasons hereinabove there shall be no impact of his absence during the course of partition proceedings because this Court has reasons to believe that learned Commissioner shall effect the partition of the suit property in accordance with law and in terms of the preliminary decree as well as in the better interest of all the co-sharers.

12. The tentative remuneration of learned Commissioner is fixed at Rs.2,00,000/- to be borne by the parties on both sides in equal shares. The amount in question be deposited in the Registry of this Court within four weeks. The incidental expenses, if any, incurred upon by the Commissioner shall also be borne by the parties in equal shares. The final remuneration of the Commissioner is left open to be considered and assessed after the receipt of the report.

13. Learned Commissioner shall inform the parties through learned Counsel representing them and also defendant No. 5 to remain present in person on the date, time and the venue for effecting partition which is left open to be fixed by him. Learned Commissioner to submit the report to this Court on or before *30th April, 2017*. There shall be a direction to the Registry to handover the record of the case as and when any request in this regard is made by learned Commissioner.

14. Learned Counsel representing the parties on both sides further submit that Mr. Naresh Sood, learned Senior Advocate can be appointed as Local Commissioner to effect partition of the property, A-1/12, Safdarjung Enclave, New Delhi also. Previously, it has been noticed that it was not possible to partition the suit property by metes and bounds and it is for this reason the same was ordered to be put to auction. The auction proceedings also did not mature for the reasons recorded in the order dated 2.4.2015 passed in OMP Nos. 4229 and 4319 of 2013 as neither the auction purchaser nor the parties were ready to part with 50% of the sale

consideration towards unearned increase in favour of Delhi Development Authority. Learned Counsel on both sides to ascertain there being any change in the rules and regulations if any to chalk out that the suit property situate at Delhi can now be partitioned or not. If it is possible to do so the authority of the Commissioner can be extended to partition the said property also in due course as and when the status of the rules and regulations governing lease hold property under the partition of Delhi Development Authority is placed on record.

15. The copy of this order and also that of the preliminary decree passed in this suit be supplied free of cost to learned Local Commissioner.

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

Shimla Educational Society Trust and Anr. …Petitioners.

Versus

National Council for Teachers Education & Anr. …Respondents.

CWP No. 1217 of 2016
Judgment reserved on: 25.10.2016
Date of decision: 8.11. 2016

Constitution of India, 1950- Article 226- Petitioner No. 1 is an educational trust having established a senior secondary public school and is also running B.Ed. college- it had applied to introduce diploma in elementary education- permission was rejected- writ petition was filed, in which a direction was issued – affiliation was not granted- it was contended that all the conditions were met and despite that the permission was not granted – respondents stated that the land is on private lease basis, which is in contravention of the regulation - a complaint was received against the petitioner – held, that the complaint could not have been made basis for rejecting the approval – no inquiry was conducted – copy of complaint was not supplied to the petitioners and opportunity of hearing was not given to them- other institutes were granted 6 months time to get the land transferred in their names- it was a case of hostile discrimination – even Appellate Authority had granted time of six months to get the land transferred – it was not permissible for the respondents to sit over the orders passed by the Appellate Authority- the petitioners have been compelled to approach the Court repeatedly- petition allowed- permission granted subject to transfer of the land within a period of four weeks. (Para- 17 to 25)

For the petitioners: Mr. Suneet Goel, Advocate.
For the respondents: Mr. B. Nandan Vashisth, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Petitioner No. 1 is an educational trust, having established a Senior Secondary Public School and is also running B.Ed. College in the name and style of 'Shimla College of Education'. In order to introduce new professional course i.e. Diploma in Elementary Education (hereinafter referred to as the Course in question), it applied to respondent No. 2 i.e. Northern Regional Committee, National Council for Teachers Education (for short 'NRC'), initially in December, 2008, which application was rejected by respondent No. 2 vide letter dated 15.1.2009 constraining it to again apply, however, this application also came to be rejected on 16.5.2009 solely on the ground of delay. Thereafter, petitioners, time and again, applied to the respondents for grant of permission to run the course in question, but the said requests as also the appeal

were rejected by the respondents on different counts till 13.8.2010, the details of which have been given in the writ petition.

2. Left with no option, the petitioners preferred a writ petition being CWP No. 5944 of 2010 and during the pendency of this petition, respondent No. 2 carried out the inspection of the institution and in view of this development, the writ petition was disposed of vide judgment dated 23.4.2012 with a direction to respondent No. 2 to take appropriate action in light of the inspection report as also the action taken by the management of the institution.

3. The respondents again decided against the petitioners, constraining it to file an appeal before the Appellate Authority, which was accepted and the matter was again remanded to respondent No. 2 with a direction to conduct inspection of the institute afresh. The inspection was conducted in the first week of March, 2013, upon which respondent No. 2 issued show cause notice, dated 31.5.2013, calling upon the petitioners to submit a list of its teaching faculty members for the B.Ed. course, which the petitioners were already running. Petitioners filed reply to the show cause notice, which was considered by respondent No. 2 in its meeting held on 27th and 28th June, 2016, wherein it was observed as under:-

> *"…Therefore, the NRC came to the conclusion that the institution is running the B.Ed. Course without approved faculty since the grant of recognition by the NRC, NCTE. It is a violation of the provisions of the NCTE Regulations. "*

4. On the basis of the above observation, show cause notice was issued to the petitioners and the application for grant of permission to run the course was decided to be kept in abeyance. However, in the meeting held by respondent No. 2 on 28.1.2014, it was decided to withdraw the affiliation granted to the petitioners in respect of B.Ed. course. This constrained the petitioners to file an appeal, however, no decision was taken on the appeal, the petitioners again moved this Court by filing a writ petition being CWP No. 1062 of 2014, which was disposed of vide order dated 1.5.2014 with a direction to the Appellate Authority to decide the appeal within six weeks.

5. Subsequent thereto, the appeal of the petitioners was allowed and matter was remanded to respondent No. 2 whereafter, in the 235th meeting of respondent No. 2 held on 15.04.2015 to 18.04.2015, the recognition in respect of B.Ed. course was restored. As regards granting of recognition in favour of the petitioners for running the course in question, a letter of intent dated 24.4.2015, was issued in its favour. In compliance to the said letter, the petitioners requested the H.P. Board of School Education (for short 'Board') to constitute a selection committee in accordance with the letter of intent issued by respondent No. 2 for constitution of a selection committee for the selection of faculty/staff for running the course in question.

6. The Board, in turn, directed the Principal, district Institute of Education and Training, Shamlaghat to constitute a committee for the selection of faculty members. The said selection committee held meetings on 2.5.2015 and 6.5.2015 respectively and vide letter dated 14.5.2015 granted its approval of the teaching faculty and this committee recommended the names of ten (10) fresh teachers exclusively for D.EI.Ed. programme and also included list of six (6) teachers and Principal, already working in the B.Ed. college for D.EI.Ed. programme.

7. The case of the petitioners for recognition was thereafter taken in the 238th meeting held between 20th to 31st May, 2015, however, certain objections were raised which were responded to by the petitioners vide representation dated 4.6.2015. The case of the petitioners was thereafter taken up in the meeting of respondent No. 2 held on 30.6.2015 and 1.7.2015, wherein the recognition for running the course in question was again refused and against the said decision, petitioners filed the appeal before the Appellate Authority and also approached this Court by way of CWP No. 3279 of 2015. The said writ petition was disposed of vide order dated 6.8.2015 with a direction to respondent No. 2 to examine the case of the petitioners.

8. The case of the petitioners was again considered in the 242nd meeting of respondent No. 2 held between 1st to 3rd September, 2015, wherein also recognition was not

granted to the institution for running the course in question, against which, the petitioners preferred an appeal to the Appellate Authority. The petitioners also preferred writ petition, being CWP No. 3945 of 2015, before this Court, which was disposed of vide order dated 17th September, 2015, with a direction to the Appellate Authority to decide the appeal within a period of six weeks. When the appeal was not decided, a letter was written to the Member Secretary of respondent No. 1 for listing the appeal of the petitioners, but when no action was taken, the petitioner filed CWP No. 4283 of 2015, which was disposed of vide order dated 30.11.2015, with the following directions:-

> *"Learned counsel for the parties stated at the Bar that during the pendency of the writ petition, appeal was heard, the matter has been remanded and the lis is pending before respondent No. 2. Their statement is taken on record.*
>
> *2. In the given circumstances, we deem it proper to dispose of this writ petition with a direction to respondent No. 2 to decide the matter after hearing the parties within three weeks and report compliance before the Registrar (Judicial). The writ petitioners are at liberty to seek appropriate remedy at appropriate stage."*

9. In compliance to the aforesaid orders, the case was again taken up by respondent No.2 in its 246th meeting held on 9th to 12th December, 2015 and was rejected on the basis of the earlier grounds.

10. This constrained the petitioners to again approach this Court by way of CWP No. 4755 of 2015 and vide judgment dated 22.3.2016, the decision taken by the Appellate Authority in the proceedings of the 246th meeting, in so far as it pertained to the petitioners was quashed and respondents were directed to pass orders afresh within a period of three months.

11. The respondents were further directed to take into consideration the decision made by the Member Secretary, National Council for Teachers Education on 16.11.2015 whereby he had clearly observed that the petitioners have taken steps to remove all the deficiencies and the operative part of the decision reads thus:-

> "AND WHEREAS Appeal Committee noted that the Letter of Intent under Section 8(13) was issued to institution on 24.04.2015. The appellant institution furnished to N.R.C. on 30.5.2015, a revised list of faculty approved by the duly constituted selection Committee of the Himachal Pradesh Board of School Education, Dharamshala. There is valid evidence that the appellant institution had taken steps to remove deficiency in the earlier select list. Committee also noted that the appellant institution vide its letter dated 22.06.2015 addressed to R.D., N.R.C. had furnished a further revised list of faculty approved by the Himachal Pradesh Board of School Education on 17.05.2015 in which names of faculty which were erstwhile noticed to be working as B.Ed. faculty were replaced by new faculty exclusively selected for the D.EI.Ed. course. Appeal Committee noted that the appellant institution as well as N.R.C. got entangled in leveling unnecessary allegations and counter allegation. The crux of the case is that the appellant institution was found fit for conducting D.EI.Ed. course subject to fulfillment of certain conditions and the institution has finally completed the formalities under intimation to the N.R.C. The refusal order dated 09.07.2015 is not justified and hence the matter deserved to be remanded to N.R.C. for taking note of the revised list of faculty and, if need be, after getting the overwriting (erasing) verified through the issuing authority. The NR.C. may thereafter take further action as per the Regulations."

12. In compliance to the aforesaid directions, the respondent No. 2 vide its 252nd meeting held between 19.4.2016 to 2.5.2016, again rejected the case of the petitioners and same reads thus:-

> "The Prof. Y.K. Sharma was not present at the time of this decision.

The original file of the Institution alongwith other related documents, NCTE Act, 1993, Regulations were carefully considered by NRC and following observation was made:-

- In compliance with the order of Hon'ble High Court of Himachal Pradesh at Shimla, dt. 16.3.2016 in CWP No. 4755 of 2015, the applicant institution letter dt. 02.03.2016 was considered by the Committee and NRC decided the land for the proposed programme (D.EI.Ed. course) is on private lease basis which is contravenes the provisions of 8(4)(i) of the NCTE Regulations, 2014. Hence, grant of recognition is refused.
- Further, a complaint letter by Narendra Thakur, Counsellor, Kamla Nagar, Ward No. 6, Shimla was received in this office on 12.04.2016 against the institution may forward to Secretary, H.P. Board of School Education, Dharamshala, Kangra, for necessary action.

Hence, the Committee decided that the application is rejected and recognition/permission is refused u/s 14/15(3)(b) of the NCTE Act, 1993, FDRs, if any, be returned to the institution."

13. It is this order which has been assailed by the petitioners on the ground that the same is against the principal of natural justice and in complete violation of the order dated 30.11.2015 passed by this Court in CWP No. 4283 of 2015 whereby the respondent No. 2 was specifically directed to decide the matter after hearing the parties. It is further claimed that the decision is also vitiated on the grounds that the respondents have rejected the case of the petitioners under Rule 8(4)(i) of the NCTE Regulations, 2014, whereas, petitioners have met all the objections as has been raised by the respondents from time to time.

14. Lastly, it is averred that the respondents have adopted pick and choose policy in respect of the petitioners and they have been discriminated in as much as similarly situated institutions have been granted six months time to remove the deficiencies.

15. The respondents have filed their replies, wherein apart from setting out certain allegations against the faculty appointed by the respondents, it has been pointed out that the case of the petitioners has been rejected on two counts. Firstly that the land where the institute is situated is on a private lease basis, which is in contravention of the provisions of Clause 8(4)(i) of NCTE Regulations, 2014. Secondly, a complaint had been received from one Narender Thakur against the petitioners.

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

17. At the outset, we may observe that the petitioners appear to have been dragged into unnecessary and unwarranted litigation, which could have conveniently been avoided in case the respondents would have acted fairly and impartially. We observe so because the complaint filed by Sh. Narender Thakur, Councilor could not have formed one of the basis for rejecting their case for grant of approval, more particularly, when the contents of the complaint have not even been spelt out.

18. That apart, admittedly, no inquiry was conducted on such complaint and even copy thereof was not supplied to the petitioners so as to enable them to make representation. Therefore, the action of the respondents is clearly in violation of natural justice and fair play.

19. Adverting to the other ground for rejection, which is regarding the land for the proposed programme, being on a private land and not in the name of the institute, suffice it to say that as per the recognition order placed in case of other institute, the respondent No.2 itself has granted six months time to have the land transferred as would be evident from clause 7 of the recognition order dated 2.3.2015 (Annexure P-11) wherein it is clearly provided as under:

"7. In case if the land is in the name of the Society/trust, the land is to be transferred within six months in the name of the institution, failing which action shall be initiated to withdraw the recognition. It shall be essential on the part of the institution concerned to get the needful done in this regard and intimate about the same to the respective Regional Committee alongwith the new land documents within the stipulated time."

Therefore, this is clearly a case of invidious discrimination wherein the petitioners alone have been discriminated against, whereas other similarly situated societies/trusts have been granted six months time to have the land transferred in the name of institution.

20. Not only this, we in view of the earlier order passed by the appellate authority further find the action of the respondents to be unsustainable, whereby the respondents had already granted six months time to the petitioners to establish their ownership over the property through legally permissible documents and to show their ability to transfer the land and built up area thereupon in the name of the institution, as would be evident from the order dated 13.10.2015, relevant portion whereof reads thus:

"AND WHEREAS Committee noted that application for M.Ed. course was made by Shimla Educational Society Trust on 30.12.2012 and the name of appellant college is Shimla College of Education. The land documents enclosed with the application consist of a Lease Deed. The lease is granted by Shimla Education Society in favour of the Shimla College of Education. Committee further noted the relevant contents of clause 8(4) (i) & 8 (4) (iii) of the NCTE Regulations, 2014 which lay down as under: (i) No institution shall be granted recognition under these regulations unless the institution or society sponsoring the institution is in possession of required land on the date of application. The land free from all encumbrances could be either on ownership basis or on lease from Government or Government institutions for a period of not less than thirty years. In cases where under relevant State or Union territory laws the maximum permissible lease period is less than thirty years, the State Government or Union territory administration law shall prevail and in any case no building shall be taken on lease for running any teacher training programme, (ii) The society sponsoring the institution shall be required to transfer and vest the title of the land and building in the name of the institution within a period of six months from the date of issue of formal recognition order under sub-regulation (16) of regulation 7. However, in case, the society fails to do so due to local laws or rules or bye-laws, it shall intimate in writing with documentary evidence of its inability to do so. The Regional Office shall keep this information or record and place it before the Regional Committee for its approval.

AND WHEREAS keeping in view the above provisions of NCTE Regulations, 2014, Appeal Committee is of the opinion that so long as appellant society is able to establish its ownership rights over the property through legally permissible documents and also able to transfer the land and built up area thereupon in the name of the appellant institution within 6 months after the grant of recognition, there is no objection to the appellant society's leasing out the land to the applicant college.

AND WHEREAS Appeal Committee, having considered the submissions made by appellant and the relevant clauses of the NCTE Regulations, 2014 decided to remand back the case to N.R.C. with a direction to process the application as per Regulations, 2014.

AND WHEREAS after perusal of the memorandum of appeal, affidavit, documents available on records and considering the oral arguments advanced during the hearing, the Committee concluded that the appeal deserves to be remanded to NRC with a direction to process the application as per Regulations, 2014.

NOW THEREFORE, the Council hereby remands back the case of Shimla College of Education, Sanjauli, Shimla, Himachal Pradesh to the NRC, NCTE, for necessary action as indicated above." (underlining supplied by us)

21. The respondents could not have sat over the order passed by the appellate authority and it is only when the petitioners would have shown their inability or failed to comply with the terms of the appellate authority, could they have rejected the case of the petitioners.

22. We are really at a complete loss to understand and as to how and why the respondents have once again rejected the case of the petitioners, that too, on the ground of violation of provisions of clause 8 (4) (i) of the Regulations. Undoubtedly, the respondents are vested with the authority to grant or refuse the recognition but the same has to be in accordance with law and the rejection cannot be left to the whims and caprices of the authorities (respondents), as is clearly reflected in the instant case.

23. It is unfortunate that the petitioners have repeatedly been compelled to approach this Court and within a span of five years have been constrained to file the seventh petition, earlier ones being:

1. CWP No. 5944/2010 decided on 23.4.2012
2. CWP No. 1062/2014 decided on 1.5.2014
3. CWP No. 3279/2015 decided on 6.8.2015
4. CWP No. 3945/2015 decided on 17.9.2015
5. CWP No. 4283/2015 decided on 30.11.2015
6. CWP No. 4755/2015 decided on 22.3.2016

24. That apart, the petitioners have time and again been compelled to approach the appellate authority against the action/inaction of the respondents.

25. In view of aforesaid discussion, we have no hesitation in allowing the petition and accordingly the same is allowed. The decision taken by respondent No.2 in its 252nd meeting held on 19.4.2016 to 2.5.2016 is quashed and set aside and the petitioners are permitted to start the course in question, i.e. D.El.Ed course for the session 2015-17. However, this would be subject to the petitioners transferring the land and built up area thereupon in the name of the institute within a period of four weeks.

The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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

Narain Dass Chauhan ....Petitioner
Versus
State of H.P. ....Respondent.

Cr.MP(M) No. 1244 of 2016
Decided on: 9th November, 2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Section 447, 323, 341, 504, 506 of I.P.C and Section 3(1)(g), 3(1)(r) and 3(1)(s) of the Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act, 1989- the petitioner applied for bail- held, that the offence punishable under the provisions of atrocities Act is not against an individual but against the society as a whole- particularly the weaker section of the society- however, considering the age of the petitioner, the bail application allowed subject to furnishing personal and surety of Rs.1 lacs. (Para-1 to 3)

For the petitioner Mr. Bimal Gupta, Sr. Advocate with Ms. Kusum Chaudhary, Advocate.
For the respondent Mr. Neeraj K. Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

The petitioner who has been booked by the police of Police Station, Kotkhai in a case registered under Sections 447, 323, 341, 504, 506 of the Indian Penal Code and 3(1)(g),3(1)(r)3(1)(s) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 had surrendered before this Court on 18.10.2016 and filed this application with a prayer to enlarge him on bail. Though he is in custody, however, vide order dated 18.10.2016 was ordered to be not arrested subject to the outcome of this petition. The interim order so passed came to be extended from time to time with a direction to the accused-petitioner to continue to join the interrogation.

2. The record produced by the investigating agency reveals that besides the commission of an offence under the provisions of Indian Penal Code, the accused-petitioner has committed an offence punishable under the provisions of Atrocities Act also. The offence, therefore, he committed is not only against an individual i.e. the complainant but also the society as a whole, particularly weaker section of the society. Therefore, in all fairness though the prayer he made for being admitted on bail should have been declined, however, keeping in view his advanced age i.e. 79 years and also the submissions persuasive in nature made on his behalf by Mr. Gupta, learned arguing counsel and also that there being no complaint that he was not available to the investigating agency for the purpose of interrogation as and when called upon to do so, a lenient view of the matter has been taken, of course subject to the accused-petitioner not indulging in an illegal activity of this nature in future and maintain peace and good behavior in the area. As regards the apprehension of the investigating agency is that if admitted on bail, he may again torture and try to win over or influence the complainant who lives alone in the village, though, it is not expected from the accused-petitioner to do so, however, in case any such instance is brought to the notice of this Court either by the complainant or the investigating agency, he will be dealt with sternly in accordance with law including the cancellation of the liberty of bail against any such act and behaviour on his part.

3. In view of the above, I allow this application and order to release the accused-petitioner on bail subject to his furnishing personal bond in the sum of Rs.1,00,000/- with one surety in the like amount to the satisfaction of learned Judicial Magistrate, Rohroo/Jubbal. He shall further abide by the following conditions:-

(a) make himself available for interrogation as and when called upon to do so;

(b) not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever.

(c) not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer.

(d) not leave the territory of India without the prior permission of the Court.

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

5. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone. Petition stands disposed of accordingly.

Dasti ***copy***.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Roshan Lal son of Shri Nandu and others ....Revisionists/Judgment Debtors

Versus

Nika Ram son of Budhu & others ....Non-Revisionists/Decree Holders

Civil Revision No. 9 of 2012
Order Reserved on 2nd September 2016
Date of Order 9th November 2016

Code of Civil Procedure, 1908- Order 21 Rule 32- It was pleaded that Judgment Debtor had violated the decree of the Court by alienating suit land and they be detained in civil prison – judgment debtor stated that the sale deed was legal and valid and was executed after taking legal advice – the execution petition was allowed against J.D. 1 to 3- held in revision that undertaking was given before District Judge not to alienate the suit land till partition – the Court ordered that undertaking shall form part of the order – alienation made in spite of undertaking will amount to violation of the order of the Court- judgment debtors were rightly held liable to pay the amount – revision dismissed. (Para- 13 to 18)

Cases referred:

Masjid Kacha Tank Nahan vs. Tuffail Mohammed, AIR 1991 SC 455
The Municipal Corporation Indore vs. K.N. Palsikar, AIR 1969 SC 580
P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another. AIR 1995 SC 1357
Gurdial Singh vs. Raj Kumar Anjela, AIR 2002 SC 1004

For the Revisionists: Mr. Ashwani Sharma Advocate
For Non-Revisionists Nos. 1 and 2 : Mr. Y. Paul Advocate
For Non-revisionist No.6: Ms. Komal Chaudhary, Advocate.
For other Non-revisionists: None.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 115 of the Code of Civil Procedure 1908 against order of learned Civil Judge (Senior Division) Court No.1 Sundernagar District Mandi passed in execution petition No. 8 of 1999 decided on 28.12.2011.

Brief facts of the case

2. Nika Ram Decree Holder filed execution petition No. 8 of 1999 pleaded therein that civil suit No. 1 of 1988 titled Nika Ram and others vs. Nandu was decided by learned Civil Judge on 11.2.1991 and Nandu son of Shri Chamaru was restrained from making any sale deed of suit land till partition of suit land. It is pleaded that thereafter civil appeal No. 77 of 1996 was filed by judgment debtors. It is pleaded that judgment debtor died and his LRs were impleaded in civil appeal No. 77 of 1996 which was disposed of on 1.8.1997 by learned District Judge Mandi (H.P.). Matter was compromised before learned Appellate Court inter se parties and appeal was not pressed and appeal was dismissed as withdrawn. It was ordered that statements of parties and their counsel recorded would form part of order. It is pleaded in execution petition that judgment debtors have intentionally and voluntarily violated decree of learned Trial Court by way of alienating suit land in favour of Hasan Ali on dated 20.10.1998 registered on 21.10.1998 in consideration amount of Rs.150000/- (Rupees one lac fifty thousand) before partition of suit land. It is prayed that judgment debtors be detained in civil prison and property of judgment debtors be also attached. It is further pleaded that

sale deed dated 20.10.1998 registered on 21.10.1998 executed by judgment debtors in favour of Hasan Ali be cancelled.

3. Judgment Debtors Nos. 1 to 6 filed objections in execution petition. It is pleaded that sale deed has been executed by judgment debtor in favour of Hasan Ali in accordance with law. It is pleaded that undertaking before learned District Judge Mandi H.P. was subject to decision of civil suit No. 71 of 1992 titled Khalelu and others vs. Radha and others. It is pleaded that civil suit No. 71 of 1992 was decided on 31.8.1998. It is pleaded that after decision of civil suit No. 71 of 1992 judgment debtors were legally competent to execute sale deed qua land mentioned in decree sheet. It is pleaded that judgment debtors have alienated suit land in favour of Hasan Ali after receiving legal opinion from Advocate. It is pleaded that Hasan Ali is bonafide purchaser for consideration. Prayer for dismissal of execution petition sought.

4. Per contra separate objections filed by Hasan Ali purchaser of suit land pleaded therein that he is bonafide purchaser of land mentioned in decree sheet for valuable consideration of Rs.150000/- (Rupees one lac fifty thousand). Prayer for dismissal of execution petition sought.

5. Per contra separate objections filed on behalf of Kundan Lal Patwari pleaded therein that he was not aware of judgment and decree passed by learned Trial Court. Kundan Lal further pleaded that he simply supplied the copy of record of right on demand as per H.P. Land Revenue Act 1954 while discharging his official duty. Prayer for dismissal of execution petition against Kundan Lal Patwari sought.

6. Learned Executing Court framed following issues on dated 19.6.2002:-

1. Whether Judgment Debtors Nos. 1 to 6 have disobeyed the decree of Court by making alienation in favour of Hasan Ali as alleged? ....OPP
2. Whether execution application is not maintainable? .....OPRs
3. Relief.

7. Learned Executing Court decided issue No. 1 in affirmative and decided issue No. 2 in negative. Learned Executing Court partly allowed the execution petition against Judgment Debtors Nos. 1 to 3 namely Roshan Lal, Shyam Lal, Smt. Chetri Devi and ordered that Judgment Debtors Nos. 1 to 3 would be detained in civil imprisonment for a period of one month. Learned Executing Court issued arrest warrant against Roshan Lal, Shyam Lal and Khetri Devi returnable for 19.2.2012. Learned Executing Court further held that there is nothing on record to establish that Hasan Ali has constructive notice or knowledge regarding decree of civil suit No. 1 of 1988 titled Nika Ram and others vs. Nandu. Learned Executing Court further held that Hasan Ali is bonafide purchaser of suit land and his rights stand protected under Section 41 of Transfer of Property Act 1882. Learned Executing Court further held that sale deed in favour of Hasan Ali could not be declared as null and void.

8. Feeling aggrieved against order of learned Executing Court dated 28.12.2011 revisionists namely Roshan Lal, Shyam Lal, Smt. Chetri Devi filed present revision petition under Section 115 of Code of Civil Procedure 1908.

9. Court heard learned Advocate appearing on behalf of revisionists and learned Advocate appearing on behalf of non-revisionists and Court also perused entire record carefuly.

10. Following points arise for determination in civil revision petition:-

Point No.1 Whether revision petition filed under Section 115

of Code of Civil Procedure 1908 is liable to be accepted as mentioned in memorandum of grounds of civil revision petition?

Point No.2 Relief.

11. Findings upon point No.1 with reasons

11.1 PW1 Ram Singh has stated that he filed civil suit and same was decreed and it was directed by Civil Court that judgment debtor namely Nandu son of Chamaru would not alienate the suit land till partition. PW1 has stated that thereafter appeal was filed and LRs of Nandu were impleaded after death of Nandu and thereafter appeal was dismissed as withdrawn on 1.8.1997 and judgment and decree of learned Trial Court was affirmed. PW1 has stated that he has supplied the copy of decision to Halqua Patwari. PW1 has stated that despite prohibitory decree of Civil Court suit land was alienated by Chetri Devi, Roshan Lal and Shyam Lal to Hasan Ali in the year 1998. PW1 has tendered in evidence documents Ext.PA to Ext.PF. PW1 has admitted that Hasan Ali was not party in civil suit. PW1 has denied suggestion that decision of Civil Court was not in knowledge of Hasan Ali. PW1 has denied suggestion that civil suit title Khalelu vs. Radha was decided in favour of judgment debtors and thereafter suit land was alienated.

11.2 RW1 Shyam Lal has stated that two civil suits were filed qua land in dispute and title of other suit was Khalelu and others vs. Radha and others. RW1 has stated that dispute in civil suit i.e. Khalelu and others vs. Radha and others was relating to shares of parties. RW1 has stated that compromise was executed in appeal No. 77 of 1996 that till decision of civil suit titled Khalelu and others vs. Radha Devi and others suit land mentioned in decree would not be alienated. RW1 has stated that it was also decided in civil appeal No. 77 of 1996 that in case partition takes place prior to the decision of civil suit title Khalelu and others vs. Radha and others then judgment debtors would be competent to alienate the suit land mentioned in decree sheet. RW1 has stated that after decision of civil suit titled Khalelu and others vs. Radha and others share of judgment debtors increased. RW1 has stated that after decision of civil suit title Khalelu and others vs. Radha and others judgment debtors have alienated their share to Hasan Ali vide sale deed Ext.RW1/A qua land mentioned in decree sheet. RW1 has stated that field map is Ext.RW1/B and jamabandi is Ext.RW1/C. RW1 has stated that advice of Advocate was also sought. RW1 has stated that Advocate advised judgment debtors to alienate land mentioned in decree sheet. RW1 has stated that Hasan Ali was not party in both civil suits. RW1 has stated that Halqua Patwari also told that land mentioned in decree sheet could be alienated. RW1 has admitted that it was decided in decree of civil suit No. 1 of 1988 that till partition of land mentioned in decree sheet land would not be alienated. RW1 has admitted that appeal was also filed and in appeal undertaking was given by judgment debtors that judgment debtors would not alienate the land mentioned in decree sheet till partition. Self stated that undertaking was conditional to the effect that land mentioned in decree sheet would not be alienated till decision of civil suit title Khalelu and others vs. Radha and others. RW1 has denied suggestion that judgment debtors have wilfully failed to obey decree of Civil Court.

11.3 RW2 Tara Chand Patwari has tendered only jamabandi.

11.4 RW3 Kundan Lal Patwari has stated that he was posted as Patwari w.e.f. 1994 to 1998. RW3 has stated that field map Ext.RW1/B and Ext.RW1/C have been issued by him. RW3 has stated that both documents are correct as per original record. RW3 has stated that field map was prepared as per reqeust of legal representatives of Nandu. RW3 has stated that vendee was also alongwith vendors. RW3 has stated that as of today he is patient of paralysis.

11.5 RW4 Chander Mani Patwari has stated that he remained as Patwari w.e.f. 1998 to 2001. RW4 has stated that he has recorded note Ext.PG in red ink. RW4 has stated that rapat No. 484 was recorded on dated 26.6.2000. RW4 has stated that he did not peruse old record when he issued copy of jamabandi.

11.6 RW5 Hasan Ali has stated that he has purchased the land mentioned in decree sheet from Chetri Devi, Roshan Lal and Shyam Lal vide sale deed Ext.RW1/A relating to Khasra No. 1306/1 area measuring 0-4-13 bighas. RW5 has stated that he inquired from Halqua Patwari and Halqua Patwari informed him that there was no impediment for purchase of land mentioned in decree sheet. RW5 has stated that Halqua Patwari also issued field map. RW5 has denied

suggestion that decree of Civil Court was in his knowledge. RW5 has denied suggestion that he has intentionally purchased the land mentioned in decree sheet despite knowledge of decree passed by Civil Court.

12. Following documents filed by parties. (1) Ext.A-1 is certified copy of judgment dated 11.2.1991 passed in civil suit No. 1 of 1988. (2) Ext.A2 is certified copy of decree sheet passed in civil suit No. 1 of 1988. (3) Ext.A3 is certified copy of order dated 1.8.1997 passed by learned District Judge Mandi H.P. in civil appeal No. 77 of 1996. (4) Ext.A4 is certified copy of statements of Shyam Lal judgment debtor and Mr.D.N.Pathak Advocate given in civil appeal No. 77 of 1996 dated 1.8.1997. (5) Ext.A5 is certified copy of decree sheet in appeal. (6) Ext.A-6 is certified copy of judgment dated 31.8.1998 passed in civil suit No. 71 of 1992 title Khalelu and others vs. Radha Devi & others. (7) Ext.A7 is certified copy of decree passed in civil suit No. 71 of 1992 title Khalelu and others vs. Radha Devi and others. (8) Ext.RW1/A is copy of sale deed dated 20.10.1998 registered on 21.10.1998 qua land mentioned in decree sheet dated 11.2.1991 passed in civil suit No. 1 of 1988 whereby judgment debtors namely Roshan Lal, Shyam Lal, Chetri Devi alienated land in favour of Hasan Ali in consideration amount of Rs.150000/- (Rupees one lac fifty thousand). (9) Ext.RW1/B is copy of field map. (10) Ext.RW1/C is copy of jamabandi for the year 1992-93.

13. Submission of learned Advocate appearing on behalf of revisionists that order of learned Executing Court is contrary to law and contrary to proved facts is rejected being devoid of any force for the reasons hereinafter mentioned. In present case it is proved on record that civil suit No. 1 of 1988 titled Nika Ram vs. Nandu was decided by Civil Court and prohibitory decree was passed by Civil Court against Nandu judgment debtor to the effect that judgment debtors would not sell the land mentioned in decree sheet till its partition. It is also proved on record that thereafter appeal No. 77 of 1996 was filed before learned District Judge Mandi title Roshan Lal and others vs. Nika Ram and others and civil appeal No. 77 of 1996 dismissed on 1.8.1997 by learned District Judge Mandi as withdrawn. Statement of co-appellant Shyam Lal and learned Advocate D.N.Pathak were recorded by learned District Judge Mandi on 1.8.1997 and Shri Shyam Lal and learned Advocate D.N. Pathak appeared on behalf of appellants before learned District Judge Mandi have given statement on 1.8.1997 that appellants namely Shyam Lal and others would not alienate the suit land in any manner till partition of suit land take place in accordance with law and subject to decision of suit filed by respondents which was pending before learned Civil Judge Sundernagar titled Khalelu and others vs. Radha and others. It is also proved on record that learned District Judge Mandi H.P. has specifically mentioned in order dated 1.8.1997 passed in civil appeal No. 77 of 1996 that statements of parties and their Advocates shall form part of order. It is held that undertaking given by Shyam Lal and learned Advocate D.N.Pathak on behalf of other judgment debtors is binding upon Roshan Lal, Shyam Lal and Chetri Devi. It is held that Roshan Lal, Shyam Lal and Smt. Chetri Devi cannot be allowed to flout undertaking given in civil appeal No. 77 of 1996 titled Roshan Lal and others vs. Nika Ram and others decided on 1.8.1997.

14. Submission of learned Advocate appearing on behalf of revisionists that after decision of civil suit No. 71 of 1992 decided on 31.8.1998 titled Khalelu and others vs. Radha and others judgment debtors were legally competent to alienate land mentioned in decree sheet in civil suit No. 1 of 1988 in view of statements given on dated 1.8.1997 by Shri Shyam Lal and learned Advocate D.N. Pathak in civil appeal No. 77 of 1996 is rejected being devoid of any force for the reasons hereinafter mentioned. Undertaking given by co-appellant Shri Shyam Lal and Mr.D.N. Pathak before learned District Judge Mandi on dated 1.8.1997 is quoted in toto:-

> *"I have the instructions to state that the appellants undertake not to alienate the suit land in any manner till partition of suit land in accordance with law and subject to decision of suit filed by the respondents which is pending before learned Civil Judge Sundernagar titled as Khalelu versus Radha and others. The appeal may be dismissed as withdrawn."*

Court has carefully perused the contents of undertaking cited supra. Court is of the opinion that undertaking is not alternative in nature subject to decision of civil suit No. 71 of 1992 titled Khalelu and others vs. Radha & others but undertaking is additional undertaking subject to decision of civil suit No. 71 of 1992 titled Khalelu and others vs. Radha and others. It is held that word 'And' is always used for additional purpose and not used for alternative purpose. It is held that word 'Or' is always used for alternative purpose. In the present case word 'And' has been used in the undertaking given by Shri Shyam Lal and learned Advocate D.N. Pathak in civil appeal No. 77 of 1996 decided on 1.8.1997.

15. Submission of learned Advocate appearing on behalf of revisionists that judgment debtors have alienated the suit land in favour of Hasan Ali as per advise given by learned Advocate and on this ground revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Judgment debtors did not examine learned Advocate in order to prove fact that judgment debtors were advised by learned Advocate to execute sale deed qua property mentioned in decree sheet passed in civil suit No. 1 of 1988 prior to partition. Plea of judgment debtors that they have alienated land mentioned in decree sheet as per advise of their Advocate is defeated on the concept of *ipse dixit* (An assertion made without proof).

16. Submission of learned Advocate appearing on behalf of revisionists that judgment debtors have not wilfully disobeyed the decree passed by Civil Court is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record beyond reasonable doubt that judgment debtors have failed to obey decree of civil Court having an opportunity of obeying decree by way of executing sale deed in favour of Hasan Ali on 20.10.1998 registered on 21.10.1998 in consideration amount of Rs.150000/- (Rupees one lac fifty thousand) before Sub Registrar Sundernagar Mandi (H.P.).

17. It is well settled law that High Court cannot reverse the findings of fact of learned Executing Court unless findings of facts are perverse. ***See AIR 1991 SC 455 Masjid Kacha Tank Nahan vs. Tuffail Mohammed. See AIR 1969 SC 580 The Municipal Corporation Indore vs. K.N. Palsikar. See AIR 1995 SC 1357 P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another. See AIR 2002 SC 1004 Gurdial Singh vs. Raj Kumar Anjela.*** In view of above stated facts and case law cited supra it is held that order of learned Executing Court is not perverse. Point No.1 is answered in negative.

Point No. 2 (Relief)

18. In view of findings upon point No.1 revision petition is dismissed. Order passed by learned Executing Court dated 28.12.2011 in execution petition No. 8 of 1999 is affirmed. Parties are left to bear their own costs. Record of learned Executing Court be sent back forthwith along with certified copy of order. Revision petition is disposed of. All pending miscellaneous application(s) if any also disposed of.

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

State of H.P. .....Appellant.

Versus

Khem Chand .....Respondent.

Cr. Appeal No. 561 of 2008
Decided on : 09/11/2016

Indian Penal Code, 1860- Section 279 and 337- Accused was driving the car rashly and negligently, which hit the informant causing injuries to her – accused was tried and convicted by the trial Court- an appeal was preferred, which was allowed- held in appeal that the medical evidence does not establish the prosecution version – material witness was not examined – the

Appellate Court had rightly acquitted the accused, in these circumstances appeal dismissed.(Para-9 to 12)

For the Appellant: Mr. Vivek Singh Attri, Dy. A. G.
For the Respondent: Mr. Neel Kamal Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed against the impugned judgement recorded by the learned Sessions Judge, Shimla, whereby he reversed the findings of conviction recorded upon the accused by the learned trial Court and acquitted the accused respondent herein for his allegedly committing offences punishable under Sections 279 and 337 IPC.

2. The brief facts of the case are that on 9th July, 2002 at 3.40 p.m. on duty pharmacist, DDU Hospital, Shimla, informed Police Station, Sadar, Shimla that a lady has been brought to the hospital in an injured condition. On this information H.C Lal Singh and constable Rai Singh were sent to DDU Hospital for investigation vide daily diary Ext.PW-9/A. The complainant made a statement Ext.PW-2/A that her daughter in law was admitted in Ripon Hospital, Shimla for the last 10-12 days and she came to Shimla to see her. When she wanted to cross the road near Ripon Hospital, a red coloured car came and hit her from right side. The car was being driven rashly and negligently. She has stated that she suffered injuries on the right side of the body. The number of the car was noted by her nephew Ramesh Kumar. In the meantime, a Traffic Police constable came there and stopped the car. She was taken to hospital by Ramesh Kumar and other people. Upon the aforesaid statement, formal F.I.R was registered. The Investigating Officer prepared the site plan on the spot and took into possession the offending vehicle. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279 and 337 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused whereas the learned Sessions Judge returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Sessions Judge standing not based on a proper appreciation by him of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by him of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. In sequel to the victim injured standing struck with the vehicle allegedly driven in a rash and negligent manner by the accused respondent herein, she begot injuries on her person, injuries whereof stand reflected in MLC Ext.PW-6/A. The injuries which stand pronounced therein stand testified by PW-6 to arise by user thereon of a blunt weapon. Also in Ext.PW-6/A there occurs a disclosure qua on the victim standing brought for examination before PW-6 hers divulging to the latter qua hers standing struck by a bus. The aforesaid revelation occurring in Ext.PW-6/A when holds an apparent contra-distinctivity vis.a.vis. the ascription made by her in the F.I.R qua hers begetting the injuries pronounced in Ext.PW-6/A on hers standing struck with the vehicle allegedly driven in a rash and negligent manner by the accused respondent herein does scuttle the vigour of the ascriptions made by her in the F.I.R. embodying therein qua the accused while negligently driving his vehicle, his striking her also denudes the vigour of her testimony holding therein communications in tandem therewith. Furthermore, with PW-6 in her testification proclaiming therein qua the injuries reflected in Ext.PW-6/A standing caused by user of blunt weapon also perse when holds no connectivity with the testification of the injured victim wherein she discloses qua hers standing entailed with injuries reflected in Ext.PW-6/A on hers standing struck with the car purportedly driven in a rash and negligent manner by the accused/respondent herein whereupon cumulatively hence with dichotomy also occurring intra se the testification of the victim vis.a.vis the testification of PW-6 qua the cause of injury delineated in Ext.PW-6/A, renders the genesis of the prosecution case embodied in the F.I.R. to stand not convincingly established.

10. Be that as it may, the prosecution had relied upon the testimony of PW-5 a purported eye witness to the occurrence who in his testification lends corroborative succor to the testification of the victim injured. However, his testimony wherewithin communications are held of his sighting the accused/respondent herein to strike the victim/injured at the place pronounced in site plan comprised in Ext.PW-8/A also wherewithin he pronounces qua the car driven by the accused purportedly in a rash and negligent manner arriving thereat from the lift side, does not command any probative vigour significantly when it is in rife contradiction with the relevant manifestations occurring in Ext.PW-8/A, contrarily wherein the car allegedly driven in a rash and negligent manner by the accused stands disclosed to arrive from a side other than the one divulged by PW-5 whereupon his testimony is to be concluded to stand ridden with a vice of invention besides concoction also thereupon when apparently he was not available at the site of occurrence his testification in purported corroboration to the testification of the victim injured who has deposed as PW-2, is legally unworthwhile.

11. Be that as it may, even though the sole testimony of the victim/injured was sufficient to constrain this Court to return findings of conviction upon the accused respondent nonetheless with the aforesaid reason assigned by this Court for dispelling the vigour of her testimony contrarily prods this Court to conclude qua her version loosing veracity. Also the vigour of her testimony stands denuded by the factum of hers deposing qua at the relevant time when she alighted from the bus, one Ramesh in simultaneity with her also alighting therefrom whereas with the aforesaid Ramesh standing neither cited as a prosecution witness nor obviously his statement coming to be recorded whereas his testimony constituted the best evidence to lend succor to the prosecution case. Consequently, when the adverse effect of his non examination stands construed in entwinement with the inference aforestated qua the testimony of the injured wanting in any tenacity also when is construed in coagulation with the legally frail testimony of a purported eye witness to the occurrence who deposed as PW-5 whereupon an inference qua its hence wanting in any legal vigour is erectable, constrains this Court to conclude qua the propagation made by the prosecution standing bereft of truth.

12. The learned Deputy Advocate General has contended of with PW-2 in her testification comprised in her examination in chief divulging therein qua hers while after alighting the bus hers taking to proceed to DDU hospital wherebefore she testifies qua hers looking around for ascertaining whether the vehicles from the apposite side had arrived thereat whereupon with hers despite hence adhering to the standards of due care and caution hers standing struck by the vehicle driven by the accused while its standing driven by him at a brazen pace, when has

remained unrebutted does hold visible echoings of the defence acquiescing to the inculpation of the accused respondent. However, the aforesaid submission stands negated preeminently when Ext.PW-8/A makes a disclosure of the purported incident occurring in close proximity to the road leading onwards to the DDU hospital whereat uncontrovertedly the victim/injured alighted from the bus whereon she was aboard as a passenger besides when the vehicle driven by the accused respondent stands not displayed by invincible evidence to stand driven on the inappropriate side of the road rather when it stands displayed by Ext.PW-8/A to occur at point 'E' thereof location whereof, is in close proximity to the road leading to DDU hospital, begets an inference of the victim injured abruptly arriving at the relevant site of occurrence unnoticing the car driven by the accused which came from the apposite direction wherefrom hence it is to be concluded qua her testimony qua hers adhering to the standards of due care and caution being incredible contrarily it is to be concluded of her abrupt appearance at the relevant site causing the mishap bereft of any element of penally inculpable negligence.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned Sessions Judge has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Sessions Judge does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

State of H.P. .....Appellant.
Versus
Parveen Kumar and another ....Respondents.

Cr. Appeal No. 529 of 2008.
Date of Decision: 9th November, 2016.

Indian Penal Code, 1860- Section 379 read with Section 34- **Indian Forest Act, 1927-** Section 41 and 42- A nakka was laid and a Tractor carrying 20 quintals fuel wood of different specis was recovered- no permit for transporting the same was produced – it was found on investigation that fuel wood was stolen from khasra No.326 – the accused were tried and acquitted by the Trial Court- held in appeal that PW-11 and PW-13 made contradictory statements regarding place of recovery – no disclosure statement was made prior to the discovery of the place from where the recovery was effected – the prosecution case was not proved beyond reasonable doubt and the accused were rightly acquitted by the trial Court- appeal dismissed. (Para- 9 to 11)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.
For the Respondents: Mr. N.K. Thakur, Senior Advocate with Ms. Jamna Kumari, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Chief Judicial Magistrate, Una, District Una, H.P., rendered on 31.05.2008 in Case No. 156-III-2002, whereby, he acquitted the accused/respondents herein for theirs allegedly

committing offences punishable under Section 379 of the IPC and Sections 41/42 of the Indian Forest Act.

2. The facts relevant to decide the instant case are that on 29.4.2002 C. Yash Pal No. 364 was present at village Ghaluwal whereat he received a secret information that accused Parveen and Vijay Kumar are dealing in sale of stolen timber in Punjab and that on that day also they have gone to Dulehar Brahmna forest in the tractor to fetch timber and that if a naka is laid on the border of Punjab and Himachal Pradesh they can be apprehended red handed. This information was passed on by C. Yash Pal to ASI Baldev Ram,I/C P.P. Haroli who met him at Pubowal who recorded his statement under Section 154 Cr.P.C. on the basis of which FIR No. 228/2002 under Sections 379 IPC and 41 and 42 of Indian Forest Act was registered in P.S Una. Thereafter, SI Baldev Ram laid a naka on the border of Himachal and Punjab at Brahmnawala Forest and intercepted a Sonalika Tractor Trolley which was not bearing any registration number. On checking the accused persons were found sitting in the said tractor and fuel wood weighing about 20 quintals of different species was found loaded therein. On demand by SI Baldev Ram the accused persons could not produce any permit for transporting the fuel wood loaded in the tractor. Upon this SI Baldev Ram seized the tractor alongwith the fuel wood loaded therein in the presence of Sh. Krishan Gopal, Prem and H.C Jagtar Singh. During further investigation conducted by SI Baldev Ram it was found that the accused persons had stolen the fuel wood by cutting about 40 trees of different broad leave species from land bearing Khasra No. 326 situated at Mohal Bhariyara, Mauza Dulehar, Tehsil Haroli and converted the same into fuel wood and that they were transporting the same to Punjab without possessing any valid permit. Therefore, after completion of investigation the SHO P.S Una found the accused persons guilty under Section 379 IPC and Section 41/42 of Indian Forest Act, 1927.

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

4. The accused were charged by the learned trial Court for theirs committing offences punishable under Section 379 of the IPC and under Sections 41 and 42 of the Indian Forest Act, 1927. In proof of the prosecution case, the prosecution examined 13 witnesses. On conclusion of recording of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the trial Court, in which they claimed innocence and pleaded false implication. However, they did not lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondent herein.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. Under recovery memo Ex.PW11/A fuel wood holding a weight of 20 quintals stood recovered from the relevant tractor which at the relevant time stood occupied by the accused/respondents. The accused/respondents stood detected by the Investigating Officer

concerned to not hold a valid permit under the Himachal Pradesh Forest Land Transit Rules for transporting it in the relevant vehicle also with the owner of the land wherefrom purportedly it stood stolen in his previous statement recorded before the Investigating Officer concerned making a disclosure therein qua trees standing felled from his land constrained the Investigating Officer to in his report prepared under Section 173 of the Cr.P.C., report whereof stood furnished before the learned trial Court, conclude qua offences constituted under Section 379 of the IPC and under Sections 41 and 42 of the Indian Forest Act standing committed by the accused/respondents. In sequel thereto the accused/respondents faced trial.

10. On conclusion of the trial qua the offences aforesaid, the learned Chief Judicial Magistrate on holding an incisive perusal of the evidence on record concluded qua the charge to which the accused/respondents stood subjected to not standing proven by adduction of emphatic evidence.

11. The reasoning as stands assigned by the learned trial Court for pronouncing an order of acquittal qua the accused/respondents stands founded upon the factum of with PW-11 and PW-13 contradictorily deposing qua the place whereat the relevant seizure occurred, significantly, with PW-11 deposing qua the relevant seizure occurring about 10-12 kilometers away from the territorial boundaries of the State of Punjab whereas PW-13 deposing of the relevant seizure occurring at a place wherefrom the territorial boundary of the State of Punjab stands located at a distance of ½ kilometers, it therefrom recorded a conclusion, conspicuously, when the relevant demarcation for ascertaining qua whether the naka whereat the relevant seizure occurred falling within the territorial jurisdiction of the State of Himachal Pradesh or within the territorial jurisdiction of the State of Punjab, qua hence the relevant seizure not occurring within the State of Himachal Pradesh rather it occurring within the territorial domain of the State of Punjab. However, the aforesaid reasoning as stands propounded by the learned Chief Judicial Magistrate to record an order of acquittal qua the accused/respondents herein may not hold any tenacity unless evidence stood adduced by the prosecution marking the factum of the tractor whereon fuel wood stood carried emanating from the territorial domain of the State of Himachal Pradesh. However, for the reasons ascribed hereinafter, the prosecution has miserably failed to adduce the aforesaid relevant best evidence whereupon this Court is interdicted to conclude of the tractor whereon the relevant illicit timber stood transported originating from within the territorial domain of the State of Himachal Pradesh. (a) Recovery memo Ex.PW11/A whereunder the accused/respondents recorded their statement whereby they identified the place held in the ownership of PW-9, whereat they axed trees for converting therefrom fuel wood allegedly carried in the relevant vehicle occupied at the relevant time by them not standing preceded by any disclosure statement. Consequently, with Ex.PW11/A remaining unpreceded by any disclosure statement constrains a conclusion of the recitals occurring therein standing prodded by duress besides compulsion exerted upon the accused by the Investigating Officer concerned during the period whereat he subjected them to custodial interrogation. Also it hence appears qua the Investigating Officer concerned inventing besides preceding the making of Ex.PW11/A his suo motto discovering the relevant place whereat the relevant purported fellings occurred whereafter he obviously proceeded to record an engineered recovery memo borne on Ex.PW11/A, memo whereof obviously holds no probative sinew. The effect of the aforesaid inference is hence the imperative ingredient for Ex.PW11/A to hold efficacy embodied in the factum of the relevant identified place reflected therein standing held within the exclusive knowledge of the accused/respondents remaining unsatiated. (b) PW-9 the owner of the land whereupon the relevant fellings occurred omitting to identify the accused to be the persons who had proceeded to fell trees growing upon his land. (c) The Investigating Officer concerned not placing on record the apposite scientific evidence obtained from the Forest Institute, Dehradun, comprised in a report prepared by its relevant officer in sequel to his visiting the relevant khasra number whereat the relevant felling of trees occurred, wherewithin unfoldments occur qua the fuel wood allegedly carried in the vehicle whereon the accused/respondents were aboard at the relevant time, standing felled therefrom. Omission of adduction by the prosecution of the aforesaid best evidence cannot constrain a conclusion qua the fuel wood as stood carried in the

relevant vehicle wherefrom its seizure occurred standing axed from trees growing upon khasra No.326 whereupon it is but natural to conclude of the fuel wood borne on the relevant vehicle not originating from khasra No.326 rather its occurrence thereon originating from a place other than khasra No.326. Consequently, when khasra No.326 stands concluded to be located within the territorial domain of the State of Himachal Pradesh wherefrom the relevant fellings did not occur, the imperative conclusion therefrom is of the fuel wood which stood carried in the relevant vehicle originating from outside the territorial domain of the State of Himachal Pradesh, whereupon, this Court is prodded to record a conclusion qua their being no necessity for the accused to hold the relevant permit for carrying the fuel wood in the relevant vehicle.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

13. Consequently, there is no merit in the instant appeal which is accordingly dismissed and the judgment of acquittal recorded by the learned trial Court in favour of the accused/respondents herein is affirmed and maintained. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Suman Kumari .....Petitioner

Versus

State of Himachal Pradesh & another .....Respondents

Execution Petition No. 136 of 2016
Date of Order : 09.11.2016

Code of Civil Procedure, 1908- Order 21 Rule 1- It was contended that respondents have not complied with the directions passed by the Court – a contempt petition was filed, in which time was granted to comply with the direction contained in the judgment – respondents directed to file a detailed status report indicating the compliance of direction. (Para-2 to 5)

Present: Mr. K.D. Shreedhar, Senior Advocate, with Mr. Sameer Thakur, Advocate, for the petitioner.
Mr. Anup Rattan, Mr. Romesh Verma, learned Additional Advocate Generals with Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals, for the respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

While hearing the case, Mr. K.D. Shreedhar, learned Senior Counsel caused appearance and stated that the respondents have not complied with the directions contained in the judgment passed by this Court in a batch of writ petitions, the lead case of which is CWP No. 3588 of 2012, which were supposed to be complied with within three months.

2. Further stated that the respondents have retired some of the writ petitioners and amended the rules, constraining one of the writ petitioners to file Contempt Petition No. 625 of 2015. The said contempt petition was disposed of vide judgment dated 22.09.2015, whereby four months' further time was granted to the respondents to comply with the directions contained in

the aforesaid judgment. He also stated that the Law Department has given opinion, which finds place from pages 30 to 32 of the paper book, has also been turned down.

3. Mr. J.K. Verma, learned Deputy Advocate General, was asked to seek instructions whether the respondents have complied with the directions passed in the judgment, *supra,* within the time frame. He stated that the respondents are concerned only with the petitioner in this execution petition.

4. We take suo motu cognizance and draw the proceedings against the respondents. Respondents are directed to file a detailed status report indicating therein whether the respondents have complied with the directions passed by this Court within aforesaid stipulated period, in letter and spirit.

5. List on **07.12.2016**.

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

Smt. Vijaya Devi and others ......Appellants.
Versus
Resident Engineer ......Respondent.

FAO No. 103 of 2007.
Decided on : 9th November, 2016.

Workmen Compensation Act, 1923- Section 4- Deceased was electrician and he died during the course of his duty- compensation of Rs.3,38,880/- was awarded by the commissioner with interest @ 12% per annum- held in appeal that interest is to be awarded from one month after the fatal accident- an amount of Rs.25,000/- was deposited which is not sufficient considering that ultimately an amount of Rs.3,38,880/- was awarded- therefore, employer is liable to pay the penalty on the awarded amount – the amount of Rs.40,000/- imposed as penalty. (Para-4 to 7)

For the Appellants: Mr. Ramesh Sharma, Advocate.
For the Respondent : Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal arises from the impugned order rendered by the Commissioner under Workmen's Compensation Act, HPSEB, Shimla-3, (for short the "Commissioner"), whereby compensation quantified in a sum of Rs. 3,38,880/- stood assessed qua the claimants, successors-in-interest of one Jai Singh, who uncontrovertedly during the course of his performing employment as an electrician under the respondent suffered fatal injuries.

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

3. The instant appeal stands admitted by this Court on 14.05.2007 on the hereinafter extracted substantial questions of law:

> 1. Whether provision of Section 4-A (3) (a) & (b) of the Workmen's Compensation Act is mandatory, when the due amount of compensation has not been paid within one month from the date of accident?

2. Whether the award passed by the ld. Commissioner deserved to be modified when there is no reasoning for ignoring the interest as well as penalty part to the claimants/appellants?

3. Whether the appellants are entitled to get the interest on the compensation amount as awarded by the learned Commissioner below?

Substantial questions of law Nos. 1 to 3.

4. The learned counsel appearing on either side do not contest the findings recorded by the learned Commissioner qua the predecessor-in-interest of the claimants/appellants herein suffering fatal injuries during the course of his performing employment as an electrician under his employer. However, the only address made herebefore by the counsel for the appellants for assailing the impugned order stands harboured upon the factum of it omitting to in detraction of the mandate enshrined in Section 4-1 (3) (a) of the Act, provisions whereof stand extracted hereinafter, wherewithin an obligation stands cast upon the Commissioner to on the compensation amount determined under Act, his levying interest thereon at the rate of 12% per annum, levy of interest in the aforesaid percentum on the compensation amount determined under the Act stands mandated in judicial verdicts to commence from one month elapsing since the fatal accident, whereas, in the impugned order the Commissioner omitting to levy on the compensation amount assessed qua the claimants interest thereon in the manner aforesaid, whereupon he contends qua the order impugned hereat standing modified.

5. The aforesaid submission addressed before this Court holds absolute concurrence with the relevant mandate encapsulated in the Act besides is in tandem with judicial verdicts. Consequently, it is accepted. Since apparently the impugned order has not begotten compliance therewith it stands modified to the extent that the amount of compensation assessed therein qua the apepllants/claimants shall beget interest @12% per annum from one month elapsing since the fatal accident. The provisions of Section 4A of the Act read as under:-

"**4-A. Compensation to be paid when due and penalty for default.**-

(1) Compensation under section 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

(3)Where any employer is in default in paying the compensation due under this Act within one month from the date of it fell due, the Commissioner shall-

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent. of such amount by way of penalty;"

6. Furthermore the mandate of Section 4-A (3) (b) of the Act which stands extracted hereinabove, stands espoused by the counsel for the appellant to stand infracted. Since an obligation stands cast therein upon the employer to in immediate sequel to the ill-fated occurrence make provisional payment of compensation, inconsonance wherewith the counsel for the respondent contends of with a sum of Rs.25,000/- standing deposited before the learned Commissioner hence compliance with the relevant mandate of the Act standing begotten. However, the aforesaid submission is unacceptable as a meager amount of Rs.25,000/- cannot be construed to be proportionate to the liability of the respondent herein towards compensation qua the dependents of the workman, significantly, when during the course of his performing

employment under the respondent, he suffered his end. However, since ultimately an amount of Rs.3,38,880 stands assessed as compensation qua the appellant herein, the imposition of penalty upon the respondent herein for its omitting to beget compliance with the relevant mandate of the Act in a sum equivalent to the amount of compensation assessed under the impugned award would be improper. Consequently, statutory penalty in a sum of Rs. 40,000/- (Rs. Forty thousand only) stands imposed upon the respondent herein. Accordingly, all the substantial questions of law are answered in favour of the appellants and against the respondent.

7. For the reasons recorded hereinabove, the instant appeal is allowed and the award impugned before this Court is modified to the extent that the compensation amount Rs.3,38,880/- as assessed by the learned Commission qua the appellants/claimants shall carry interest at the rate of 12% per annum from one month elapsing since the fatal accident which occurred on 6.8.2005. The respondent herein is also directed to pay statutory penalty quantified in a sum of Rs.40,000/- (Rs. Forty thousand) to the claimants/appellant herein for its omitting to comply with the mandate of Section 4-A of the Act. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Shri Chander Sen Thakur son of Shri Tikkam Ram Thakur ....Revisionist/Applicant
Versus
Shri Jiwa Nand son of late Shri Ram Chand & others ...Non-Revisionists/Non-applicants

Civil Revision No. 149 of 2014
Order Reserved on 19th October 2016
Date of Order 10th November 2016

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed pleading that the applicant had entered into an agreement to purchase the suit land and is a necessary party – the application was dismissed by the trial Court- held in revision that plaintiff had not sought any relief against the applicant – applicant has already filed a civil suit, which is pending before High Court- an agreement to sell does not create any right in the property – the order of the trial Court is not perverse and cannot be interfered in exercise of the revisional jurisdiction. (Para-13 to 18)

Cases referred:
Mohd. Farooq vs. District Judge Allahabad and others, AIR 1993 Allahabad 8
Jiwan Dass Rawal vs. Narain Dass, AIR 1981 Delhi 291
Imtiaz Ali vs. Nasim Ahmed, AIR 1987 Delhi 36
Amulya Gopal Majumdar vs. United Industrial Bank Limited, AIR 1981 Calcutta 404
Indira Fruits and General Market vs. Bijendra Kumar Gupta, AIR 1995 Allahabad 316
Masjid Kacha Tank Nahan vs. Tuffail Mohammed, AIR 1991 SC 455
Indore Municipality vs. K.N. Palsikar AIR 1969 SC 580
P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another, AIR 1995 SC 1357
Gurdial Singh vs. Raj Kumar Anjela, AIR 2002 SC 1004

For the Revisionist:	Mr. Dibender Ghosh Advocate
For Non-Revisionist No. 1:	Mr. B.S. Attri Advocate
For Non-revisionists Nos. 2 to 7:	Mr. Ashish Verma, Advocate.
For other Non-revisionists:	None.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 115 of the Code of Civil Procedure 1908 against order dated 27.8.2014 passed by learned Civil Judge (Junior Division) Manali whereby application filed under Order 1 Rule 10 CPC by revisionist was dismissed.

Brief facts of the case

2. Shri Jiwa Nand plaintiff filed civil suit old No. 183 of 2010 new No. 143 of 2013 title Jiwa Nand vs. Chande Ram and others before learned Civil Judge for declaration to the effect that plaintiff is in possession of suit land vide agreement of sale dated 7.11.2003 executed by co-defendants Nos. 1 to 8 in favour of plaintiff and co-defendant No. 9 for sale consideration of Rs. 678000/- (Rupees six lacs seventy eight thousand). Additional relief of declaration also sought to the effect that judgment and decree passed in civil suit No. 4 of 2004 by learned Civil Judge (Junior Division) Manali on 25.2.2004 is illegal, void, inoperative and same was procured by defendants Nos. 1 to 10 on false facts by way of playing fraud upon Court and plaintiff is not bound by same. Additional relief of declaration also sought to the effect that mutation No. 3303 dated 31.3.2004 is also illegal, void, inoperative. Additional relief of specific performane of contract dated 7.11.2003 in favour of plaintiff and co-defendant No. 9 also sought. Additional consequential relief of permanent prohibitory injunction also sought against defendants.

3. Per contra written statement filed on behalf of co-defendants Nos. 1 to 8 pleaded therein that suit in present form is not maintainable and plaintiff has no cause of action and locus standi to file the present suit. It is pleaded that suit of plaintiff is based upon false facts and plaintiff filed the suit just to harass co-defendants Nos. 1 to 8. It is further pleaded that present suit for declaration and specific performance of contract with consequential relief of injunction is also not legally maintainable. It is also pleaded that plaintiff is estopped from filing the present suit by his act and conduct and present suit is barred by law of limitation. It is also pleaded that suit of the plaintiff is not valued properly for the purpose of court fee and jurisdiction. Prayer for dismissal of suit sought.

4. Per contra separate written statement filed on behalf of co-defendant No. 9 Ved Ram pleaded therein that plaintiff has not come to Court with clean hands and has suppressed material facts from Court. It is pleaded that suit of plaintiff is liable to be dismissed with special costs under Section 35-A of CPC and further pleaded that plaintiff has no cause of action against defendants and plaintiff is estopped from filing present suit by his act and conduct. It is pleaded that suit is barred by law of limitation. It is pleaded that suit of plaintiff is not valued properly for the purpose of Court fee and jurisdiction.

5. Separate written statement filed on behalf of legal representatives of co-defendant No.10 namely Ram Chand pleaded therein that suit of the plaintiff is liable to the dismissed with special costs under Section 35-A of CPC and also pleaded that plaintiff has no cause of action against legal representatives of co-defendant No.10 Ram Chand and further pleaded that plaintiff did not come to Court with clean hands and plaintiff is estopped from filing the present suit by his act and conduct. It is pleaded that suit is not maintainable and also pleaded that suit is not valued properly for the purpose of Court fee and jurisdiction. It is also pleaded that suit is barred by law of limitation. It is also pleaded that suit is also bad for non-joinder of necessary parties. It is pleaded that Ram Chand vide agreement dated 20.7.2010 has sold the suit land to Chander Sen and Tikam Ram in sale consideration amount of Rs. fifty lacs. It is pleaded that Rs. eight lacs received on 20.7.2010 and later on Rs.104000/- (Rupees one lac four thousand) received. It is pleaded that remaining consideration amount was to be paid at the time of registration of sale deed before Sub Registrar. It is pleaded that Chander Sen and Tikam Ram are necessary parties. Prayer for dismissal of suit sought.

6. Plaintiff filed replication and re-asserted the allegations made in plaint.

7. Shri Chander Sen revisionist filed application under Order 1 Rule 10 CPC for impleading him as co-defendant in civil suit title Jiwa Nand vs. Chande Ram and others. It is pleaded that Chander Sen has filed civil suit title Chander Sen vs. Jiwa Nand & others before Hon'ble H.P. High Court for specific performance of contract dated 20.7.2010 with respect to suit land. It is pleaded that as per revenue record deceased Ram Chand was owner in possession of suit land and deceased Ram Chand contracted to sell the suit land to revisionist Chander Sen. It is pleaded that Chander Sen is necessary party in present suit to enable the Court to effectually and completely adjudicate upon and settle all questions involved in present suit. Prayer for acceptance of application filed under Order 1 Rule 10 CPC sought in civil suit title Jiwa Nand vs. Chande Ram & others.

8. Per contra response filed on behalf of plaintiff pleaded therein that civil suit filed by revisionist in the Hon'ble H.P. High Court on the basis of false facts. It is pleaded that deceased Ram Chand had no right title or interest in suit land. It is pleaded that agreement alleged by revisionist is also fictitious and forged. It is also pleaded that no agreement was executed by deceased Ram Chand. It is pleaded that plaintiff is dominus litis in civil suit and revisionist cannot be allowed to implead as co-party in present suit. It is pleaded that revisionist has already agitated the matter in Hon'ble High Court and it is not open for the revisionist to agitate the present matter before learned Trial Court. Prayer for dismissal of application sought.

9. Learned Trial Court dismissed the application under Order 1 Rule 10 CPC on dated 27.8.2014 filed by revisionist.

10. Feeling aggrieved against order of learned Trial Court revisionist filed present revision petition under Section 115 of Code of Civil Procedure 1908.

11. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionists and Court also perused entire record carefuly.

12. Following points arise for determination in civil revision petition:-

Point No.1 Whether revision petition filed under Section 115 of Code of Civil Procedure 1908 is liable to be accepted as mentioned in memorandum of grounds of civil revision petition?

Point No.2 Relief.

Findings upon point No.1 with reasons

13. Submission of learned Advocate appearing on behalf of revisionist that as per Order 1 Rules 3 and 5 of CPC revisionist should be impleaded as co-defendant in civil suit title Jiwa Nand vs. Chande Ram and others is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused relief clause of present civil suit title Jiwa Nand vs. Chande Ram and others. Jiwa Nand plaintiff did not seek any relief against revisionist in present civil suit. In present civil suit filed by Jiwa Nand sale agreement dated 20.7.2010 executed between revisionist and deceased Ram Chand is not under dispute. Revisionist Chander Sen has also already filed civil suit title Chander Sen vs. Jiwa Nand for specific performance of agreement dated 20.7.2010 executed between Chander Sen and deceased Ram Chand which is pending for disposal before Hon'ble H.P. High Court.

14. It is well settled law that plaintiff is dominus litis of his suit. It is well settled law that plaintiff has legal right to choose his own adversary against whom he seeks relief. It is well settled law that when there are no allegations against person who sought to be impleaded as co-party in civil suit or when there is no cause of action against the person who sought to be impleaded as co-defendant in the suit then application filed under Order 1 Rule 10 CPC should not be allowed. It is well settled law that any decree or order passed by Court did not affect any person who is not party in judicial proceedings except in cases of decree in rem. ***See AIR 1993 Allahabad 8 Mohd. Farooq vs. District Judge Allahabad and others.***

15. Submission of learned Advocate appearing on behalf of revisionist that deceased Ram Chand has executed sale of agreement dated 20.7.2010 with revisionist qua suit land and

on the basis of agreement of sale revisionist is necessary party in civil suit title Jiwa Nand vs. Chande Ram and others as per Order 1 Rule 10 (2) CPC is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that as per Section 54 of Transfer of Property Act 1882 a contract for sale of immovable land itself does not create any interest or charge upon immovable land. It is well settled law that contract for sale creates rights in personam and did not create rights in estate. ***See AIR 1981 Delhi 291 Jiwan Dass Rawal vs. Narain Dass. See AIR 1987 Delhi 36 Imtiaz Ali vs. Nasim Ahmed. See AIR 1981 Calcutta 404 Amulya Gopal Majumdar vs. United Industrial Bank Limited. See AIR 1995 Allahabad 316 Indira Fruits and General Market vs. Bijendra Kumar Gupta.***

16. Submission of learned Advocate appearing on behalf of revisionist that possession of suit property was given to revisionist by deceased Ram Chand father of Jiwa Nand plaintiff vide agreement for sale dated 20.7.2010 and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Civil suit title Chander Sen vs. Jiwa Nand and others is pending before Hon'ble High Court on the basis of agreement of sale dated 20.7.2010. In civil suit title Chander Sen vs. Jiwa Nand pending before Hon'ble H.P. High Court Shri Jiwa Nand plaintiff son of deceased Ram Chand is already impleaded as co-party. It is held that proper relief in accordance with law will be granted to revisionist Shri Chander Sen by Hon'ble H.P. High Court in civil suit title Shri Chander Sen vs. Jiwa Nand and others.

17. It is well settled law that while exercising revisional powers under Section 115 of Code of Civil Procedure 1908 High Court can interfere only when order of learned Trial Court is perverse. ***See AIR 1991 SC 455 Masjid Kacha Tank Nahan vs. Tuffail Mohammed. See AIR 1969 SC 580 Indore Municipality vs. K.N. Palsikar. See AIR 1995 SC 1357 P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another. See AIR 2002 SC 1004 Gurdial Singh vs. Raj Kumar Anjela.*** In view of above stated facts and case law cited supra it is held that order of learned Trial Court is not perverse and it is also held that order of learned Trial Court is also not illegal. Point No.1 is answered in negative.

Point No. 2 (Relief)

18. In view of findings upon point No.1 revision petition is dismissed. Order passed by learned Trial Court dated 27.8.2014 passed upon application filed under Order 1 Rule 10 CPC is affirmed. Observations will not effect merits of case in any manner. Parties are directed to appear before learned Trial Court On ***30.11.2016.*** Parties are left to bear their own costs. Record of learned Trial Court be sent back forthwith along with certified copy of order. Revision petition is disposed of. All pending miscellaneous application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Shri Chander Sen Thakur son of Shri Tikkam Ram Thakur ……….Revisionist/Applicant
Versus
Jiwa Nand son of late Shri Ram Chand & others ….Non-Revisionists/Non-applicants

Civil Revision No. 150 of 2014
Order Reserved on 19th October 2016
Date of Order 10th November 2016

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed pleading that the applicant had entered into an agreement to purchase the suit land and is a necessary party – the application was dismissed by the trial Court- held in revision that plaintiff had not sought any relief against the applicant – applicant has already filed a civil suit, which is pending before High Court- an agreement to sell does not create any right in the property – the

order of the trial Court is not perverse and cannot be interfered in exercise of the revisional jurisdiction. (Para-13 to 18)

Cases referred:
Mohd. Farooq vs. District Judge Allahabad and others, AIR 1993 Allahabad 8
Jiwan Dass Rawal vs. Narain Dass, AIR 1981 Delhi 291
Imtiaz Ali vs. Nasim Ahmed, AIR 1987 Delhi 36
Amulya Gopal Majumdar vs. United Industrial Bank Limited, AIR 1981 Calcutta 404
Indira Fruits and General Market vs. Bijendra Kumar Gupta, AIR 1995 Allahabad 316
Masjid Kacha Tank Nahan vs. Tuffail Mohammed, AIR 1991 SC 455
Indore Municipality vs. K.N. Palsikar AIR 1969 SC 580
P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another, AIR 1995 SC 1357
Gurdial Singh vs. Raj Kumar Anjela, AIR 2002 SC 1004

For the Revisionist: Mr. Dibender Ghosh Advocate
For Non-Revisionist No. 1: Mr. B.S. Attri Advocate
For Non-revisionists Nos. 2 to 7: Mr. Ashish Verma, Advocate.
For other Non-revisionists: None.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 115 of the Code of Civil Procedure 1908 against order dated 27.8.2014 passed by learned Civil Judge (Junior Division) Manali whereby application filed under Order 1 Rule 10 CPC by revisionist is dismissed.

Brief facts of the case

2. Shri Jiwa Nand plaintiff filed civil suit title Jiwa Nand vs. Dile Ram and others before learned Civil Judge for declaration to the effect that plaintiff is in possession of suit land under agreement of sale dated 7.11.2003 executed by defendant No. 1 in favour of plaintiff and defendant No. 2 for sale consideration amount of Rs. 471200/- (Rupees four lacs seventy one thousand two hundred). Additional relief of declaration also sought to the effect that judgment and decree passed in civil suit No. 3 of 2004 by learned Civil Judge Manali dated 25.2.2004 is illegal, void, inoperative and same was procured by defendants Nos. 1 to 3 on false facts by way of playing fraud upon Court and plaintiff is not bound by same. Additional declaration also sought to the effect that mutation No. 3304 dated 31.3.2004 is also illegal, void, inoperative. Additional relief of specific performane of contract dated 7.11.2003 in favour of plaintiff and co-defendant No. 9 also sought. Additional consequential relief of permanent prohibitory injunction also sought. Alternative relief of recovery of Rs.503504/- (Rupees five lac thirty thousand five hundred four) also sought against co-defendants Nos. 1 to 3. Prayer for decree of suit sought.

3. Per contra written statement filed on behalf of defendant No. 1 pleaded therein that suit in present form is not maintainable and plaintiff has no cause of action to file the present suit. It is pleaded that suit of plaintiff is based upon false facts and plaintiff filed the suit just to harass co-defendant No.1. It is also pleaded that plaintiff is estopped from filing the present suit by his act and conduct and present suit is barred by law of limitation. It is also pleaded that suit of the plaintiff is not properly valued for the purpose of court fee and jurisdiction. Prayer for dismissal of suit sought.

4. Per contra separate written statement filed on behalf of co-defendant No. 2 Ved Ram pleaded therein that plaintiff has not come to Court with clean hands and has suppressed material facts from Court. It is pleaded that suit of plaintiff is liable to be dismissed with special costs under Section 35-A of CPC and further pleaded that plaintiff has no cause of action against

co-defendant No.2 and plaintiff is estopped from filing present suit by his act and conduct. It is pleaded that suit is barred by law of limitation. It is pleaded that suit of plaintiff is not properly valued for the purpose of Court fee and jurisdiction. Prayer for dismissal of suit sought.

5. Separate written statement filed on behalf of legal representatives of co-defendant No.3 namely deceased Ram Chand pleaded therein that suit of the plaintiff is liable to the dismissed with special costs under Section 35-A of CPC and also pleaded that plaintiff has no cause of action against legal representatives of co-defendant No.3 deceased Ram Chand and further pleaded that plaintiff did not come to Court with clean hands and plaintiff is estopped from filing the present suit by his act and conduct. It is pleaded that suit is not maintainable and also pleaded that suit is not properly valued for the purpose of Court fee and jurisdiction. It is also pleaded that suit is barred by law of limitation. It is also pleaded that suit is also bad for non-joinder of necessary parties. It is pleaded that deceased Ram Chand vide agreement dated 20.7.2010 has sold the suit land to Chander Sen and Tikam Ram in consideration amount of Rs.fifty lacs. It is pleaded that Chander Sen son of Tikam Ram is necessary party. Prayer for dismissal of suit sought.

6. Plaintiff filed replication and re-asserted the allegations made in plaint.

7. Shri Chander Sen revisionist filed application under Order 1 Rule 10 CPC for impleading him as co-defendant in civil suit title Jiwa Nand vs. Dile Ram and others. It is pleaded that Chander Sen revisionist has filed civil suit title Chander Sen vs. Jiwa Nand & others for specific performance of contract dated 20.7.2012 in consideration amount of Rs. fifty lacs by deceased Ram Chand executed with respect to suit land before Hon'ble H.P.High Court. It is pleaded that as per revenue record deceased Ram Chand was owner in possession of suit land and he contracted to sell the suit land with Chander Sen revisionist. It is pleaded that Chander Sen is necessary party in present suit to enable the Court to effectually and completely adjudicate upon and settle all questions involved in present suit. Prayer for acceptance of application filed under Order 1 Rule 10 CPC sought in civil suit title Jiwa Nand vs. Dile Ram.

8. Per contra response filed on behalf of plaintiff Jiwa Nand pleaded therein that civil suit before Hon'ble H.P.High Court has been filed by revisionist on the basis of false facts. It is pleaded that deceased Ram Chand had no legal right title or interest in suit land. It is pleaded that agreement alleged by revisionist is also fictitious and forged. It is also pleaded that no agreement was executed by deceased Ram Chand in consideration amount of Rs. fifty lacs qua suit property. It is pleaded that plaintiff is dominus litis and revisionist cannot be allowed to implead as co-party in present suit. It is pleaded that revisionist has already agitated the matter in Hon'ble High Court and it is not open for the revisionist to agitate before learned Trial Court. Prayer for dismissal of application sought.

9. Learned Trial Court dismissed the application filed under Order 1 Rule 10 CPC on dated 27.8.2014.

10. Feeling aggrieved against order of learned Trial Court revisionist filed present revision petition under Section 115 of Code of Civil Procedure 1908.

11. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionists and Court also perused entire record carefuly.

12. Following points arise for determination in civil revision petition:-

Point No.1 Whether revision petition filed under Section 115 of Code of Civil Procedure 1908 is liable to be accepted as mentioned in memorandum of grounds of civil revision petition?

Point No.2 Relief.

Findings upon point No.1 with reasons

13. Submission of learned Advocate appearing on behalf of revisionist that as per Order 1 Rules 3 and 5 of CPC revisionist should be impleaded as co-defendant in present civil suit title Jiwa Nand vs. Dile Ram and others is rejected being devoid of any force for the reasons

hereinafter mentioned. Court has carefully perused relief clause of present civil suit title Jiwa Nand vs. Dile Ram and others. Jiwa Nand plaintiff did not seek any relief against revisionist in present civil suit. Sale agreement dated 20.7.2010 is not disputed in present civil suit. Revisionist has also already filed civil suit title Chander Sen vs. Jiwa Nand which is pending in Hon'ble High Court of H.P. for specific performance of contract dated 20.7.2010 executed by deceased Ram Chand in favour of Chander Sen.

14. It is well settled law that plaintiff is dominus litis of his suit. It is well settled law that plaintiff has legal right to choose his own adversary against whom he seeks relief. It is well settled law that when there are no allegations against person who sought to be impleaded as co-party in civil suit then application filed under Order 1 Rule 10 CPC should not be allowed. It is also well settled law that when there is no cause of action against person who sought to be impleaded as co-party in civil suit then application filed under Order 1 Rule 10 CPC should not be allowed. It is well settled law that any decree or order passed by Court did not affect person who is not a party in suit or civil proceedingts except in cases of decree in rem. ***See AIR 1993 Allahabad 8 title Mohd. Farooq v. Disrict Judge Allahabad and others.***

15. Submission of learned Advocate appearing on behalf of revisionist that deceased Ram Chand has executed sale of agreement dated 20.7.2010 with revisionist qua suit land and on the basis of agreement of sale revisionist is necessary party in civil suit title Jiwa Nand vs. Dile Ram and others under Order 1 Rule 10 CPC is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that as per Section 54 of Transfer of Property Act 1882 a contract for sale of immovable land does not create any interest or charge upon immovable property. It is well settled law that contract for sale creates rights in personam and did not create rights in estate. ***See AIR 1981 Delhi 291 Jiwan Dass Rawal vs. Narain Dass. See AIR 1987 Delhi 36 Imtiaz Ali vs. Nasim Ahmed. See AIR 1981 Calcutta 404 Amulya Gopal Majumdar vs. United Industrial Bank Limited. See AIR 1995 Allahabad 316 Indira Fruits and General Market vs. Bijendra Kumar Gupta.***

16. Submission of learned Advocate appearing on behalf of revisionist that possession of suit property was given to revisionist by deceased Ram Chand father of Jiwa Nand plaintiff vide agreement of sale dated 20.7.2010 and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Civil suit title Chander Sen vs. Jiwa Nand and others is pending before Hon'ble High Court on the basis of agreement of sale dated 20.7.2010. In civil suit title Chander Sen vs. Jiwa Nand pending before Hon'ble H.P. High Court Shri Jiwa Nand plaintiff son of deceased Ram Chand is also impleaded as co-party. It is held that proper relief in accordance with law will be granted to revisionist Shri Chander Sen by Hon'ble H.P. High Court in civil suit title Shri Chander Sen vs. Jiwa Nand and others.

17. It is well settled law that while exercising revisional powers under Section 115 of Code of Civil Procedure 1908 High Court can interfere only when order of learned Trial Court is perverse. ***See AIR 1991 SC 455 Masjid Kacha Tank Nahan vs. Tuffail Mohammed. See AIR 1969 SC 580 Indore Municipality vs. K.N. Palsikar. See AIR 1995 SC 1357 P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another. See AIR 2002 SC 1004 Gurdial Singh vs. Raj Kumar Anjela.*** In view of above stated facts and case law cited supra it is held that order of learned Trial Court is not perverse and it is also held that order of learned Trial Court is also not illegal. Point No.1 is answered in negative.

<u>Point No. 2 (Relief)</u>

18. In view of findings upon point No.1 revision petition is dismissed. Order passed by learned Trial Court dated 27.8.2014 passed upon application filed under Order 1 Rule 10 CPC is affirmed. Observations will not effect merits of case in any manner. Parties are directed to appear before learned Trial Court On ***30.11.2016.*** Parties are left to bear their own costs. Record of learned Trial Court be sent back forthwith along with certified copy of order. Revision petition is disposed of. All pending miscellaneous application(s) if any also disposed of.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Court on its own motion ……….Petitioner.

Versus

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

CWPIL No.13 of 2015
Date of order:10.11.2016.

Constitution of India, 1950- Article 226- DGP was directed to be present in the Court but he did not appear and instead sent ADGP- directions issued to Chief Secretary to ensure that Officers who are required to be present before the Court in terms of the Court's order should remain present. (Para-5 to 7)

For the Petitioner:	Mr.C.N. Singh, Advocate, as Amicus Curiae.
For the Respondents:	Mr.Romesh Verma & Anup Rattan, Addl.A.Gs. and J.K. Verma, Dy.A.G., for respondents No.1 to 13. Mr.Tara Singh Chauhan, Advocate, for respondent No.14. Superintending Engineer, Pollution Control Board, present in person. Mr.Atul, ADGP, HP, present in person.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

CMP No.9088 of 2016

By the medium of this application, applicant/respondent No.14 has sought exemption from appearing personally before this Court, as directed vide order dated 19th October, 2016. However, the Superintending Engineer, Pollution Control, Board is present in person.

2. For the reasons mentioned in the application, the same is allowed, as prayed for.

CWPIL No.13 of 2015

3. It is stated that some of the respondents have filed the status reports and some are yet to file. The respondents who have not filed the status reports are directed to file the same within two weeks, with advance copy to the learned Amicus Curiae, enabling him to respond to all the status reports within two weeks thereafter

4. Response to the affidavit of the Drug Controller, Himachal Pradesh has been filed by the Amicus Curiae.

5. On the last date of hearing, we had directed the Director General of Police, Himachal Pradesh to remain present in person before this Court. Today, instead of remaining present in person, the Director General of Police had sent Additional Director General of Police Mr.Atul, who has stated that the Director General of Police has gone to Delhi in connection with some personal work.

6. We may remind that vide order dated 4th October, 2016, passed in COPC No.188 of 2016, titled Smt. Pratibha Kaushik vs. Shri R.D. Dhiman and another, this Court has directed the Chief Secretary to the Government of Himachal Pradesh to ensure that the officers, who are required to remain present before the Court in terms of the Court orders, seek exemption/permission from the Court before leaving the State. It is apt to reproduce paragraph 3 of the said order hereunder:

> "3. The Chief Secretary to the Government of Himachal Pradesh is directed to ensure that all those officers, who have been arrayed as party-respondents in the

contempt petitions or who have to remain present before the Court in the case(s) on the date(s) fixed, have to seek exemption/ permission from the Court before leaving for Delhi or outside the State. Any deviation shall be seriously viewed."

7. The said directions passed in COPC No.188 of 2016 are restated. Mr.Anup Rattan, learned Additional Advocate General, to convey this order to the Chief Secretary, to the Government of Himachal Pradesh, for strict compliance, otherwise this Court would be constrained to initiate contempt proceedings against the erring officers/officials.

8. List on 22nd December, 2016. The Director General of Police, H.P. to remain present in person before this Court on the next date of hearing.

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

State of H.P. .....Appellant.
Versus
Ashwani Kumar ....Respondent.

Cr. Appeal No. 685 of 2008.
Date of Decision: 10th November, 2016.

Indian Penal Code, 1860- Section 279 and 506 – **Motor Vehicles Act, 1988-** Section 181, 184 and 196- Accused was driving a scooter in a rash and negligent manner- he drove the scooter upon the informant and from the wrong side - when the accused was called to stop the scooter, he abused the informant and B, and intervenor- the accused was tried and acquitted by the trial Court- held, that PW-1 and PW-4 had feigned ignorance regarding the identity of the accused and the registration number plate – police station was at a distance of 15 meters from the place of incident- however, investigating officer visited the site of the occurrence after one day - the site plan prepared by him cannot be relied upon - the Trial Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 11)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.
For the Respondents: Mr. Dhananjay Sharma, Advocate vice to Mr. Naveen Pathania, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Judicial Magistrate 1st Class, Court No.3, Hamirpur, District Hamirpur, H.P. rendered on 21.07.2008 in Police Challan No. 72-II-04, RBT No.437-II-4, whereby, he acquitted the accused/respondent herein for his allegedly committing offences punishable under Sections 279 and 506 of the IPC read with Sections 181, 184 and 196 of the Motor Vehicles Act.

2. The facts relevant to decide the instant case are that complainant Ram Narain, Sub Inspector, Enforcement, South Zone, Shimla, made a report at Police Station, Hamirpur, that he had accompanied Dy. S.P. Satish Kumar to Hamirpur. On 20.03.2004, at about 9.15 p.m., he alongwith Rafiq Mohammad and Harnam Singh were going towards rest house through the road that is lying in front of the rest house. A well built person came driving scoooter No. HP-22-2952 in a rash and negligent manner and drove it upon him from the wrong side. He at once took a jump and saved himself. When scooter driver was called to stop, he started abusing them and threatened them to his high contacts. One Banarsi Dass Malhotra, who tried to intervene, was also abused. He was threatened by the scooter driver. On the basis of the aforesaid facts, an FIR was registered in the police station concerned. The police started the investigations in the case and completed all the codel formalities.

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

4. The accused was charged by the learned trial Court for his committing offences punishable under Sections 279 and 506 of the IPC read with Sections 181, 184 and 196 of the Motor Vehicles Act. In proof of the prosecution case, the prosecution examined 8 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 trial Court, in which he claimed innocence and pleaded false implication. However, he did not lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondent herein.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The victim/complainant is alleged to be struck by a scooter bearing No. HP-22-2952 on account of it at the relevant time standing driven in a rash and negligent manner by the accused herein. The prosecution would succeed in establishing the charge to which the accused/respondent herein stood subjected to trial only when the prosecution witnesses consistently depose qua the material factum of the accused/respondent herein at the relevant time negligently driving it also the prosecution by cogent evidence forthrightly unveiling the identity of the accused. The complainant in his testimony has communicated therein qua the scooter at the relevant time being driven on the inappropriate side of the road whereupon it almost struck him, whereas, his by jumping aside overting its striking him, whereas, PW-1, an independent witness to the occurrence has contradictorily deposed of the scooter at the relevant time occupying the appropriate side of the road. Be that as it may, even though occurrence of the aforesaid minimal contradiction intra se the testimony of the victim vis-a-vis the testimony of an independent witness to the occurrence, who testified as PW-1 would obviously not per se render rudderless the propagation of the prosecution. However, the crucial factum of PW-1 and PW-4 conjointly feigning ignorance qua the identity of the accused besides qua the apposite number borne on the number plate of the scooter whereas evidently with both at the relevant time walking along with the complainant hence held the capacity to disclose in their respective testifications the apposite number borne on the number plate of the scooter also to unanimously depose qua the identity of the accused, whereas, theirs omitting to do so cannot with aplomb lend any impetus to any formidable conclusion of the scooter bearing No. HP-22-2952 at the relevant time standing driven by the accused at the relevant site of occurrence nor it can be convincingly concluded qua the accused at the relevant time driving it wherefrom it is inapt to conclude qua the charge for which the accused/respondent stood tried warranting any inference qua it standing cogently proven.

10. Be that as it may, despite the occurrence taking place at a distance of 15 meters from the police station concerned, whereas, the Investigating Officer visiting the relevant site of occurrence a day subsequent to its taking place, in sequel, the omission of the Investigating

Officer to in prompt sequel to the occurrence visit the relevant spot constrains an inference of the spot map prepared by him being a sequel to a machination of engineering and invention deployed by the Investigating Officer whereupon no reliance is imputable.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

12. Consequently, there is no merit in the instant appeal which is accordingly dismissed and the judgment of acquittal recorded by the learned trial Court in favour of the accused/respondent herein is affirmed and maintained. Records be sent back forthwith.

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

State of H.P. .....Appellant.

Versus

Kheera Mani ....Respondent.

Cr. Appeal No. 678 of 2008.

Date of Decision: 10th November, 2016.

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving Swaraj Majda – he hit his vehicle against the bus due to which occupants of the bus sustained injuries- accused was tried and acquitted by the trial court- held in appeal that the prosecution witnesses deposed that the Swaraj Majda was heavily loaded and was being driven at a slow speed- it was moving upward- the Bus on the other hand was being driven with the high speed and on the inappropriate side of the road- the prosecution version was not proved, in these circumstances – appeal dismissed. (Para-9 to 11)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.

For the Respondents: Mr. R.L. Chaudhary, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Judicial Magistrate, Court No.4, Mandi, District Mandi, H.P. rendered on 18.06.2008 in Police Challan No. 263/1/04/03 or 263/II/04/03, whereby, he acquitted the accused/respondent herein for his allegedly committing offences punishable under Sections 279, 337 and 338 of the IPC.

2. The facts relevant to decide the instant case are that on 13.02.2003 at about 11.45 a.m., at place Hanogi Bridge, accused was driving Swaraj Mazda bearing registration No. HP-33A-535 and was coming from the side of Pandoh and a bus bearing registration HP-37-2559 was going towards Kullu and since the accused was driving the Swaraz Mazda in a rash and negligent manner, so he dashed the vehicle against the bus due to which the occupants of the bus sustained injuries. On the aforesaid facts, FIR was registered in the police station concerned. The police started the investigations in the case and completed all the codel formalities.

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

4. The accused was charged by the learned trial Court for his committing offences punishable under Sections 279, 337 and 338 of the IPC. In proof of the prosecution case, the prosecution examined 19 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 trial Court, in which he claimed innocence and pleaded false implication. However, he did not lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondent herein.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. A collision occurred inter se a swaraz mazda driven at the relevant time by the accused/respondent and a bus driven at the relevant time by PW-10. In sequel, to the collision which occurred inter se a swaraz mazda and a bus , the driver of the bus begot on his person injuries reflected in Ex.PW9/A whereas other occupants of the bus also sustained injuries on their respective persons. The prosecution version stood consistently testified by the prosecution witnesses. Unfoldments occur in the deposition of PW-13 qua at the relevant time a fully loaded swaraz mazda occupying the correct side of the road. Both PW-2 and PW-3 consistently depose qua at the relevant time the relevant vehicle driven by the accused moving upwards. Also they in their respective testifications make articulations therein qua its being heavily loaded besides it standing driven at a slow speed. Contrarily, they depose qua the bus driven at the relevant time by PW-10 whereon they were occupants standing driven at a high speed. The depositions of the aforesaid prosecution witnesses make vivid unfoldments qua (a) the swaraz mazda truck driven at the relevant time by the accused/respondent moving upward; (b) it being heavily loaded; (c) it standing driven at a slow speed and (d) its occupying the correct side of the road. Moreover, the depositions of the aforesaid witnesses underscore the factum of obviously the vehicle driven at the relevant time by PW-10 occupying the inappropriate side of the road also its at the relevant time standing driven at a brazen pace by PW-10. The effect of the aforesaid testifications of the prosecution witnesses qua the relevant bus driven at the relevant time by PW-10 occupying the inappropriate side of the road and its being driven at a brazen pace when read in coagulation with the evident testified fact qua the relevant vehicle driven by the accused occupying the correct side of the road also with its at the relevant time standing driven by the accused at a slow speed imperatively warrants an inference of PW-10 being negligent in driving his bus. Consequently, any imputation of penal negligence to the accused/respondent herein is unwarranted.

10. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

11. Consequently, there is no merit in the instant appeal which is accordingly dismissed and the judgment of acquittal recorded by the learned trial Court in favour of the accused/respondent herein is affirmed and maintained. Records be sent back forthwith.

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

State of H.P. .....Appellant.

Versus

Ravinder Kumar ....Respondent.

Cr. Appeal No. 647 of 2008.
Date of Decision: 10th November, 2016.

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a Trolla, which crushed the right foot of the informant – the accident had taken place due to the negligence of the accused- the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed – held, that as per the prosecution case the informant was hit from the rear – she should have sustained injuries on the back but no injury was found on her back – the defence version that the informant was in the process of alighting from the stair case is made probable by the testimony of PW-1 – the prosecution version was not proved, in these circumstances and Sessions Judge had rightly acquitted the accused- appeal dismissed. (Para- 9 to 12)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.
For the Respondent: Mr. Sheetal Vayas, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The accused/respondent herein stood convicted by the learned trial for his committing offences punishable under Section 279, 337 and 338 of the IPC. On his standing aggrieved by the verdict by the learned trial Court, he carried an appeal therefrom before the learned Sessions Judge, Hamirpur, H.P. whereby the latter reversed the findings of conviction recorded upon the accused/respondent by the learned trial Court. The State of H.P. stands aggrieved by the verdict of the learned Sessions Judge, Hamirpur whereupon it by preferring an appeal herebefore concerts to beget its reversal.

2. The facts relevant to decide the instant case are that on 9.9.2004, the complainant had gone to Mehre Bazar. After purchasing some articles, she was proceeding towards the bus-stand at Mehre on her own side at about 4.40 p.m., and while, she was in front of Punam General Store, a jeep trolla came from behind in a rash and negligent manner and crushed her right foot. She made a cry and the trolla was stopped by the driver. Its number was HP-21-0545. The trolla driver disclosed his name as Ravinder Kumar. It is stated that the accident took place due to rash and negligent driving of Ravinder Kumar. On the aforesaid facts, FIR was registered in the police station concerned and thereafter the police completed all the formalities relating to the investigations.

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

4. The accused was charged by the learned trial Court for his committing offences punishable under Sections 279, 337 and 338 of the IPC. In proof of the prosecution case, the prosecution examined 12 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 trial Court, in which he claimed innocence and pleaded false implication. However, the accused examined two witnesses in his defence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/respondent herein. In an appeal preferred by the accused/respondent before the learned Sessions Judge, Hamirpur, the latter set aside the conviction and consequent sentences recorded by the learned trial Court against the accused/convict for his committing the offences punishable under Sections 279, 337 and 338 of the IPC.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned Sessions Judge, Hampur, H.P.. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Appellate Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Sessions Judge, Hamirpur, H.P., standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The victim/injured PW-7 sustained injuries as pronounced in Ex.PW10/A. The injuries borne thereon make a vivid portrayal qua hers suffering injuries on the right toe of her foot. However, the version propagated by the prosecution in the relevant FIR comprised in Ex.PW9/A is qua the accused/respondent while rashly and negligently driving his vehicle his striking the complainant from the rear. Though, the victim/injured has deposed in tandem with her previous statement comprised in Ex.PW7/A also though the site plan purveys succor to her testification, however, the factum of hers suffering an injury on the right toe of her foot on hers standing struck from the rear by the relevant vehicle allegedly rashly and negligently driven by the accused is per se, a sheered blatant concoction arising from the factum of thereupon the victim/injured would not stand entailed with injuries on the right toe of her foot, it facing a direction opposite to the one whereat she stood struck. Contrarily, she standing struck from the rear warranted infliction of injuries on her back besides in sequel thereto she imperatively was to suffer a fall with her face falling on the road, whereon also injuries were enjoined to occur. However, reflections occurring in the apposite MLC comprised in Ex.PW10/A do not bear out the propagation of the prosecution qua hers standing struck from the rear, conspicuously, when thereupon as aforestated she was to suffer injuries on her back besides on her face, whereas, with Ex.PW10/A omitting to pronounce the aforesaid factum, in sequel, the vigour of the prosecution case loses its creditworthiness besides its tenacity.

10. Be that as it may, one of the prosecution witnesses, namely, PW-1 Meenakashi Devi has conceded to the suggestion put to her by the learned defence counsel while holding her for cross-examination qua one foot of the victim occupying the road whereas the other foot occupying the stair case of a shoe shop whereupon credence is acquired by the espousal of the defence of the victim being in the process of alighting from the stair case of a shoe shop, whereas, hers omitting to take due care and caution qua arrival thereat of the relevant vehicle, she yet alighting from the stair case of a shoe shop whereupon her foot stood crushed under the tyres of the vehicle driven by the accused/respondent, also the efficacy of the aforesaid inference gets enhanced significantly when the aforesaid revelations stand unborne in the relevant testifications of the prosecution witnesses whereupon a sequel is derivable qua their testimonies not

warranting imputation of credence thereto also therefrom it is to be concluded qua the factum/injured abruptly arriving at the relevant site, whereupon, the accused/respondent hence stood precluded to sight her whereupon hence any purported negligence imputed to him cannot hold any element of penal inculpability.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned Sessions Judge has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Sessions Judge does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

12. Consequently, there is no merit in the instant appeal which is accordingly dismissed and the judgment of acquittal recorded by the learned Sessions Judge, Hamirpur in favour of the accused/respondent herein is affirmed and maintained. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh ....Appellant
Versus
Vijay Kumar ...Respondent

Cr. Appeal No. 538 of 2012
Decided on: 10th November, 2016

Indian Penal Code, 1860- Section 363, 376, 342 and 506- Accused kidnapped the minor prosecutrix from the lawful guardianship of her parents and she was taken to a hotel, where she was subjected to sexual intercourse- she was threatened by the accused- the accused was tried and acquitted by the trial Court- held in appeal that the prosecutrix was 18 years and 8 months old at the time of making the application – the school certificate is not admissible because no evidence was led to prove the source on the basis of which the date of the birth of the prosecutrix was recorded – the entries in the parivar register are not primary evidence regarding the birth of the person- it was admitted that there were over writing and cutting in the birth register, which makes it difficult to rely upon the entries in the same – the person at whose instance the entries were recorded was not produced in evidence – the radiological age of the prosecutrix was 15½ to 17 years which could be 3-4 years more or less on either side – the prosecutrix admitted that she used to talk with the accused for 15 minutes to 1 hour, this shows that prosecutrix and accused were acquainted with the each other – she was taken from Solan to Deonghat in a broad day light – she had not raised any hue and cry, which shows that she was a consenting party – on other occasion also she had not raised hue and cry, although the incident had taken place in thickly populated area- prosecution case was not proved beyond reasonable doubt and the accused was rightly acquitted- appeal dismissed. (Para-6 to 23)

Cases referred:
State of Punjab Vs. Gurmeet Singh and others, AIR 1996 SC 1393,
Ranjit Hazarika Vs. State of Assam, (1998) 8 SCC 635
Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175

For the appellant: Mr. M.A. Khan and Mr. Virender Verma, Addl. A.Gs.
For the respondent: Mr. Dalip K. Sharma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

State of Himachal Pradesh aggrieved by the judgment dated 17.07.2012, passed by learned Additional Sessions Judge, Fast Track Court, Solan in Session Trial No. 28FTC/7 of 2010, is in appeal before this Court. It is seen that learned trial Judge has acquitted the respondent (hereinafter referred to as the accused) of the charge under Sections 363, 376, 342 and 506 of the Indian Penal Code.

2. The allegations against the accused in a nut-shell are that on 2.6.2010 and 13.7.2010, in the morning hours, he kidnapped the prosecutrix, a minor from the lawful guardianship of her parents and she was taken to hotel 50 miles stone near Deonghat, where she was subjected to forcible sexual intercourse in Room No. 102 and thereby he has committed an offence punishable under Section 363 and 376 of the Indian Penal Code. As per further allegations against the accused, on 2.6.2010, the prosecutrix was wrongfully detained in Room No. 102 of hotel 50 miles stone after 12.00 noon for about 2-3 hours and also threatened to do away with her life by throwing '*Tezab*' if she disclosed the factum of her kidnapping by him and subjecting her to sexual intercourse in the room of hotel to anyone and thereby committed an offence punishable under Section 342 read with Section 506 of the Indian Penal Code.

3. The legality and validity of the impugned judgment has been questioned on the grounds *inter-alia* that despite of the direction evidence as has come on record by way of own testimony of the prosecutrix and her father PW-16 as well as by way of testimony of PW-6 Jagdeep Singh, the owner of hotel 50 miles stone near Panch Parmeshwar Temple, Solan, the same has not been appreciated in its right perspective and the trial Court has proceeded to record findings of acquittal mechanically and without application of mind. The testimony of PW-16 that while going to his residence in police line Solan from market, he got attracted to the place of occurrence on hearing cries of people gathered there and school girls present and noticed that the accused had caught hold hand of his daughter the prosecutrix and that on seeing him the accused had fled away from the spot is also not appreciated in its right perspective and to the contrary, the accused has been acquitted of the charge on presumptions and assumptions.

4. The grouse of the appellant-State, therefore, in a nut-shell is that learned trial Court has erroneously ignored and brushed aside the cogent and reliable evidence produced by the prosecution. In order to show the involvement of the accused in the commission of the offence and that he has been acquitted erroneously without application of mind, the findings recorded by learned trial Court are stated to be perverse and as such, the impugned judgment is not legally sustainable.

5. The nature of the offence, the accused allegedly committed is not only heinous but also grievous in nature because as per the allegations, he has not only removed the prosecutrix, a minor from her lawful guardianship, but also subjected her to sexual intercourse against her will and without her consent. It is, however, yet to be determined by us that occurrence has taken place in the manner as claimed by the prosecution or not and also that the prosecution has been able to establish its case that the prosecutrix at the relevant time was a minor and kidnapped as well as subjected to sexual intercourse forcibly.

6. Before coming to the factual matrix and also re-appraisal of the evidence available on record, it is desirable to take note as to under what circumstances it can be inferred that the prosecutrix, a minor has been kidnapped from the lawful guardianship of her parents and under what circumstances she can be said to have been subjected to forcible sexual intercourse. A bare perusal of Section 361 IPC reveals that if a female under 18 years of age is enticed away by a person from her lawful guardianship without the consent of her guardian, such person can be said to have committed the offence of kidnapping. The essential ingredients to constitute an offence of kidnapping, therefore, is enticing away a minor form her lawful guardianship without the consent of her guardian or any other person legally authorized to

consent on behalf of such guardian of minor. Such person can be said to have committed an offence of kidnapping punishable under Section 363 of the Indian Penal Code.

7. Now if coming to the commission of offence punishable under Section 376 of the Indian Penal Code in a case of minor, the commission of such an offence can be inferred once it is established that the prosecutrix has been subjected to sexual intercourse and it is not required to prove that she was not a consenting party to such an act on the part of the accused. However, in a case where the prosecutrix is not minor, the prosecution is required to plead and prove beyond all reasonable doubt that such cardinal intercourse with her was against her will and without her consent.

8. Now if coming to the legal principles attracted in a case of this nature, in ***State of Punjab*** Vs. ***Gurmeet Singh and others, AIR 1996 SC 1393***, the Apex Court has held that the own statement of the prosecutrix if inspires confidence is sufficient to bring the guilt home to the accused. The apex Court in order to ensure that an innocent person is not implicated in the commission of an offence of this nature, while taking note of the judgment in ***Gurmeet Singh's*** case supra has however diluted the ratio thereof in ***Ranjit Hazarika*** Vs. ***State of Assam, (1998) 8 SCC 635*** and held that the statement of prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault, as in its opinion, in such cases, the possibility of false implication can't also be ruled-out. Similar was the view of the matter taken again by the apex Court in V***imal Suresh Kamble*** Vs. ***Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175***. While placing reliance on this judgment and the law laid down by the Apex Court in the judgment supra, this Court in ***Criminal Appeal No. 481 of 2009*** titled ***State of Himachal Pradesh*** V. ***Negi Ram***, decided on 27th May, 2016 has held as under:

> "15. Therefore, the legal position as discussed supra makes it crystal clear that irrespective of an offence of this nature not only grievous but heinous also, the Court should not got swayed merely by passion and influence only on account of the offence has been committed against a woman and rather keep in mind the cardinal principle of criminal administration of justice, that an offender has to be believed to be innocent unless and until held guilty by the Court after satisfying its judicial conscience on the basis of given facts and circumstances of each case as well as proper appreciation of the evidence available on record."

9. It is also worth mentioning that in a case of this nature, it is the age aspect of the prosecutrix which assumes significance.

10. Now if coming to the factual matrix, the prosecutrix being born on 10.11.1992 was approximately 18 years and eight months old on 26.07.2010, when she made the application Ext. PW-5/A to the Station House Officer, Sadar, District Solan for registration of a case against the accused. Even if the date of occurrence is taken as 2.6.2010, in that event also, she was approximately 17 years seven months old at that time. In order to prove her age below 18 years school certificate Ext. PW-16/A, date of birth certificate Ext. PW-22/A and the extracts of parivar register Ext. PW-10/B has been produced in evidence. The school certificate Ext. PW-16/A has been produced in evidence by her father PW-16 Narender Pal Singh. The same in the present form is not legally admissible because no evidence has come on record as to what was the source on the basis of which the date of birth of the prosecutrix has been recorded as 10.11.1992 in this document. The entries in the parivar register being not primary evidence qua the birth of a person are also not legally admissible in evidence nor on the basis thereof, it can be said that such person was born on the date mentioned therein. Now if Ext. PW-16/A and Ext. PW-10/A are excluded from the evidence, there remains only Ext. PW-22/A, the date of birth certificate issued by the Registrar, Births and Deaths, Gram Panchayat, Maan, Tehsil Arki, District Solan, H.P. PW-22, who has proved this document is Ravinder Kumar, Registrar, Births and Deaths, Gram Panchayat, Maan, Tehsil Arki, District Solan. True it is that he had brought the birth register and while in the witness box has deposed that the birth certificate Ext. PW-22/A has been issued by him on the basis of entries in the said register, however, in his cross-examination he has admitted over writing and cutting in column No. 5 of the register and that the entries at

Serial No. 46 in the said register are in different ink. He has also admitted over writing and cutting in the entries made at Serial No. 47, 48 and 49 of the register. He has also admitted rubbing of entries at Serial No. 46 in the register. The abstract of register was obtained by the police during the course of investigation and as such this witness while in the witness box has proved the abstract of register, which is Ext. D-1. Overwriting and cutting in the entries against Serial No. 46 of the register qua the birth of prosecutrix renders the prosecution case that she has been born on 10.11.1992 as highly doubtful. The extract of register, Ext. D-1 makes it crystal clear that there is overwriting against entries at Serial No. 46. Otherwise also, it is Yasoda Devi, the grand mother of the prosecutrix at whose instance as per version of PW-22, the entries qua birth of the prosecutrix were entered in the birth register, was a material witness who could have told us that the prosecutrix was born on 10.11.1992 and that she had disclosed her correct date of birth to the Registrar, Births and Deaths, Gram Panchayat, Maan. As per version of PW-22, said Smt. Yasoda Devi is known to him and that she is alive. She, however, has neither been associated nor cited as a witness to the reasons best known to the prosecution. On the other hand, if coming to the opinion of Radiologist encircled red at point 'B' on the reverse of the MLC Ext. PW-24/A, the radiological age of the prosecutrix at the relevant time was 15½ to 17 years. The margin of two years, though as per the testimony of PW-24 Dr. Tanzin Chhokit the same may 3-4 years on either side, if taken into consideration, the age of the prosecutrix at that time was more than 18 years. Otherwise also, the age of the prosecutrix if taken above 17½ years, she had already attained the age of discretion. In the given facts and circumstances to be discussed hereinafter, therefore, it cannot be said that she was below 18 years of age and removed from her lawful guardianship by the accused without the consent of her parents. Being so, it cannot be said that the prosecutrix was minor below 18 years on the date of occurrence.

11. Before coming to the merits of the case, it is desirable to take note of the own admission of accused in his statement recorded under Section 313 of the Code of Criminal Procedure. His answers to question No. 2 to 8 reveal that he has admitted the prosecutrix a student of Government Girls Senior Secondary School, Solan and that he is owner of Balero bearing registration No. HP-11-3765 (used in the commission of offence). He has also admitted that the students of Badhalag were taken to Chandigarh, Kurukshetra and Renuka side for picnic and his vehicle was also hired for the purpose. It is he who had driven the vehicle during the period the students were taken for picnic. Though it is denied that he had obtained the cellphone number of the prosecutrix, however, according to him it is she who herself had asked for number of his cellphone. He also admits that he started calling the prosecutrix over her cellphone from his cellphone number 98054-38872. The prosecutrix also admitted in her cross-examination that she used to talk with accused continuously for 15 minutes to one hour at a time. She also used to call him from her cellphone. The explanation that she had been doing this due to fear is neither plausible nor reasonable. The accused also admits that he was subjected to medical examination vide MLC Ext. PW-1/B and that his vehicle HP-11-3765 was taken in possession vide seizure memo Ext. PW-7/A. It is thus seen that the accused and prosecutrix were well acquainted with each other. They used to talk with each other because as per prosecution case also, if believed to be true the accused had taken the number of cellphone of the prosecutrix. The controversy, therefore, lies in a narrow compass because it is to be seen from the evidence available on record that the prosecutrix a minor below 18 years was kidnapped by the accused from her lawful guardianship and subjected her to sexual intercourse.

12. On 2.6.2010, in the morning on her way to school from her quarter in Police Line, Solan at 11.30 a.m the accused was sitting in his Bolero and met her on bye pass near police line, Solan. He offered lift to her at the pretext that he will drop her near school, however, when they reached near Saproon bye pass, instead of taking turn towards Saproon chowk, he drove the vehicle towards Deonghat side. She tried to get the vehicle stopped but accused did not agree, therefore, she had altercation with him, but of no avail. She was taken to hotel at Deonghat and subsequently to a room in the said hotel. There he committed rape with her forcibly and also man handled her. He threatened her to throw acid on her body in case she

disclosed the incident to anyone else. He removed her clothes including salwar and subjected her to sexual intercourse forcibly.

13. It cannot be believed by any stretch of imagination that the prosecutrix had reasons to withheld the occurrence from her parents because the explanation that she was threatened not to disclose the incident to anyone, failing which, the accused will throw acid on her, is neither plausible nor reasonable. This Court has also failed to understand as to how the prosecutrix could have forcibly taken away by the accused, that too, from Solan town. As per her own admission in the cross-examination, the locality from police line Solan onward is thickly populated up to Deonghat. The hotel at Deonghat is touching the road. A 'Dhaba' also exist on roadside near the hotel. Room No. 102, where she was allegedly subjected to sexual intercourse situate below the restaurant/dhaba. She has not denied that in the restaurant no person was taking meal, however, expressed her ignorance as to how many persons were taking meal there. She was taken to the hotel in a broad day light i.e. 12.00 noon. As per her version, they both went walking through stairs up to the room. She also admitted that on the gate of police line at Solan, there are shops of a single owner. In view of such evidence as has come on record by way of her own testimony, even if it is believed that she was taken to hotel and subjected to sexual intercourse, it cannot be said that such an act on the part of the accused was forcible and contrary to her consent and against her will because had it been so, she could have raised hue and cry as it was not possible for the accused to have prevented her from doing so and also driving the vehicle simultaneously, that too, in Solan town and on Solan bye pass road, which as a matter of fact, is national highway and a very busy road. Being so, it would not be improper to conclude that she had voluntarily accompanied the accused and whatever happened on that day, she was a consenting party thereto. The prosecutrix for the purpose of commission of an offence under Section 376 of the Indian Penal Code was not minor below 16 years of age and rather more than 17½ years of age on that day. At the relevant time a female below 16 years of age used to be minor so far as the commission of an offence punishable under Section 376 of the Indian Penal Code is concerned.

14. Now if coming to the incident of 13.07.2010 that she was taken by the accused in the same vehicle to the same hotel. He allegedly tried to subject her to sexual intercourse forcibly inside the vehicle, however, he did not succeed in his attempt to do so and he administered beatings to her inside the vehicle. Her testimony in cross-examination that they could not reach in the hotel on that day as a result thereof, the accused parked the vehicle at an isolated place on the national highway where he tried to subject her to sexual intercourse cannot also be believed to be true for the reason that it was not possible for the accused to have assaulted her sexually on road side, had she been not a consenting party for the reason that on national highway there always remain flow of traffic and she being a young lady, the accused would have not made an attempt to assault her sexually on road side in the vehicle. How the accused could have driven the vehicle at a high speed and fighting with the prosecutrix also simultaneously. He could have also not prevented her from breaking glasses of the moving vehicle and driving the vehicle also simultaneously. This part of her statement in cross-examination also seems to be merely an afterthought. The incident of 13.7.2010 is also not disclosed by her to her parents as according to her she was threatened by the accused.

15. Now if coming to the incident of 26.7.2010, the accused caught hold her hand near ITI Solan at such a time when she was coming back from her school. On raising hue and cry other persons gathered there. As per prosecution case, even school girls were also present there. Had it been so, it is not known as to why no-one from the locality or other persons gathered there or the school girl(s) were not associated by the police during the course of investigation and cited as witnesses to prove this aspect of the matter beyond all reasonable doubt. In the given facts and circumstances and taking into consideration the own conduct of the prosecutrix, it is not safe to place reliance on her own testimony and that of her father PW-16. Had the occurrence of 26.07.2010 been taken place in the manner as claimed by the prosecution, the local people or anyone else gathered at the alleged place of occurrence would have voluntarily come forward to assist the police in the investigation of the case in order to bring guilt home to

the accused and to ensure that he is convicted. The possibility of the prosecutrix having voluntarily accompanying the accused on that day and when seen by her father PW-16, a false case was engineered and fabricated at the instance of her father to implicate the accused in this case, cannot be ruled-out.

16. It is significant to note that as per the complaint Ext. D-1, PW-16, the father of prosecutrix had mercilessly beaten up the accused. The allegations in the complaint also find support from the testimony of Dr. Lalit Mahajan who on being taken to the hospital by the police had examined the accused on the next day i.e. 27.7.2010 and issued MLC Ext. PW-1/B. PW-1 has noticed multiple reddish abrasion on upper half of back, swelling and bluish sicolouration below both eyes in infraorbital region and swelling on nasal bridge. PW-1 has also stated that injuries mentioned in the MLC can be caused by way of beatings. In his cross-examination conducted on behalf of learned defence counsel, he has stated that the injuries as disclosed in the MLC were recent. Therefore, the possibility of the accused having been beaten up by none-else but by the father of the prosecutrix, cannot be ruled-out. Nothing has come on record as to that any inquiry was made on the application, Ext. D-1 submitted by the mother of the accused to the police. We, therefore, find the present a case where the prosecutrix was in the company of the accused on 26.7.2010 and the case was registered at the instance of her father PW-16, who was working in Police Department as Head Constable at Solan at the relevant time. PW-16 even had administered beatings also to the accused may be on account of that they both were seen in the company of each other. The evidence as has come on record by way of the testimony of prosecutrix and that of her father is, therefore, not suggestive of that the prosecutrix was kidnapped from her lawful guardianship by the accused and that she was subjected to sexual intercourse without her consent and against her will in Room No. 102 of Hotel 50 Mile Stone.

17. The statement of PW-6, the owner of Hotel 50 Mile Stone has also been pressed in service. He while in the witness box has stated that the accused and prosecutrix were identified by him in the Court to be the same persons who had come to his hotel on 2.6.2010 in vehicle HP-11-3765 around 12.00 noon. The accused had introduced the prosecutrix as his wife. He further tells us that Room No. 102 was got booked by the accused and the entries Ext. PW-5/B were made by him in the register. He has identified the bed sheet, Ext. P-6, which according to him was lying spreaded on the double bed on 2.6.2010 and on 27.7.2010 also. Interestingly enough, his testimony in cross-examination reveals that the hotel situates on road side and there is 'Dhaba' of his brother where the services of Amar Deep have been engaged for prepration of meal. The accused and prosecutrix were not quarreling with each other, however, according to him gone to the room quietly. He did not over hear the cries or shouting from the room. He remained in the hotel during the night also. As per his version, the bed sheets and other clothes being used in the hotel are changed on each and every occasion after use of the room. The father of the prosecutrix was known to this witness. He tells us that those persons found to be quarreling with each other are not being allowed to stay in the hotel. The prosecutrix and the accused had gone for a walk in the evening, however, it is only the accused who had returned at 8.00 p.m. to the hotel and not the prosecutrix. Even if his testimony in his examination-in-chief is believed to be true and it is believed that the accused had taken the prosecutrix on 2.6.2010 to his hotel, it would not be improper to conclude that she had gone there voluntarily because as per version of this witness, the accused and prosecutrix were not quarreling with each other and rather went quietly to the room. Not only this but on the reception, the accused had introduced her being his wife to this witness. It is not known as to why the prosecutrix has not agitated against such conduct of the accused. Therefore, the evidence as has come on record by way of testimony of PW-6 Jagdeep Singh also does not support the prosecution case.

18. Now if coming the to to the medical evidence as has come on record by way of testimony of PW-24 Dr. Tanzin Chhokit and the MLC Ext. PW-24/A, no doubt, at the time of medical examination of the prosecutrix, in her opinion, based upon local and physical examination of the prosecutrix, the possibility of sexual activity was not ruled-out, however, the duration of such activity could not be ascertained. The final opinion was left to be given after the receipt of the Chemical Examiner's report and the report of Radiologist. The report of chemical

examiner was received from the FSL, no blood and semen was detected on public hair, external genitalia, vaginal swab and salwar of the prosecutrix. Human blood was detected in the sample of blood of the prosecutrix, shirt and bed sheet but the result was not conclusive in respect of blood groups. No semen could be detected on other exhibits sent for analysis. The blood was detected in traces on underwear, however, the same was insufficient for further examination. Semen was not detected on the exhibits examined. The medical examination report Ext. PW-25/F was produced before the Medical Officer, PW-24. She, however, has noticed only gist and the results and failed to give her final opinion as to whether the prosecutrix was subjected to sexual intercourse or not, nor said that her opinion remained the same even on perusal of the report of chemical examiner also. On the other hand, result of the examination of the exhibits sent to the laboratory for analysis is not suggestive of that the prosecutrix was subjected to sexual intercourse.

19. In view of the discussion made hereinabove, the offence punishable under Section 341 and 506 of the Indian Penal Code has not been made out for the reason that the prosecution has failed to prove beyond all reasonable doubt that the prosecutrix was kidnapped by the accused form her lawful guardianship without the consent of her parents and that she has been subjected to sexual intercourse without her consent and against her will. Being so, there is no question of wrongful confinement of the prosecutrix in Room No. 102 of hotel 50 Miles Stone. It cannot also be believed that the prosecutrix was threatened with dire consequences including throwing of acid on her by the accused. Thyerefore, the charge under Section 341 and 506 of the Indian Penal Code as framed against the accused also fall to the ground.

20. There is no need to discuss the evidence as has come on record by way of the testimony of PW-7 Dharam Singh, PW-9 Naveen Kumar, Senior Assistant, office of Registering and Licensing Authority, Arki. The accused has not disputed the prosecution case qua his vehicle was taken into possession by the police along with its keys. PW-8 Vir Bhadra Tekta, Lecturer English, PW-18 Randhir Thakur, Lecturer Economics, PW-19 Narinder Pal Singh, Computer Teacher, PW-20 Tripta, Lecturer Sociology and PW-21 Veena Gupta, Lecturer Maths are formal in nature because they were working as Lecturers in Government Girls Senior Secondary School, Solan at the relevant time and as such had produced the record and deposed that the prosecutrix did not attend the classes on 2.6.2010. PW-10 Ravinder Kumar, Panchayat Sahayak, Gram Pachayat, Maan and Ravinder Kumar, Deputy Registrar, Births and Deaths, Gram Panchayat, Maan have produced the record pertaining to the date of birth of the prosecutrix, which has been duly considered hereinabove and the findings already recorded.

21. The official witnesses i.e. PW-4 LC Sandhya, PW-11 LC Neelam Kumari, PW-12 HHC Narender Prakash, PW-13 Constable Sanjay Kumar, PW-14 HC Pradeep Kumar, PW-17 HC Chander Mohan, PW-23 HC Rakesh Guleria and PW-25 ASI Dharam Sain, the Investigating Officer are formal as they remained associated during the investigation of the case in one way or the other, whereas, PW-25 has conducted the investigation of this case also. Their testimony could have been used as link evidence had the prosecution been otherwise able to establish beyond all reasonable doubt that the prosecutrix was kidnapped by the accused from her lawful guardianship and subjected to sexual intercourse without her consent and against her will.

22. In view of the re-appraisal of the given facts and circumstances of this case and also the evidence available on record, in our considered opinion, the prosecution has failed to prove its case against the accused beyond all reasonable doubt. The accused, as such, has rightly been acquitted of the charge framed against him. The judgment under challenge is neither perverse nor can be said to be legally and factually unsustainable. The same is accordingly affirmed.

23. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. Personal bonds furnished by the accused shall stand cancelled and surety bonds discharged.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Shri Avtar Singh ….Appellant

Versus

Sh. Tilak Raj & another ….Respondents

FAO No. 355 of 2012

Decided on : 11.11.2016

Motor Vehicles Act, 1988- Section 149- Tribunal held that driver was not having a valid and effective licence at the time of accident – licence was in the name of J and not in the name of S – there was no evidence that the owner had taken due care and caution while engaging the driver – held, that Tribunal had rightly recorded the findings- the driver was not having a valid and effective drivinglicence at the time of accident and the owner insured had committed willful breach- appeal dismissed.(Para-14 and 15)

Cases referred:

Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

For the Appellant : Mr. Ramakant Sharma, Advocate.

For the Respondents: Nemo for respondent No. 1.

Mr. P.S. Chandel, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the judgment and award, dated 5th June, 2012, made by the Motor Accident Claims Tribunal, Hamirpur, H.P. (for short 'the Tribunal') in MAC Petition No. 42 of 2008, titled as Tilak Raj versus Shri Avtar Singh & others, whereby compensation to the tune of Rs. 3,64,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant and appellant-owner was saddled with liability (for short 'the impugned award').

2. The claimant, driver and insurer have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

3. The owner-insured has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned Counsel for the appellant-owner/insured argued that the Tribunal has fallen in an error in saddling him with the liability and the amount awarded is excessive.

5. Thus, the following questions are to be determined in this appeal:

1. Whether the Tribunal has rightly saddled the owner-insured with liability and discharged the insurer?

2. Whether the amount awarded is adequate?

6. In order to determine the aforesaid questions, it is necessary to examine the pleadings of the parties and record.

7. The claimant had invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs. 6,00,000/- as per the break-ups given in the claim petition.

8. The respondents resisted and contested the claim petition by filing replies.

9. Following issues came to be framed by the Tribunal:

"1. Whether the petitioner has suffered injuries due to rash and negligent driving of Qualis, bearing No. PB-18-J-0074 by its driver-respondent No. 2, as alleged? ..OPP

2. If Issue No. 1 is proved in affirmative, whether the petitioner/claimant is entitled to compensation, if so, to what amount and from which of the respondents? …OPP

3. Whether the petition is not maintainable in the present form?…OPRs

4. Whether the vehicle in question was being driven by respondent No. 2 at the time of accident in violation of the terms and conditions of the Insurance Policy? …OPR-3

5. Whether the respondent No. 2 was not holding a valid and effective driving licence to drive the vehicle in question at the time of accident?…OPR-3

6. Relief."

10. The parties led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that the driver was not holding a valid and effective driving licence at the time of accident, the owner-insured has committed willful breach, saddled him with liability and discharged the insurer and granted compensation to the tune of 3,64,000/- with interest @ 7.5% per annum in favour of the claimant.

Issue No. 1

11. There is no dispute qua findings recorded on issue No. 1. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

12. Before dealing with issue No. 2, I deem it proper to deal with Issues No. 3 to 5.

Issue No. 3

13. The respondents have not led any evidence to prove that the claim petition was not maintainable, thus have failed to discharge the onus. Accordingly, the findings returned by the Tribunal on Issue No. 3 are upheld.

Issues No. 4 & 5

14. The Tribunal has held that the driver was not having a valid and effective driving licence at the time of accident and the same was in the name of Jaswinder Singh, son of Shri Karam Singh and not in the name of Sarvjeet Singh, son of Shri Balbir Singh. Further, it has recorded that there was no evidence on the record to show that the owner-insured had engaged the driver after exercising due care and caution and has taken steps as required under law while engaging driver.

15. Having said so, I am of the considered view that the Tribunal has rightly recorded the findings that the driver was not having a valid and effective driving licence at the time of accident and the owner-insured has committed willful breach. Thus, the findings, recorded by the Tribunal on issues No. 4 & 5 are upheld.

Issue No. 2.

16. The Tribunal has assessed the monthly income of the claimant-injured at Rs. 5,000/- per month and held that the claimant has suffered 25% permanent disability and granted him compensation to the tune of Rs. 15,000/, under the head 'loss of dependency'. The claimant-injured has not questioned the same. Accordingly, the same is upheld.

17. The age of the claimant-injured was 35 years at the time of accident. The Tribunal has fallen in an error in applying the multiplier of '16'.

18. The multiplier of '14' is applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR**

2009 SC 3104, upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.**

19. Thus, the claimant-injured is held entitled to compensation to the tune of Rs. 1250 x 12 x 14 = Rs. 2,10,000/- under the head 'loss of dependency'.

20. The amount awarded under the other heads is maintained.

21. Accordingly, the claimant-injured is held entitled to total compensation under the following heads with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization,

(i) loss of dependency :	Rs. 2,10,000/-
(ii) Medical expenses :	Rs. 14,000/-
(iii) Attendant charges, special diet and transportation:	Rs. 15,000/-
(iv) Loss of income:	Rs. 15,000/-
(v) Pain and suffering:	Rs. 30,000/-
(vi) Loss of amenities of life:	Rs. 50,000/-
Total:	Rs. 3,34,000/-

22. Now, the question is- who is to be saddled with liability.

23. As discussed hereinabove, the owner-insured has committed willful breach. The claimant is the third party.

24. It is a beaten law of the land that right of third party cannot be defeated and even if the owner-insured has committed breach, the insurer has to satisfy the award, with right of recovery.

25. Viewed thus, the insurer is saddled with the liability, with right of recovery.

26. Learned Counsel for the appellant-insured stated at the Bar that an amount of Rs. 25,000/- stands already deposited before the Registry.

27. The insurer is at liberty to lay a motion before the Tribunal for recovery of the amount.

28. The insurer is directed to deposit the awarded amount minus the amount already deposited by the owner-insured before the Registry within a period of eight weeks from today.

29. The Registry is directed to release the awarded amount in favour of the claimant-injured, strictly as per the terms and conditions contained in the impugned award after proper identification, through payees' account cheque and by depositing the same in his account.

30. The impugned award is modified, as indicated hereinabove and the appeal is disposed of.

31. Send down the record after placing copy of the judgment on Tribunal's file.

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

Bimla and others ..Appellants/Defendants.

Versus

Saroj Rani ..Respondent/plaintiff.

RSA No. 235 of 2007
Reserved on : 1/11/2016
Date of decision: 11/11/2016

Specific Relief Act, 1963- Section 5 or 38- Plaintiff pleaded that he had given four rooms to the defendants as licencee- he demanded the possession but the defendants threatened to demolish the rooms – defendants pleaded adverse possession – the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal that the evidence in support of adverse possession was not satisfactory – the ingredients of adverse possession were not established – plaintiff is recorded to be the owner in the copy of jamabandi, which carries with it a presumption of correctness- the suit was maintainable without joining the co-owners – the evidence was properly appreciated by the Courts – appeal dismissed.(Para-7 to 12)

For the appellants: Ms. Seema Sood, Advocate.
For the respondents: Mr. H.C.Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

Both the learned Courts below concurrently rendered a decree vis.a.vis the plaintiff qua mandatory injunction whereupon the defendants were mandated to hand over possession of licensed premises borne on Khasra Nos. 264, 257 and 258 situated in Chak Khalinda, Pergana Matiana, Tehsil Theog, District Shimla, H.P. besides both the learned Courts below rendered qua the plaintiff a decree of permanent prohibitory injunction for restraining the defendants from raising any construction or carrying any construction on the existing construction. The defendants standing aggrieved by the concurrently recorded verdicts of both the Courts below preferred herebefore the instant appeal whereby they concert to seek their reversal.

2. The facts necessary for rendering a decision in the instant appeal are that the plaintiff is the owner in poosession of Khasra Nos. 264, 257 and 258 situated in Chak Kalinda to the extent of 3/4th share alongwith Kamlesh who is owner of 1/4th share. The defendants were co-villagers, who were in need of accommodation for their use. The plaintiff gave one room over Khasra No. 258 and three rooms over Khasra No. 257 to defendants as licensee. The defendants are in possession of four rooms as licensee. The plaintiff demanded the possession from the defendants but the defendants threatened to demolish the same and refused to handover the possession. The defendants have collected the construction material. Hence, it was prayed that defendants be restrained from raising the construction and be directed to handover the possession.

3. The suit is opposed by filing written statement, taking preliminary objections regarding the lack of maintainability, suit being barred for non joinder of necessary party and for misjoinder of cause of action. It was specifically denied that plaintiff is the owner in possession of the land bearing Khasra No. 257 and 258. It was asserted that the father of the defendant No.1 constructed one single storeyed house over the land bearing Khasra No. 257 showing his hostile animus over the same. The possession of defendants No. 1, 3 and 4 is open, visible and hostile to the true owner. The defendants No. 1, 3 and 4 have become the owners of the land bearing Khasra No. 257 by way of adverse possession and the revenue entries are wrong. The defendant Bimla constructed three rooms in the year 1980 over Khasra No. 258. The possession of the defendants No.2 is continuous since 1980 and she has become the owner by way of adverse possession. The possession of the defendants was also found by the settlement staff. The plaintiff came to know about the revenue entries and wants to take advantage of the same. Therefore, a false suit has been filed. Therefore, it was prayed that this suit be dismissed.

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

1. Whether the possession of the defendants over the suit premises and land is that of licencee, as alleged? OPP.

2. If issue NO.1 is proved in affirmative, whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed for? OPP.
3. Whether the plaintiff is also entitled to the relief of possession by way of mandatory injunction, as prayed for? OPP.
4. Whether the suit in the present form is not maintainable? OPD.
5. Whether the suit is bad for misjoinder of parties and cause of action? OPD.
6. Whether the defendants No. 1, 3 and 4 have perfected their title qua Khasra No. 257 by way of adverse possession, as alleged? OPD.
7. Whether the defendant No. 2 has also perfected her title in respect of Khasra NO. 258 by way of adverse possession, as alleged? OPD.
8. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the defendants.

6. Now the defendants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 26/07/2007 this Court admitted the appeal on the hereinafter extracted substantial question of law:-

> "1. Whether the suit is groverned exclusively Article 64 (old article 142) of the Limitation Act?
>
> 2. Whether the purchase of shares of other coshares except that Smt. Kamlesh contrary to the restrictions imposed vis.a.vis transfer of the said shares by way of sale, mortgage, gift, etc. incorporated in Revenue Record (Jamabandi) vide report No. 115 dated 13.11.1969 to the knowledge of the plaintiff respondent or her predecessor in interest perfects her title and possession as alleged and makes her competent to file the suit?
>
> 3. Whether plaintiff respondent can be deemed to be legally competent to create interest in the suit land by alleged delivery of possession as licensees of four rooms located in Khasra No. 257 and 258 thereof in view of Report No. 115 dated 13.11.1969 and the restriction on transfer imposed thereby?

Substantial questions of law.

7. The premises existing upon the suit land contrarily stand contended by the litigating parties hereat qua the defendants' standing in the year 1992 inducted thereon as licensees whereas defendant No.1 espouses qua theirs acquiring/perfecting their title thereon by prescription arising from elapse hereat of the statutorily prescribed period of limitation commencing from the year 1950 whereat their predecessor in interest raised a construction thereon whereafter she contends qua hers continuously holding its possession of premises existing on Khasra No. 257. On the other hand the defendant No.2 has espoused qua construction standing raised by her upon Khasra No. 258 in the year 1980 whereafter she canvases of hers continuously since thereat upto date with a animus possidendi holding its possession whereupon with their statutorily prescribed period of time elapsing therefrom she espouses qua hers becoming its owner by adverse possession. Initially the veracity of DW-1 testify qua her predecessors in interest raising a construction in the year 1950 upon Khasra No. 257 is bereft of vigour especially when DW-3 testifies qua the father of defendant Surmi expiring about 45 to 46 years ago. Also with his testifying qua the predecessor in interest of defendant Surmi raising a construction upon Khasra No. 257 about 40 years back whereas with his rendering his testification in the year 2003 wherefrom on 40 years standing computed hitherto imperatively nails a conclusion of the father of defendant Surmi purportedly raising construction upon Khasra No. 257 not in the year 1950 as deposed by Surmi rather his purportedly raising construction thereon in the year 1963 whereupon reiteratedly he omits to lend succor to the

deposition of DW-1 qua her predecessor in interest raising construction upon Khasra No. 257 in the year 1950. In aftermath, the aforesaid plea raised by defendant No.1 warrants its standing discountanced it remaining in the realm of unsubstantiation. Also defendant No.2 espouses qua hers raising a construction on Khasra No. 258 in the year 1980 factum whereof is in rife contradiction to the testimony of DW-1 wherein she testifies qua her predecessor in interest raising construction upon Khasra No. 257 in the year 1950. Moreover, the factum aforesaid espoused in the testification of defendant Bimla is ridden with a vice of in veracity significantly when she has omitted to recite the name of the mason who had constructed the house in the year 1980 on Khasra No. 258.

8. Be that as it may with defendant Surmi besides defendant Bimla abysmally failing to establish the factum of construction standing raised respectively by them upon Khasra No. 257 besides upon Khasra No. 258 respectively in the year 1950 and in the year 1980, concomitantly the assertion respectively made by them qua theirs since thereat holding with an animus possidendi, possession of the suit property cannot stand ingrained with any virtue of truth. The effect of the aforesaid failure on the part of the defendant Surmi besides on the part of defendant Bimla to establish the relevant factum aforesaid constrains a derivative qua their assertion qua theirs respectively since 1950 besides since 1980 commencing with an animus possidendi possession of the suit land wherefrom with the statutorily prescribed period of limitation elapsing therefrom upto date theirs hence perfecting their title thereto, not warranting acceptance. Fortification to the inference aforesaid stands marshaled by the fact of DW Surmi omitting to specifically recite the name of the owner of Khasra No. 257 and 258. Though DW-2 has testified qua the plaintiff holding ownership of the suit land nonetheless her testification qua the aforesaid facet is bereft of credence significantly when she has feigned ignorance qua the owners of houses adjacent thereto. Moreover with hers not assigning any special reason qua hers holding knowledge qua the plaintiff holding ownership of Khasra No. 257 and 258 renders her testification qua the plaintiff holding ownership of the suit land whereon the disputed premises stand raised to be susceptible to skepticism. In aftermath it is to be concluded with aplomb qua with both not holding knowledge qua the plaintiff holding ownership of the suit property whereas for theirs obtaining success in their espousal qua theirs acquiring title thereto by adverse possession the identity of the real owner whereagainst the apposite plea is canvassed is enjoined to emerge by adduction of invincible evidence, contrarily with non emergence of the identity of the true owner of the disputed suit property constrains a deduction qua the plea of adverse possession asserted by the defendants qua the suit property holding no vigour, it being speciously raised for want of the indispensable besides imperative ingredients for it to hold success embodied in upsurgence of the identity of the person whereagainst it is asserted, hence remaining unsatiated.

9. Uncontrovertedly, reflections stand borne in Ext.P-1 comprising the Jamabandi qua the suit property wherewithin unveilings occur qua the plaintiff being the owner of the suit property besides the Jamabandi for the year 1982-83 shows the plaintiff to be the co-owner in possession of the suit property, likewise copy of Jamabandi qua the suit property comprised in Ext.P-4 pertaining to the year 1992-93 shows the plaintiff to be owner in possession of the suit property. Presumption of truth as carried by the aforesaid exhibits has remained uneroded also when for reasons aforesaid the plea of adverse possession reared by the defendants qua the suit property founders, the presumption of truth held by the reflections carried therewithin acquire conclusivity. Also the testification of the plaintiff qua the defendants standing inducted as licensees in the suit property in the year 1992 acquires corroborative vigour from the deposition of PW-2 besides when the testification of PW-2 on its wholesome appraisal holds credibility, it warrants its acceptance.

10. The learned trial Court on the issue of maintainability of the suit arising from lack of impleadment in the array of plaintiff other co-owners, had recorded thereon a finding adverse to the defendants, finding whereof stood anvilled upon pronouncements of this Court occurring in Ajmer Singh Vs. Shamsher Singh, AIR 1984, P&H 58 and Kanchna Vs. Bishan 2003(3), SLJ 700 wherein a mandate is encapsulated qua a co-sharer holding entitlement as a

plaintiff to institute a suit for injunction without his joining in the array of plaintiff the other co-owners of the joint suit property. The aforesaid mandate encapsulated in the aforesaid verdict warrants reverence. Consequently, the suit of the plaintiff for relief of injunction is maintainable even without hers joining in the array of the co-plaintiffs other purported co-owners of the jointly recorded suit property.

11. Be that as it may, since invincible evidence stands adduced qua under the purported report No. 115 of 13.11.1969 prepared by the Patwari concerned whereupon an interdiction stood cast upon the plaintiff to acquire the share of other co-owners in the suit property concomitantly when thereon she stood incapacitated to institute the suit against the defendants besides when it holds no tenacity its holding disconcurrence with the apposite rules, though imperatively warranted the learned trial Court to strike an apposite issue thereon whereas with the defendants at the time whereat the learned trial Court struck issues on the contentious pleadings of the litigating parties acquiescing qua the issues as stood struck for trial inter se the litigating parties rather is a vivid display of the defendants standing estopped to espouse herebefore qua on the aforesaid factum the concurrently recorded verdicts of both the Courts below warranting reversal also when any acceptance of the contention of the defendants anvilled thereupon would unnecessarily sequel a de novo trial of the suit despite the defendants at the apposite stage waiving the striking of the aforesaid issue(s) thereon by the learned trial Court. Contrarily thereupon on ground of estoppel arising from waiver forestalls on anvil thereof any argument in consonance therewith.

12. For reasons aforesaid this Court concludes with aplomb of the judgements and decrees of the Courts below standing sequelled by theirs appraising the entire evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of material on record by the learned Courts below not suffering from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather they have aptly appreciated the material available on record. I find no merit in this appeal, which is accordingly dismissed and the judgments and decrees of the both the Courts below are maintained and affirmed. Substantial questions of law stands answered against the defendants. Decree sheet be prepared accordingly. All pending applications stand disposed of accordingly. No costs.

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

Chattar Singh …..Appellant-Plaintiff.

Versus

Gauri Singh and others ….Respondents/defendants.

RSA No. 630 of 2012.
Reserved on : 04.11.2016.
Decided on : 11th November, 2016.

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that defendant is obstructing the passage to his house and is not allowing him to carry the construction material – defendant denied the existence of the passage- the suit was decreed by the Trial Court- an appeal was preferred, which was allowed- held in second appeal that plaintiff had proved the existence of the path by the spot map, oral testimony and the revenue record- however, no satisfactory evidence was led by the defendant- the Appellate Court had wrongly discarded the evidence on the ground that no demarcation was conducted- however, the demarcation was not required- appeal allowed- judgment of Appellate Court set aside and the suit of the plaintiff decreed.

(Para-8 to 11)

For the Appellant: Mr. Vijay Chaudhary, Advocate.
For the Respondents : Mr. Vikas Rathore, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The learned trial Court had decreed the suit of the plaintiff wherein he had claimed injunction against the defendants for restraining them from causing interference in his using path existing on abadideh land for facilitating his accessing his house. However, in an appeal carried therefrom by the aggrieved defendants before the First Appellate Court, the latter Court reversed the verdict of the learned trial Court. The plaintiff standing aggrieved by the pronouncement of the learned First Appellate Court has proceeded to through the instant appeal assail it herebefore.

2. The brief facts leading to the lis inter se the parties are that the plaintiff is permanent resident of Muhal Ahju/10, Tehsil Jogindernagar, District Mandi, H.P. and owns a considerable property there. House of the plaintiff is stated to be built over abadi deh land comprised in khasra No.487/1 and is in existence for last more than 90 years which requires immediate repairs. It is further averred that defendants without any right and authority are creating active interference on the path existing on the spot and leading to the house of the plaintiff and they are not allowing him to carry any building material for repair of the said house and are also not allowing him to repair the path by laying pucca cemented concrete. This path is alleged to be existing between khasra No.79 and 490 and passes through one side of the court yard of the house of the defendants and then it reaches to the house of the plaintiff. This path is in existence since the time of the forefathers and has always been peacefully used and enjoyed as a matter of right. Hence the suit.

3. The defendants contested the suit and filed the written statement wherein they have taken preliminary objection qua maintainability, cause of action etc. On merits, it is admitted that the house of the plaintiff exists over abadi deh land. It is denied that there is any passage over the abadi deh land ever enjoyed by the plaintiff and others. It is further stated that allegations are vague for want of any spot map and measurement of the passage. Other allegations are denied and it is stated that the suit is without any merits and it be dismissed.

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 there exists any passage over the suit land, as claimed? OPP
2. Whether the plaintiff is entitled to the relief of injunction as prayed for? OPD
3. Whether the suit is not maintainable in the present form? OPD
4. Whether the plaintiff has no cause of action and locus standi to file the suit? OPD.
5. Whether the suit is bad for want of better particulars? OPD.
6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, it decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom by the defendants/respondents herein before the learned first Appellate Court, the latter Court while allowing the defendants' appeal, reversed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein has instituted herebefore the instant Regular Second Appeal assailing therein the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 10.09.2013, this

Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the findings of the First Appellate Court are result of complete mis-reading, mis-interpretation of the evidence and material placed on record and against the settled position of law?

Substantial question of Law No.1:

8. The propagation of the plaintiff qua his standing entitled to user of path, entitlement whereof stood espoused to arise from its prescriptive user commencing since times immemorial, stood countenanced by the learned trial Court. The learned trial Court while pronouncing qua the plaintiff holding an entitlement to use the suit land as a path for accessing his house existing ahead of the house of the defendants stood founded upon (a) the relevant path occurring in abadi deh land; (b) spot map Ex.PW3/A proven by PW-3 holding depictions of a path existing on the suit land besides it unraveling qua its standing blocked by the defendants. It therein also holding manifestations qua the width of the path upon the suit land holding dimensions of about 1 ½ feet; (c) PW-4 while proving spot map Ex.PW4/A also corroborating the testimony of PW-3; (d) jamabandi qua the suit land holding reflections of it being abadi deh land, a part whereof has remained unconstructed, whereon PW-3 and PW-4 unanimously depose qua existence of a path thereon and (e) DW-2 Jayawanti Devi in her testification acquiescing qua existence on the suit land a path holding a width of 1 ½ feet besides hers in her cross-examination acquiescing qua the plaintiff using it in good faith.

9. Even though the aforesaid manifestations unraveled in the testifications of the aforesaid witnesses make a vivid portrayal of the plaintiff thereupon emphatically sustaining his plea qua existence of a path measuring 1 ½ feet on the suit land also thereupon his obviously sustaining the factum of his holding a prescriptive right qua its user commencing since times immemorial besides when the defendants omitted to adduce the relevant germane evidence proclaiming the factum of the plaintiff holding a facility to access his house through an alternative path than the one whereon he asserted a prescriptive right of easement, when imperatively enjoined the learned First Appellate Court to concur with the verdict recorded by the learned trial Court, it on the score of (a) Ex.PW3/A not standing supported by any demarcation report and (b) no reflection in the relevant tatima in personification of the measurement of the path, interfered with the verdict pronounced by the learned trial Court. However, the aforesaid verdict recorded by the learned First Appellate Court on anvil of the hereinabove assigned reasons holds no weight, significantly, when there occurs no dispute inter se the litigating parties qua one encroaching upon the land of the other, whereupon there was hence no enjoined necessity for the learned First Appellate Court to insist qua preceding the preparation of Ex.PW3/A a demarcation standing conducted of the relevant spot, more so, when the width of the path delineated therein stood also acquiesced by the defendants' witnesses. Also with the suit land standing reflected in the apposite revenue record to be abadi deh land whereon save and except the constructed portion, clinching evidence stands embodied in Ex.PW3/A and Ex.PW4/A besides acquiesced by the defendants' witnesses qua a path holding a width of 1 ½ feet existing thereon whereupon the portrayals occurring therein warranted acceptance as tenably done by the learned trial Court rather than theirs standing discountenanced as untenably pronounced in the impugned verdict recorded by the learned First Appellate Court.

10. The above discussion unfolds the fact that the conclusions as stand arrived at by the learned first Appellate Court standing not based upon a proper and mature appreciation of evidence on record. While rendering the apposite findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the plaintiff/appellant and against the defendants/respondents.

11. In view of above discussion, the present Regular Second Appeal is allowed and the judgement and decree rendered by the learned Additional District Judge, Mandi on 22.8.2012 in Civil Appeal No.77 of 2012 is set aside. In sequel, the judgment and decree rendered by the

learned Civil Judge (Senior Devision), Jogindernagar, District Mandi, H.P. on 9.9.2011 in Civil Suit No. 77 of 2005 is affirmed and maintained. Consequently, the suit of the plaintiff is decreed and the defendants are restrained from causing any obstructions or hindrance through themselves or their family members, agents and servants qua the user of the path holding width of 1 ½ feet, shown in Ex.PW3/A and Ex.PW4/A, by the plaintiff which is situated over abadi deh land in Mohal Ahju/10, Tehsil Jogindernagar, District Mandi, H.P. Decree sheet be prepared accordingly. All pending application(s) also stand disposed of. Records be sent back forthwith.

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

Chaudhari Ram since died through LRs ..Appellant/plaintiff.

Versus

Nathu Ram and another. ..Respondents/defendants.

RSA No. 244 of 2006
Reserved on : 1/11/2016
Date of decision: 11/11/2016

Specific Relief Act, 1963- Section 38- Plaintiff was owner in possession of the suit land- land was given to defendant No.1 on payment of rent of Rs.1 per annum- the defendant No.1 constructed a house on the suit land – the lease was terminated and an agreement was executed- plaintiff paid Rs.300/- to defendant No.1, defendant No.1 removed the material of the house from the suit land and shifted to Village B- the defendant No.1 sold the suit land in favour of defendant No.2 and defendant No.2 is threatening to interfere in the possession of the plaintiff- the suit was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held in second appeal that plaintiff has admitted that construction raised by him was demolished – the document required registration and could not be looked into in absence of the registration – khasragirdawari was not produced – plea of adverse possession was also not established- the suit was rightly dismissed by the Trial Court- appeal dismissed. (Para-7 to 10)

For the appellant: Mr. Janesh Gupta, Advocate.
For the respondent: Mr. Anil Kumar God, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned Additional District Judge, Ghumarwin, District Bilaspur, H.P., whereby he affirmed the rendition of the learned Senior Sub Judge, Bilaspur, District Bilaspur, Himachal Pradesh, Camp at Ghumarwin. The plaintiffs standing aggrieved by the concurrently recorded renditions of both the learned Courts below, concert through the instant appeal constituted before this Court, to beget reversal of the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiff was the owner in possession of land measuring 0-2 biswas, bearing Khasra No. 95, situated in village Lethwin. In the year Sambat 2010 B.K the suit land was given on lease to defendant No.1 on payment of rent of Rs.1/- per annum. The defendant No.1 had constructed a house on the suit land. Lateron the lease was terminated in the year Sambat 2025 B.K. when the defendant No.1 executed an agreement and the plaintiff paid Rs.300/- to defendant No.1. The defendant No.1 had removed the material of house from the suit land and he permanently shifted to his native village Barota. Thus, the suit land had been coming in possession of the plaintiff since Sambat 2025 B.K. But the defendant No.1 had illegally sold the suit land vide sale deed

dated 18.08.1994 in favour of defendant No.2. The defendant No.2 had threatened to interfere with possession of plaintiff and to raise construction on the suit land. Hence, the suit.

3. The suit was contested by defendants. They filed written statement, wherein they raised preliminary objections about maintainability of the suit and cause of action. On merits of the case, the defendants refuted entire case of the plaintiff. They further alleged that possession was not handed over to plaintiff nor any agreement was executed by defendant No.1 in favour of defendant No.2. The defendants refuted entire case of the plaintiff and they prayed for dismissal of the suit.

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

> 1. Whether the plaintiff is entitled for relief of declaration and permanent prohibitory injunction, as prayed for? OPP.
>
> 2. Whether in the alternative the plaintiff is entitled for possession? OPP.
>
> 3. Whether the plaintiff is owner in possession of the suit land by virtue of adverse possession? OPP.
>
> 4. Whether the plaintiff has no cause of action? OPD.
>
> 5. Whether the suit is not maintainable in the present form? OPD.
>
> 6. Relief.

5. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff besides the learned Additional District Judge, affirmed the findings of the learned trial Court.

6. Now the plaintiffs/appellants herein has instituted before this Court the instant Regular Second Appeal wherein they assail the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 8.5.2007, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

> "1. Whether both the Courts below have acted beyond their jurisdiction in applying the provisions of H.P. Tenancy and Land Reforms Act to the land which was Abadi and by no stretch of imagination was covered by provision of the said Act, to hold defendant No.1 to declare defendant No.1 to be non occupancy tenancy having acquired proprietary rights?
>
> 7. Whether both the Courts below have committed grave illegality and irregularity in misreading Ext.P1 the mutation which was not attested by a competent officer? Have not both the Courts below exceeded their jurisdiction in relying upon Ext.P1 which was illegal null and void and did not confor any provision of law and rule of procedure?
>
> 8. Whether both the Courts below have committed grave illegality in ignoring from consideration the material document Ext.PW-2/A by wrongly invoking the provisions of registration Act by holding that the document is inadmissible for want of registration, when no such objection regarding admissibility was raised during the course of the trial and when the said document was admitted in evidence?
>
> 9. Whether the lower Appellate Court has committed grave illegality and irregularity in rejecting the application filed by the plaintiff appellant for amendment of the plaint?
>
> 10. Whether both the Courts below have acted with material illegality and irregularity in presuming the title in favour of the defendant No.1 thereby holding defendant No.2 to be owner by misreading the pleadings and evidence?
>
> 11. Whether both the Courts below have acted in excess of their jurisdiction in dismissing the suit of the plaintiff to be non maintainable without properly

considering the alternative plea raised by the plaintiff for recovery of possession and mis-construing and misunderstanding the plea of perfection of the title raised by the plaintiff."

Substantial questions of law.

7. In the plaintiffs' concert to obtain qua the suit land a decree of permanent prohibitory injunction from the Civil Court for thereupon the defendants standing restrained from interfering with their possession qua it, it was imperatively incumbent upon them to by clinching evidence substantiate the trite factum qua theirs extantly holding possession of the suit land. The deceased sole plaintiff in the endeavour aforesaid had relied upon Ext.PW-2/A whereunder he espuoused qua his obtaining possession of the suit land whereon he raised a construction. However, in his plaint he acquiesces qua the construction raised by him on the suit land standing demolished whereafter his cultivating it. The impact if any of Ext.PW-2/A for clinching the factum of the plaintiffs in pursuance thereto holding possession of the suit land stands effaced by the factum of its holding a recital therein qua a sum of Rs.300/- passing as consideration from the plaintiff to defendant No.1 whereupon under the provisions of Section 17 of the Indian Registration Act its registration was compulsory whereas it remained unregistered, obviously thereupon no bestowment of title qua the suit land ensued vis.a.vis the deceased sole plaintiff. Apparently hence the gravamen of the deceased sole plaintiffs' concert to thereupon assert qua his holding possession of the suit land gets belittled besides scuttled.

8. Be that as it may, the counsel for the plaintiff relies upon Ext.P-1 wherewithin reflections are held qua the plaintiff holding possession of the suit land, described therein as 'Gair Mumkin Abadi', for making an espousal herebefore of his holding possession of the suit land. True it is of the apposite reflections aforesaid held in Ext.P-1 do carry a presumption of truth, presumption whereof carried by them unless belittled by cogent evidence would acquire conclusivity whereupon hence the plaintiff would succeed in establishing his holding possession of the suit land. However, even if no cogent evidence in rebutting the reflections held therewithin stands adduced by the defendants yet the efficacy of the reflections held therewithin stand denuded given the plaintiff acquiescing in his pleadings qua the aforesaid structure raised by him on the suit land standing demolished whereafter he espouses qua his cultivating the suit land. In sequel, it was imperative for the deceased sole plaintiff to adduce efficacious evidence in portrayal thereof. The deceased sole plaintiff has omitted to adduce the relevant best evidence comprised in the apposite reflections borne on Khasra Girdawaris whereas with defendant No.1 executing qua the suit land a registered deed of conveyance comprised in Ext.DW-1/A with defendant No.2, in sequel whereof mutation comprised in Ext.DA stood attested, pronounces upon the factum of the defendant No.2 holding possession of the suit land. The aforesaid pronouncements emerging from the exhibits aforesaid were enjoined to be subjected to an assault thereon standing constituted by the deceased sole plaintiff yet he omitted to mount an assault qua the efficacy borne by the relevant pronouncements occurring in Ext.DW-1/A and Ext.DA. The effect of his omitting to constitute an assault upon the efficacy of Ext.DW-1/A besides of Ext.DA unveils an inference of his acquiescing to the relevant manifestations which occur therewithin in display of defendant No.2 extantly holding possession of the suit land wherefrom it is apt to conclude of his pretextually canvassing qua his holding possession of the suit land.

9. The deceased sole plaintiff had canvassed qua his perfecting his title qua the suit land by way of adverse possession. However, the aforesaid plea stands propounded by a catena of judicial verdicts to be unavailable for its standing canvassed by the plaintiff also judicial verdicts expostulate qua the aforesaid plea being unavailable for its standing raised in the affirmative by the plaintiff contrarily it being available for its standing reared in-repudiation to the apposite assertions espoused by the deceased sole plaintiff. In aftermath, the ensuing apt conclusion is of the deceased sole plaintiff standing disabled to raise the aforesaid plea besides hence merit if any in the aforesaid plea gets benumbed by the factum, for reasons aforesaid his acquiescing to defendant No.2 extantly holding possession of the suit land.

10. For reasons aforesaid this Court concludes with aplomb of the judgements and decrees of both the Courts below standing sequelled by theirs appraising the entire evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of material on record by the learned Courts below not suffering from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather they have aptly appreciated the material available on record. I find no merit in this appeal, which is accordingly dismissed and the concurrently recorded judgments and decrees of both the Courts below are maintained and affirmed. Substantial questions of law stand answered against the plaintiff. Decree sheet be prepared accordingly. All pending applications stand disposed of accordingly. No costs.

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

Chhabi Ram since deceased through LRs ..Appellant/defendant-1
Versus
Smt. Narudhma Devi and others ..Respondents.

RSA No.598 of 2009
Reserved on : 28.10.2016
Date of decision: 11/11/2016

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit pleading that D had not executed any Will and the Will propounded by defendant No. 1 is a forged document – the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that execution of the Will was proved by marginal witnesses and the scribe – the Will was duly registered and was read over and explained to the deceased – testimonies of the witnesses were not shaken in the cross-examination – Sub Registrar proved the endorsement – Courts had wrongly discarded the Will – appeal allowed- judgments of Courts set aside.(Para-7 to 11)

For the appellant: Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate.
For the respondents: Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree recorded by the learned District Judge, Mandi, H.P., whereby he affirmed the rendition of the learned Civil Judge, (Jr. Division), Court No.3, Mandi, District Mandi. The defendant Chabbi Ram standing aggrieved by the concurrently recorded renditions against him by both the learned Courts below concerts through the instant appeal constituted before this Court, to beget reversal of the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision in the instant appeal are that plaintiff filed a suit for declaration and permanent injunction against the defendants with the allegations that Shri Dile Ram, husband of the plaintiff and father of defendants was owner in possession of the land comprising Khata Khatauni No. 24/26, measuring 14-19-1 bighas situate at Mauja Dhar, Tehsil Sadar, District Mandi, H.P. Dile Ram was residing and being looked after by the plaintiff as well as the daughters. The defendant No.1 was not having good relations with the plaintiff and her husband and was residing separately for the last 30 years. The defendant No.1 never rendered any assistance to Shri Dile Ram. Dile Ram did not execute will in favour of defendant No.1. Dile Ram was suffering from senile dementia and was not in sound disposing state of mind. The will was fake document manufactured under suspicious circumstances without making provisions for the maintenance of the plaintiff. The defendant No.1 got the

mutation of the estate of Dile Ram attested in his favour on the basis of Will without notice to the plaintiff and proforma defendants and the same was illegal, null and void. The plaintiff and proforma defendants were in possession of the suit land and were entitled to inherit the property. The defendant was attempting to dispossess the plaintiff and proforma defendants from the suit land. So, the plaintiff has filed suit for declaration that the plaintiff and proforma defendants being widow and daughters had succeeded to the suit land and the Will and mutation in favour of defendant was wrong, illegal, null and void, alongwith a decree for permanent injunction restraining the defendant from causing interference in the possession of the plaintiff over the suit land.

3. The defendant contested the suit and rasied preliminary objections about maintainability, locus standi, cause of action and estoppel. On merits the defendant averred that the defendant was residing jointly with the plaintiff and his father and helping them. The defendant was unemployed Matriculate and the father of defendant to get government service deliberately got the family of the defendant recorded separately in the Parivar register. The defendant used to pay the electricity bills. Dile Ram had executed a valid will in sound disposing mind in favour of the defendant. The last rites of Sh. Dile Ram were also performed by the defendant. The defendant was in possession of the suit land. The mutation has also been attested in favour of defendant. The plaintiff has filed the suit on the provocation of proforma defendants No. 2 and 3. The proforma defendants admitted the case of the plaintiff.

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

1. Whether the Will dated 26.5.2003 is the result of fraud and is a fake document as alleged? OPP.

2. Whether the plaintiff is in physical possession of the suit land? OPP.

3. Whether the deceased Dile Ram has executed a valid Will in favour of defendant No.1.

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

5. Whether the plaintiff has no locus standing to file the present suit? OPD.

6. Whether no enforceable cause of action has accrued to the plaintiff? OPD.

7. Whether the plaintiff is estopped by the own act and conduct to file the suit? OPD.

8. Relief.

5 On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the defendants.

6. Now the defendant has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 17.05.2010, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

> "Whether the findings of the learned trial Court as well as first Appellate Court are result of complete misreading and misinterpretation of the evidence and material on record and against the settled position of law?

<u>Substantial question of law.</u>

7. Under Ext.DW-5/A embodying therein a registered testamentary disposition of deceased testator, the latter alienated the suit property qua the defendant Chhabi Ram. However, both the Courts below concurrently concluded of DW-5/A not standing proven to be validly and duly executed. The conclusion aforesaid concurrently recorded by both the Courts below stood anchored upon the factum of a marginal witness thereto while testifying as DW-6 not

therein making any communication in tandem with the apposite statutory parameters engrafted in Section 63 of the Indian Succession Act, tritely qua his seeing the deceased testator embossing his thumb impression thereon in his presence nor also his making any articulation therein qua his thereafter in the presence of deceased signaturing it.

8. True it is qua on a circumspect scanning of the testimony of DW-6, its omitting to unveil the aforesaid apposite communications. However, both the learned Courts below blunted the effect of Ext.DW-5/A after its execution occurring on 26.5.2003 at the Judicial Court Complex, Mandi, it on the same day standing carried to the office of the Sub Registrar concerned for its standing presented thereat for registration besides both the Courts below blunted the effect qua on its standing presented for registration before the Sub Registrar concerned the latter accepting it for registration pre-ponderantly also both the Courts below undermined the effect of a signatured endorsement occurring thereon holding unfoldments of the Sub Registrar concerned on reading over and explaining its contents to the deceased testator also on his thereupon drawing satisfaction qua the deceased testator comprehending them besides accepting the factum of occurrence of his thumb impressions thereon, his thereupon signaturing the apposite endorsement which occurs in Ext.DW-5/A. Both the Courts below also apparently had made short shrift of the factum of the deceased testator at the time contemporaneous to Ext.DW-5/A standing registered by the Sub Registrar concerned his embossing his thumb impression thereon. Moreover, the tenacity of the factum qua the marginal witnesses thereto also contemporaneous to Ext.DW-5/A standing registered signaturing it also visibly stands negated by both the Courts below.

9. Be that as it may, DW-6 has rendered a testimony qua the deceased testator at the time whereat Ext.DW-5/A stood registered his thereat in his presence embossing his thumb impressions thereon also in his testification he has voiced qua his thereat in the presence of the deceased testator thereat signaturing it. The veracity of the signatures of DW-2 occurring on the endorsements recorded by him in Ext.DW-5/A besides the authenticity of the portrayals held therein qua on the contents Ext.DW-5/A standing read over and explained by him to the deceased testator whereafter his comprehending them also his accepting his thumb impressions occurring thereon, all stand efficaciously testified by the Sub Registrar concerned. The aforesaid testification of DW-2 qua the factum aforesaid has remained unrebutted whereupon this Court is constrained to impute vigorous sanctity to his signatures occurring on the relevant endorsements manifested in DW-2/A besides obviously this Court stands prodded to likewise impute sanctity to the recitals of the relevant signatured endorsements. The testification of a marginal witness to Ext.DW-5/A also the testification of the Sub Registrar concerned acquire a paramount virtue of truth inference whereof stands fostered by their relevant testifications qua the factum probandum deposed by them remaining un-shattered during the course of a rigorous cross-examination to which they stood subjected to. Also the counsel for the plaintiff while holding the aforesaid to cross-examination omitted to unearth any elicitation therefrom manifestive of the thumb impression of the deceased testator occurring thereon being fictitious or their signatures occurring thereon likewise being fictitious. Want of cross-examination of the aforesaid witnesses by the learned counsel for the plaintiff qua the aforesaid relevant facet erects an inference of the plaintiff acquiescing to the factum of the thumb impressions of the deceased testator occurring on Ext.DW-5/A standing not stained with any vice of fictitiousness also his acquiescing to the factum of the signatures of the marginal witnesses thereto not suffering from an alike taint. Thereupon it was insagacious for the learned trial Court to merely on DW-6 a marginal witness to Ext.DW-5/A omitting to depose in tandem with the apposite statutory mandate vis.a.vis its execution at the initial stage whereafter it stood registered whereat the apposite statutory mandate stands concurrently testified by DW-5 and DW-6 to beget satiation to conclude qua its thereupon not standing proven to be validly and duly executed.

10. Be that as it may, as aforestated the import besides efficacy of the testimony of the Sub Registrar besides the testimony of the marginal witness to Ext.DW-5/A who deposed as DW-6 stood disimputed credence by the concurrently recorded renditions of the Courts below merely for want of DW-6 not deposing stricto sensu in tandem with the apposite statutory

parameters enshrined in Section 63 of the Indian Succession Act, tritely qua the deceased testator embossing in his presence his thumb impressions on Ext.DW-5/A also his not testifying qua his in the presence of the deceased testator signaturing it. Any emphasizes by the learned Courts below upon statutory satiation standing lent by the testification of a marginal witness thereto, who testified as DW-6 for thereupon Ext.DW-5/A standing concluded to be proven to be validly and duly executed is for reasons ascribed hereinafter unwarranted (a) the plaintiff for reasons aforestated acquiescing to the factum of the relevant signatures occurring thereon holding a virtue of truth. (b) With DW-6 testifying qua at the time contemporaneous to Ext.DW-5/A standing registered the deceased testator in his presence embossing thereon his thumb impressions whereafter he similarly in the presence of the deceased testator signatured it, testification whereof when remains uneroded subsumes the effect of the earlier part of his testification pertaining to an era whereat it remained unregistered wherein he has omitted to make a pronouncement in tandem with the apposite statutory parameters, omission whereof begot an inapt sequel from both the Courts below qua hence Ext.DW-5/A not standing proven to be validly and duly executed. In making an inapt inference both the learned Courts below remained grossly mindful only to the trite factum qua thereupon though it constituting a stage earlier to the acceptance of Ext.DW-5/A for registration by the Sub Registrar concerned qua hence the relevant testamentary disposition standing unproven by the relevant testification of a marginal witness thereto qua its standing validly and duly executed by the deceased testator nonetheless the factum of Ext.DW-5/A not thereat i.e. prior to its registration standing proven to validly and duly executed stood overridden by its subsequently standing presented for registration by deceased testator Dile Ram whereat the imperative statutory compliances qua the mandate of Section 63 of the Indian Succession Act stood begotten. Both the learned Courts below in relegating to the realm of oblivion the factum of accomplishment qua the apposite statutory parameters standing begotten at the stage contemporaneous to the registration of Ext.DW-5/A rather theirs contrarily emphasizing upon the testimony of DW-6 rendered qua the occurrence of execution of Ex. DW-5/A at a stage prior to its registration whereon the apposite statutory parameters stood not accomplished whereupon they concluded qua its not standing proven to be validly and duly executed, hence naturally besides visibly misdirected themselves in law. (c) It is a settled proposition of law mandated in Theresa vs. Francis, AIR 1921 Bombay 156 besides in Smt. Asharfi Devi vs. Tirlok Chand and others, AIR 1965 Punjab 140 qua the relevant signatured endorsement occurring in the relevant registered testamentary disposition unveiling therein qua on its contents standing read over and explained to the deceased testator by the Sub Registrar concerned whereafter he on comprehending its recitals besides accepting the occurrence thereon of his signatures mark/thumb impression besides with the Sub Registrar concerned emphatically deposing in tandem thereof, testification whereof remaining unshred also with a marginal witness thereto deposing qua at the stage contemporaneous to the registration of the relevant testamentary disposition of the deceased testator the latter embossing his thumb impressions thereon in his presence whereafter he thereat in the presence of the deceased testator signatured it hence lending corroborative succor to the testification of the Sub Registrar concerned whereupon the latter is construable to be an attesting witness to Ext.DW-5/A. The natural corollary thereof is of though the testimony of DW-6 apposite to the stage contemporaneous to the registration of Ext.DW-5/A is in absolute concurrence with mandate of Section 63 of the Indian Succession Act yet infirmity if any gripping it gets scuttled in the evident face of this Court concluding qua the testimony of the Sub Registrar concerned who testified as DW-6 holding a pedestal alike a marginal witness thereto besides his being construable to be an attesting witness qua Ext. DW-5/A. Herebefore significantly the testification also of a marginal witness to Ext.DW-5/A for the aforesaid reasons preeminently rests the factum of his proving Ext.DW-5/A to be validly and duly executed dehors assumingly the Sub Registrar concerned being not construable to be a marginal witness to Ext.DW-5/A. For all the reasons aforesaid a firm inference is galvanized qua Ext.DW-5/A standing proven to be validly and duly executed. The counsel for the plaintiff has contended of with an endorsement occurring in Ext.PW-2/A disclosing qua Ext.DW-5/A standing accepted as a sale deed renders vulnerable to suspicion the other embodiments recorded therein. However, the mere factum of a signatured recital occurring

in Ext.PW-2/B portraying qua its being a sale deed would not erode the efficacy of the testification of DW-6 besides of the Sub Registrar concerned qua it holding embodiments of a testamentary disposition of the deceased testator, also the aforesaid construction on anvil of Ext.PW-2/A would be untenable given the recitals in Ext.DW-5/A holding loud portrayals qua it being a testamentary disposition of the deceased testator.

11. The result of the above discussion is that the appeal preferred by the defendant/appellant herein is allowed and the substantial question of law is answered against the plaintiff. The judgements and decrees rendered by the both the Courts below are set aside. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of accordingly. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Daulat Ram ….. Appellant

Versus

Krishan Lal and others ….. Respondents

FAO No.257 of 2012
Date of decision: 11.11.2016

Motor Vehicles Act, 1988- Section 166- MACT dismissed the petition on the ground that rashness and negligence were not proved – held, that the rashness and negligence were not specifically denied by the respondents – witnesses consistently stated that accident was the outcome of rash and negligent driving of the driver – rapat was proved on record – merely because FIR was not lodged cannot lead to the dismissal of the petition- MACT should not succumb to the niceties and hyper technicalities of law – the driver had a valid licence at the time of accident – the vehicle had all the documents and there was no breach of terms and conditions of the policy- claimant had sustained 15% disability – Rs.35,000/- awarded under the head pain and suffering – Rs.35,000/- awarded under the head loss of amenities of life – Rs.5,000/- awarded under the head attendant charges- Rs.10,000/- awarded under the head future medical treatment- Rs.30,000/- awarded under the head medical expenses – Rs.5,000/- awarded under the head special diet. (Para- 5 to 23)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646.
Savita vs. Bindar Singh & others, 2014 AIR SCW 2053
Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627

For the appellant: Mr.Tara Singh Chauhan, Advocate.
For the respondents: Mr.Malay Kaushal, Advocate, for respondents No.1 and 2.
Mr.O.P. Negi, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 20th May, 2011, passed by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P., (for short, "the Tribunal") in Claim Petition No.74 of 2006, titled Daulat Ram vs. Krishan Lal and others, whereby the claim petition came to be dismissed, (for short the "impugned award").

2. Facts of the case, in brief, are that on 11.6.2004, at about 9.30 a.m., the claimant was going to Dharamshala from Bilaspur in Maruti Car bearing No.HP-24A-1048. When

the said car reached near Damri in District Hamirpur, a truck bearing No.HP-23A-1470, being driven by driver Amar Singh rashly and negligently, hit the Maruti Car in which the claimant was traveling, resulting into injuries to the claimant in his right leg and multiple injuries on the whole body, was taken to Zonal Hospital, Hamirpur, fromwhere was referred to IGMC, Shimla where he remained admitted as indoor patient. Hence, the claim petition for compensation to the tune of Rs.8.00 lacs, as per the break-ups given therein.

3. The claim petition was resisted by the respondents and following issues were framed:

"1. Whether the injuries sustained by the petitioner on 11.6.2004 at about 1.30 P.M. near Vill. Damri, Distt. Hamirpur, H.P. were due to rash and negligent driving of Truck No.HP-23A-1470 by respondent No.2, as alleged, if so, its effect? OPP

2. If issue N.1 supra is proved in affirmative, whether the petitioner is entitled to compensation, if so, to what extent and from whom? OPP

3. Whether the present claim petition is bad for non-joinder and mis-joinder of necessary parties, as alleged? OPRs.

4. Whether the offending vehicle was being driven by its driver without valid and effective driving licence as alleged? OPR-3

5. Whether the offending vehicle was being driven without valid documents i.e. registration certificate, fitness certificate, route permit, as alleged? OPR-3.

6. Whether accident took place as a result of contributory negligence of petitioner and respondent No.2 as alleged? OPR-3

7. Relief."

4. In order to prove his claim, the claimant stepped into the witness box as PW-1 and also examined three other witnesses, namely, Dr.M.I. Ahmad as PW-2, Hari Chand as PW-3, and Amar Nath as PW-4. On the other hand, driver of the offending truck appeared as RW-1. Respondents also examined RW-2 Naresh Kumar and RW-3 Usha.

5. The Tribunal, after scanning the evidence, held that the claimant has failed to prove that the accident was the outcome of rash and negligent driving of the driver Amar Singh, which findings, factually and legally, are incorrect and wrong for the following reasons.

6. The claimant has specifically pleaded in the claim petition that the driver of the offending truck, namely, Amar Singh, had driven the offending truck rashly and negligently on the fateful date, and had caused the accident in which the claimant sustained injuries. The respondents have not specifically denied the said averment made by the claimant. All the witnesses examined by the claimant have stated that the accident was the outcome of rash and negligent driving of the driver of the offending truck. Rapat dated 11th June, 2004, was entered in Police Station, Hamirpur and has been proved on record as Ext.RW-2/A by Head Constable Naresh Kumar, who appeared as RW-2. He has admitted that the rapat Ext.RW-2/A was recorded at the instance of the claimant and one other person.

7. In the given circumstances, the lodging of FIR is immaterial and cannot be a ground to dismiss a claim petition.

8. The findings recorded by the Tribunal are erroneous and against the concept of granting compensation. The Tribunal, while dismissing the claim petition, seems to have applied the standard of proof required in criminal proceedings, which is against the spirit of awarding compensation in accident cases. The Tribunal has to keep in mind that the victims of a vehicular accident have to establish prima facie that the injury or the death was due to the rash and negligent driving of a motor vehicle.

9. It is beaten law of the land that the Courts, while determining the cases of compensation in vehicular accidents, must not succumb to the niceties and hyper technicalities of law. It is also well established principle of law that negligence in vehicular accident cases has

to be decided on the hallmark of preponderance of probabilities and not on the basis of proof beyond reasonable doubt. Furthermore, the claimants claiming compensation in terms of Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), is not to be seen as an adversial litigation, but is to be determined while keeping in view the aim and object of granting compensation.

10. My this view is fortified by the judgment of the Apex Court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646***.

11. The Apex Court in **Savita vs. Bindar Singh & others, 2014 AIR SCW 2053,** has held that at the time of fixing compensation, courts should not succumb to niceties or technicalities of law. It is apt to reproduce paragraph 6 of the said decision hereunder:

> *"6. After considering the decisions of this Court in Santosh Devi (Supra) as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."*

12. A reference may also be made to the decision of the Apex Court in **Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627,** in which, in paragraph 12, it was observed that the courts, while deciding claim petitions, must keep in mind that the right of the claimants is not defeated on technical grounds. Relevant portion of paragraph 12 of the said decision is reproduced hereunder:

> *"12. .... While interpreting the contract of insurance, the Tribunal and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."*

13. This Court also, in the recent past, in series of judgments, has followed the similar principle and held that granting of compensation is just to ameliorate the sufferings of the victims and compensation is to be granted without succumbing to the niceties of law, hyper-technicalities and procedural wrangles and tangles.

14. Having said so, I am of the considered view that the Tribunal has fallen in an error in holding that the claimant has failed to prove that the accident was the outcome of rash and negligent driving of the driver of the offending truck. Accordingly, the findings returned by

the Tribunal on issue No.1 are set aside, and it is held that the accident was the outcome of rash and negligent driving of the driver of the offending truck, namely, Amar Singh.

15. Before issue No.2 is determined, I deem it proper to decide issues No.3 to 6 at the first instance.

16. Onus to prove issue No.3 was on the respondents, have not led any evidence to prove the same. However, I have gone through the claim petition. The respondents have failed to show how the claim petition was not maintainable due to non-joinder and mis-joinder of necessary parties. The Tribunal has rightly decided the said issue against the respondents and the said findings are accordingly upheld.

17. In order to prove Issue No.4, the insurer was to plead and prove that the driver of the offending truck, namely, Amar Singh, was not having a valid and effective driving licence, has not led any evidence. However, I have gone through the pleadings and the record. Copy of the driving licence has been proved on record as Ext.RA, a perusal whereof does disclose that the driver of the offending truck had valid and effective driving licence at the time of accident. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

18. As far as issue No.5 is concerned, it is for the insurer to plead and prove, by leading evidence, that the owner of the offending vehicle had committed willful breach, has not led any evidence. In the absence of any evidence having been led by the insurer, the Tribunal has decided this issue against the insurer and the insurer has not challenged the said findings, either by way of appeal or cross objections. Thus, the said findings recorded by the Tribunal have attained finality. Notwithstanding that, I have gone through the record. Smt.Usha, Clerk from the office of RTO, Bilaspur has been examined as RW-3, who has stated that the offending truck was having all documents at the time of accident. Having said so, the findings returned by the Tribunal on issue No.5 are also upheld.

19. Issue No.6 pertains qua contributory negligence of the claimant and the driver of the offending truck, namely, Amar Singh. The insurer has pleaded in its reply that the accident was the outcome of contributory negligence. The Tribunal has recorded the findings that the accident was not the outcome of rash and negligent driving of the driver of the offending truck, which findings have been set aside by this Court while discussing issue No.1 supra and it has been held that the accident was the outcome of rash and negligent driving of the driver of the offending truck. Accordingly, this issue is governed by the findings returned on issue No.1 and is accordingly, decided against the insurer.

Issue No.2.

20. Now the question is, to what amount of compensation the claimant is entitled to. Due to the accident, the claimant sustained fracture on his leg and injuries on his body, was firstly taken to Zonal Hospital, Hamirpur wherefrom was referred to Indira Gandhi Medical College, Shimla remained admitted there till 23rd June, 2004. Discharge slips are placed on record as Exts.PW-1/A and PW-1/B. The claimant suffered 15% permanent disability, as per disability certificate Ext.PW-2/A. PW-2 Dr.M.I. Ahmad has stated that due to the injury sustained by the claimant, he would face difficulty in sitting on the ground and going upstairs/downstairs. In cross examination, this witness has admitted that the disability is in regard to the lower limb and not qua whole body.

21. The claimant has not placed on record anything about the amount he spent for the purchase of medicines etc. Thus, keeping in view the facts of the case, the injury sustained and the disability suffered, I deem it proper to award a sum of Rs.1,30,000/- in favour of the claimant, under the following heads:

Sl.No.	***Heads***	***Amount***
1.	*Pain and sufferings*	*Rs.35,000/-*

2.	*Loss of amenities of life*	*Rs.35,000/-*
3.	*Attendant charges*	*Rs.5,000/-*
4.	*Transportation charges*	*Rs.10,,000/-*
5.	*Future medical treatment*	*Rs.10,000/-*
6.	*Medical expenses incurred*	*Rs.30,000/-*
7.	*Special diet*	*Rs.5,000/-*
	Total	**Rs.1,30,000/-**

22. The amount of compensation shall carry interest at the rate of 7.5% per annum from the date of impugned award till deposit.

23. The factum of insurance is admitted. Therefore, the insurer is saddled with the liability. The insurer is directed to deposit the entire amount alongwith interest within eight weeks from today and on deposit, the same be released in favour of the claimant forthwith through bank account.

24. The appeal is allowed and stands disposed of accordingly.

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

Mukesh Kumar ….Petitioner.
Versus
State of Himachal Pradesh … Respondent.

Cr.R. No. 142 of 2010.
Reserved on: 02.11.2016.
Decided on: 11.11.2016.

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a scooter in a rash and negligent manner- scooter hit L causing her death - accused was tried and acquitted by the trial Court- an appeal was preferred, which was allowed and accused was convicted – aggrieved from the order, the present revision has been filed-held in revision that Court can interfere in exercise of revisional power only if the findings are perverse, untenable in law, grossly erroneous, glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously – the deceased was aged 80 years and was hard of hearing – the statement of the informant was contradictory - the place of accident was almost mid way between the side of the road and centre of the road, which shows that deceased was walking on the main road- the place of accident was a national highway, which was frequented by many vehicles – the conclusion of the trial Court that prosecution version was not proved beyond reasonable doubt was a reasonable conclusion and should not have been set aside merely because another view was possible- revision allowed and judgment of Appellate Court set aside. (Para- 9 to 13)

Cases referred:

Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123

Mohammed Ankoos and Others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94

For the petitioner. : Mr. Satyen Vaidya, Senior Advocate, wit Mr. Vivek Sharma, Advocate.
For the respondent :Ms. Parul Negi, Dy. A.G.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way this revision petition, petitioner has challenged the judgment passed by the Court of learned Presiding Officer, Fast Track Court, Mandi, District Mandi, in Criminal Appeal No. 56 of 2008, dated 14.06.2010, vide which learned Appellate Court, while accepting the appeal filed by the State, set aside the judgment of acquittal passed in favour of the petitioner by the Court of learned Additional Chief Judicial Magistrate, Court No. 1, Sundernagar, in Police Challan No. 379-I/2004, dated 18.06.2008 and convicted the petitioner for commission of offences punishable under Sections 279, 304-A of Indian Penal Code (hereinafter referred to as IPC) and Section 187 of the Motor Vehicle Act (hereinafter referred to as M.V.Act) and sentenced him to undergo simple imprisonment for a period of three months and to pay a fine of Rs. 1,000/- for commission of offence punishable under Section 279 of IPC, simple imprisonment for a period of eighteen months and to pay a fine of Rs. 5,000/- for commission of offence punishable under Section 304-A of IPC and simple imprisonment for a period of one month and to pay a fine of Rs. 500/- for commission of offence punishable under Section 187 of M.V.Act. All the sentences were ordered to run concurrently.

2. The case of the prosecution was that on 30.08.2003, at around 4:15 p.m., accused was driving Scooter bearing No. PB-10Z-3934 in a rash a negligent manner on National Highway-21 resulting in an accident and the death of Smt. Larju Devi at village Bhour after which the accused fled away from the spot. As per prosecution, on the fateful day, complainant Ram Pyari and her mother-in-law Smt. Larju Devi were on their way back home after attending the 'Kirtan' and while walking on the roadside, Smt. Larju Devi was hit by Scooter bearing No. PB-10Z-3934 being driven by accused in a rash and negligent manner which caused fatal injury to her. It was further the case of the prosecution that after causing the accident, accused fled away from the spot leaving Smt. Larju Devi bleeding to death. Information regarding accident was conveyed at police station Sundernagar through police station Balh, on which police party headed by HC Pushap Raj alongwith HC Karam Singh No. 5, Constable Baldev Lal No. 226 and Constable Ram Lal No. 142 reached the accident site at village Bhour where complainant Ram Pyari get recorded her statement under Section 154 of Code of Criminal Procedure (for short 'Cr.P.C.'), on the basis of said statement of complainant, FIR No. 217/03 dated 30.08.2003 was registered against the accused for the commission of offences punishable under Sections 279 and 304-A of IPC at police station Sundernagar. The body of the deceased was sent for postmortem by the police. During the course of investigation, the offending Scooter was seized alongwith documents of the same. The scooter was subjected to mechanical examination and report of the mechanic who examined the same mechanically was also obtained, as per which, there was no mechanical fault in the Scooter. Photographs of the accident site were taken, spot map was prepared and statements of witnesses under Section 161 of Cr.P.C were recorded by the Investigator. Investigation revealed that death of Smt. Larju Devi took place on account of rash and negligent driving of the accused, who was driving his aforementioned Scooter on aforesaid date, time and place on National Highway No. 21. After the completion of investigation, challan was filed in the court and notice of accusation was put to the accused for commission of offences punishable under Sections 279 and 304-A of IPC and Sections 187 and 196 of M.V. Act, to which he pleaded not guilty and claimed trial.

3. On the basis of evidence led by the prosecution both ocular as well as documentary, learned trial Court held that prosecution had failed to prove that the accused had committed offences punishable under Sections 279 and 304-A of IPC and Sections 187 and 196 of M.V. Act beyond reasonable doubt and on these bases, learned trial Court acquitted the accused by giving him benefit of doubt. While arriving at the said conclusion, it was held by the learned trial Court that the factum of death of the Smt. Larju Devi on 30.08.2013, at about 4:15 p.m. at village Bhour on National Highway No. 21 was not in dispute. It also took note of the fact that in his statement under Section 313 of Cr.P.C, accused had admitted that he was driving the

said Scooter. It was further held by the learned trial Court that the point for consideration which survived was as to whether the death of Larju Devi was the outcome of rash and negligent driving of the accused or not. Learned trial Court held that the FIR which was registered against the accused was on the basis of complaint of Smt. Ram Pyari recorded by the police under Section 154 of Cr.P.C. Ext. PW1/A. Learned trial Court further held that complainant Ram Pyari entered the witness box as PW1 and a perusal of her statement demonstrated that in fact she had not witnessed the accident since she was walking ahead of her mother-in-law when Smt. Larju Devi was hit by the Scooter. Learned trial Court further held that complainant as per her own admission did not saw the Scooter coming and hitting her mother-in-law. On these bases, it was held by the learned trial Court that as the accident took place behind the back of the complainant, her statement to the effect that the accident took place on account of rash and negligent driving of the accused becomes a highly improbable version. It further held that since complainant did not saw the accident taking place, therefore, under these circumstances, statement of the complainant to the effect that Scooter was being driven by the accused in a rash and negligent manner and in a high speed was unacceptable. Learned trial Court further held that PW2 Shri Thakru Ram who as per prosecution was an eyewitness also did not further the case of the prosecution since this witness had also admitted that he came to the spot after the Scooter had hit Smt. Larju Devi. It was further held by the learned trial Court that his statement did not clearly establish the manner in which the accident took place. On these bases, it was concluded by the learned trial Court that the statements of PW1 and PW2 did not prove that the accident in fact took place on account of rash and negligent driving on the part of the accused. Learned trial Court further held that besides this, there was no evidence whatsoever to clearly establish that the accused in fact had fled away from the spot after causing the accident. On these bases, learned trial Court acquitted the accused by holding that the prosecution has failed to prove its case against the accused beyond reasonable doubt.

4. In appeal, learned Appellate Court while setting aside the judgment of acquittal so passed by the learned trial Court held that it was not a fact in dispute that the accident took place and the deceased died on account of injuries which she suffered from the said accident. Learned Appellate Court further held that it was well settled law that test in accident cases was that whether accident could have been avoided by the respondent if he had exercised diligence which ordinarily a cautious person using the road in similar circumstances would have exercised. It further held that the question whether certain act is rash or negligent cannot be answered in the abstract and it must depend upon the time, place and nature of the road. Learned Appellate Court further held that spot map Ext. PW7/D demonstrated that the road where accident took place was 22 feet wide and the same was a straight road and there was enough space on the right side of the accused and accused could have easily seen the deceased, who was going ahead of him on the road as it was broad day light. Learned Appellate Court further held that in these circumstances, accused could have avoided the accident by sewering his scooter to the right or by stopping it as a prudent driver. It further held that he could have at least sounded the horn and warned the deceased. By relying on the report of the mechanic, learned Appellate Court held that there was no mechanical defect in the vehicle and it appeared that there was no effort on the part of accused/respondent to avoid the accident. Learned Appellate Court further went on to hold that the testimonies of PW1 and PW2 clearly established that the accident occurred due to rash and negligent driving of the accused who also fled away from the spot after causing the accident and it was clear from the statements of these two witnesses that the deceased and the complainant were walking on the left side of the road and the Scooter being driven by the accused came from the back side and dashed against the deceased and dragged her on the road up to 8 to 10 feet. Learned Appellate Court further held that act of the respondent of hitting the deceased from the back and dragging her was nothing but an act of rash and negligent driving. It further held that statements of PW1 and PW2 who were eyewitnesses to the accident demonstrated that no suggestion was put to them that deceased suddenly appeared in front of the Scooter ridden by the accused nor this was so stated by the accused in his statement under Section 313 of Cr.P.C. On these bases, learned Appellate Court held that it was of the firm view that no two views were possible as from the evidence of PW1, PW2 and PW7, the only conclusion which could be drawn

was that the accident took place due to rash and negligent driving of the Scooter being driven by the accused. On these bases, learned Appellate Court set aside the judgment of acquittal passed by the learned trial Court and convicted the accused for commission of offences punishable under Sections 279, 304-A of IPC and Section 187 of M.V. Act.

5. Feeling aggrieved by the judgment so passed by the learned Appellate Court, the petitioner preferred the present appeal.

6. Mr. Satyen Vaidya, learned Senior Counsel appearing for the petitioner has argued that the judgment of conviction passed against the present petitioner by the learned Appellate Court is perverse and the findings returned by the learned Appellate Court were not only erroneous but were also not borne out from the records of the case. Mr. Vaidya further argued that in fact a perusal of the impugned judgment clearly and categorically demonstrated that the findings returned by the learned Appellate Court were not based on material on record but were based on conjectures and surmises and assumptions drawn by the learned Appellate Court. It was argued by Mr. Vaidya that the perversity with the judgment passed by the learned Appellate Court was that the said Court lost sight of the fact that in criminal matters, adjudication cannot be made on the basis of conjectures, surmises and assumptions, but the findings must be returned on the basis of material which is produced before the court concerned. It was further submitted by Mr. Vaidya that the conclusion arrived at by the learned Appellate Court that PW1 and PW2 were eyewitnesses to the accident was a totally perverse conclusion and was a result of complete misreading ad misconstruction of statements of these two witnesses. He further argued that even the spot map was totally mis-appreciated by the learned Appellate Court as learned Appellate Court lost sight of the fact that it was not as if the deceased was hit on the side of the road but she was hit in the road where even otherwise a pedestrian was not to ordinarily walk. It was further argued by Mr. Vaidya that the judgment passed by the learned trial Court was a well reasoned judgment and keeping in view the fact that there was a judgment of acquittal in favour of the petitioner, the learned Appellate Court should not have had interfered with the same in the peculiar facts of the case especially in view of the material which was placed before the Court by the prosecution. On these bases, it was urged by Mr. Vaidya that the judgment passed by the learned Appellate Court was not sustainable in law and the same be set aside and the petitioner be acquitted.

7. Ms. Parul Negi, learned Deputy Advocate General, on the other hand, argued that the judgment passed by the learned Appellate Court was neither perverse nor it could be said that the finding of guilt returned by the learned Appellate Court was not substantiated from the records of the case. Ms. Negi submitted that learned trial Court had erred in acquitting the accused as it stood established beyond reasonable doubt from the material which was placed on record by the prosecution that the accused was in fact guilty of offences for which he was charged. She further argued that learned Appellate Court had rightly concluded that it stood established from the record especially from the statement of PW1 and PW2 who were the eyewitnesses to the incident that the accident had taken place on account of rash and negligent driving of the accused. She further argued that the findings returned by the learned Appellate Court to the effect that accident was avoidable if he had exercised diligence which ordinarily a cautious person using the road in similar circumstances would have done was based on correct appreciation of evidence placed on record and same called for no interference. On these bases, it was urged by Ms. Negi that as there was no merit in the revision petitioner, the same be dismissed.

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

9. Before proceeding in the matter, it is relevant to take note of what is the scope of revisional jurisdiction of this Court. It is settled law that the scope of revisional jurisdiction of this Court does not extend to re-appreciation of evidence. It has been held by the Hon'ble Supreme Court that the High Court in exercise of its revisional power can interfere only if the findings of the Court whose decision is sought to be revised is shown to be perverse or untenable in law or is

grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously. It has been held by Hon'ble Supreme Court in ***Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123***, that unmerited and undeserved prosecution is an infringement of guarantee under Article 21 of the Constitution of India. In this case, Hon'ble Supreme Court has further held that the purpose of revision jurisdiction is to preserve the power in the Court to do justice in cases of criminal jurisprudence.

10. Coming to the facts of this case, a perusal of the statement of PW1 (complainant) demonstrates that she cannot be termed as an eyewitness because she has not seen the occurrence of the accident. It has come in the cross examination of PW1 Ram Pyari that the age of the deceased was about 80 years and she was somewhat hard of hearing. She has also admitted that when the accident took place she was walking ahead of her mother-in-law and she came to know about the accident only when she heard the noise. She stated in her cross examination that she did not saw the Scooter coming and hitting her mother-in-law. It has also come in her statement that she became unconscious after the accident and gained consciousness after 1 ½ hour. Her testimony also does not seems to be trustworthy as besides being closely related to the deceased, on the one hand, she stated that after the accident she became unconscious and gained consciousness after 1 ½ hour and on the other hand, she stated that family members reached the spot in ten minutes.

11. A perusal of statement of PW2 Thakru Ram demonstrates that it has come in his cross examination that when he reached the spot, deceased was lying on the spot and that he had not witnessed the accident taking place.

12. The Investigating Officer had entered the witness box as PW7. He stated that he prepared the spot map on the spot which is Ext. PW7/B and also took photographs of the spot. In his cross examination, he stated that he reached the spot at around 4:30 p.m. Now, incidentally, a perusal of spot map which is on record as PW7/B demonstrates that road where the accident took place was 22 feet wide and towards the side on which the deceased was walking alongwith PW1 six feet road was available in addition to the mettle road. Mark B on the said spot is the position where the body of the deceased was lying after the accident and mark B is not on the side of the road but is almost midway between the side of the road and centre of the road. Therefore, it is evident from the spot map that the deceased was walking on the main road when the accident took place. Now, as I have already discussed above, there is no eyewitness to the occurrence of the accident as neither PW1 nor PW2 has seen the occurrence of the accident. Learned trial Court while appreciating this aspect of the matter and after taking into consideration the entire evidence placed on record by the prosecution came to the conclusion that the prosecution was not able to prove beyond reasonable doubt the guilt of the accused. Learned Appellate Court while setting aside the findings so returned by the learned trial Court has justified the conviction of the accused by raising doubt that as the road where the accident took place was 22 feet wide and it was a straight road and there was sufficient space on the right side, the accused could have easily seen the deceased and could have avoided the accident by sewering his Scooter to the right or by stopping it as a prudent driver or he could have at least sounded the horn to warn the deceased. These findings have been used by the learned Appellate Court to convict the accused. I am afraid that the conviction passed on the abovesaid findings returned by the learned Appellate Court cannot be said to be sustainable in law. It is settled law that in order to convict a person, his guilt has to be established by the prosecution beyond reasonable doubt. In other words, if there is some doubt in the case of prosecution, then he deserves the benefit of doubt. In the present case, the petitioner could not have been convicted for committing offences punishable under Sections 279 and 304-A of IPC on conjectures and surmises as has been done by the learned Appellate Court. It has not been appreciated by the learned Appellate Court that the accident had taken place on a National Highway where unfortunately the deceased, who was 80 years old and also hard of hearing, was not walking on the side of the road but was walking almost in the road, which road as per statement of daughter-in-law of deceased (PW1), was frequented by thousands of vehicles everyday (PW1 had stated in her statement that about 10

thousand vehicle ply on the said road everyday). Not only this, the findings returned by the learned trial Court that PW1 and PW2 are eyewitnesses to the occurrence of the accident are perverse findings because neither PW1 nor PW2 has seen the occurrence of the accident and this is prima facie evident from the perusal of their statements itself. In these circumstances, in my considered view, the judgment of conviction passed by the learned Appellate Court against the accused setting aside the judgment of acquittal in his favour passed by the learned trial Court is not sustainable as the findings returned by the learned Appellate Court are not borne out from the records of the case but are perverse findings based on conjectures and surmises and are contrary to the evidence on record. Learned Appellate Court has also not appreciated that there was no cogent evidence produced on record by the prosecution to conclude beyond reasonable doubt that petitioner had fled away from the accident site after causing the accident.

13. Learned Appellate Court also did not appreciate that it is settled law that Appellate Court shall not reverse the judgment of acquittal because another view is possible to be taken. It has not been appreciated that the Appellate can overrule or otherwise disturb the trial Court's acquittal if it has 'very substantial or compelling reasons' for doing so. Honble Supreme Court in ***Mohammed Ankoos and Others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94*** has held

> *"12. This Court has, time and again, dealt with the scope of exercise of power by the Appellate Court against judgment of acquittal under Sections 378 and 386, Cr.P.C. It has been repeatedly held that if two views are possible, the Appellate Court should not ordinarily interfere with the judgment of acquittal. This Court has laid down that Appellate Court shall not reverse a judgment of acquittal because another view is possible to be taken. It is not necessary to multiply the decisions on the subject and reference to a later decision of this Court in Ghurey Lal v. State Of Uttar Pradesh1 shall suffice wherein this Court considered a long line of cases and held thus : (SCC p.477, paras 69 -70)*
>
> *"69. The following principles emerge from the cases above:*
>
> *1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.*
>
> *2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when (2008) 10 SCC 450 he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.*
>
> *3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.*
>
> *70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:*
>
> *1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.*
>
> *A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:*
>
> *(i) The trial court's conclusion with regard to the facts is palpably wrong;*
>
> *(ii) The trial court's decision was based on an erroneous view of law;*
>
> *(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";*

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached--one that leads to acquittal, the other to conviction--the High Courts/appellate courts must rule in favour of the accused."

Therefore, in view of the above discussion, the revision petition is allowed and the judgment of conviction passed by the Court of learned Presiding Officer, Fast Track Court, Mandi dated 14.06.2010 is set aside and the petitioner is acquitted of offences punishable under Sections 279 and 304-A of IPC and Section 187 of M.V. Act as the prosecution has not been able to prove beyond reasonable doubt that the petitioner had committed the said offences. Fine amount, if any deposited by the petitioner be returned to him in accordance with law. The criminal revision petition is disposed of accordingly. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Co. Ltd. ..... Appellants

Versus

Saroj Kumari and others ..... Respondents

FAO No.309 of 2012
Date of decision: 11.11.2016

Motor Vehicles Act, 1988- Section 166- Number of claimants are three, therefore, 1/3rd was to be deducted from the monthly income towards personal expenses – Tribunal had fallen in error in deducting 1/4th – monthly income of the deceased was Rs.4,000/- and after deducting 1/3rd loss of dependency comes to Rs.2700/- per month – total loss of source of dependency is Rs.2700 x 12 x 16= Rs.5,18,400/-. (Para- 4 to 6)

Cases referred:

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellant: Mr.Ashwani K. Sharma, Senior Advocate, with Mr.Jeevan Kumar, Advocate.

For the respondents: Mr.H.S. Rana, Advocate, for respondents No.1 to 3.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 21st April, 2012, passed by the Motor Accident Claims Tribunal-I, Solan camp at Nalagarh, H.P., (for short, "the Tribunal") in Claim Petition No.40NL/2 of 2008, titled Saroj Kumari and others vs. Beer Chand and others,

whereby the claim petition was allowed and compensation to the tune of Rs.6,26,000/-, with interest at the rate of 7.5% per annum, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short the "impugned award").

2. Feeling aggrieved, the insurer has challenged the impugned award by the medium of instant appeal.

3. During the course of hearing, the learned Senior Advocate appearing for the appellant-insurer submitted that the impugned award is bad only to the extent that the Tribunal has wrongly deducted 1/4th amount towards the personal expenses of the deceased, whereas 1/3rd was to be deducted.

4. I have gone through the impugned award. The number of claimants, in the instant case, is three. Therefore, in view of the law laid down by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** 1/3rd was to be deducted from the monthly income of the deceased, towards his personal expenses. The Tribunal has fallen into an error in deducing 1/4th and the impugned award needs to be set aside to that extent.

5. The Tribunal, after making discussion in paragraph 9, assessed the monthly income of the deceased at Rs.4,000/-. After deducting 1/3rd towards the personal expenses of the deceased, the loss of source of dependency comes to Rs.2,700/- per month.

6. The Tribunal has applied the multiplier of 16. Thus, the total loss of source of dependency comes to Rs.2,700/- x 12 x 16 = Rs.5,18,400/-. The amount awarded by the Tribunal under the other heads is maintained. The rate of interest is also maintained.

7. In view of the above discussion, the claimant is held entitled to compensation to the tune of Rs.5,68,000/- with interest at the rate of 7.5% per annum from the date of the claim petition till the same is deposited.

8. Having said so, the appeal is allowed and the impugned award is modified to the above extent. The Registry is directed to release the amount in favour of the claimants, through their bank accounts, strictly in terms of the impugned award and the excess amount, if any, alongwith interest, be released in favour of the insurer through payee's account cheque. The appeal is disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No.1 of 2011 with FAO No.181 of 2011.
Reserved on : 4.11.2016.
Pronounced on : 11.11.2016

1. FAO No.1 of 2011

National Insurance Company Ltd. ......Appellant
Versus
Mukta Sharma and another ....Respondents

2. FAO No.181 of 2011

Mukta Sharma ....Appellant
Versus
National Insurance Company Ltd. and another ......Respondents

Motor Vehicles Act, 1988- Section 149- Insurance is not disputed- claimant is a third party – her claim cannot be rejected on flimsy ground – insurer has to prove the breach of the terms and conditions of the policy – Insurer was rightly saddled with liability. (Para-11 to 16)

Motor Vehicles Act, 1988- Section 166- Condition of the claimant was critical – injury has affected her brain- initially, her disability was quantified at 20% - subsequently, her condition deteriorated and the disability was found to be 50% - claimant remained admitted in the hospital for 25 days –the claimant was an advocate and would not be able to act as an advocate after the accident – claimant pleaded that she was earning Rs.20,000/-per month prior to accident and by guess work the income of the injured can be treated to be Rs.10,000/- per month – the claimant is entitled to Rs.10,000 x 7= Rs.70,000/- under the head loss of earning during treatment - claimant lost earning capacity to the extent of 50% and the loss of income will be Rs.5,000/- per month- claimant was aged 50 years at the time of accident and multiplier of 11 is applicable, thus, claimant is entitled to Rs.5,000 x 12 x 11= Rs.6,60,000/- under the head loss of income – the claimant is also entitled to Rs.1 lac under the head pain and suffering- Rs. 1 lac under the head loss of amenities of life – the claimant would have spent Rs.100/- per day or Rs.3,000/- per month during the period of treatment and is entitled to Rs.3,000 x 7= Rs.21,000/- under the head special diet- Rs.20,000/- awarded under the head future medical treatment – rate of interest reduced to 7.5% per annum. (Para- 17 to 47)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252
Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others vs National Insurance Company Limited and others, (2012) 11 SCC 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

FAO No.1 of 2011:

For the appellant: Mr.Jagdish Thakur, Advocate.
For the respondents: Ms.Nevadeta Sharma, Advocate, vice Mr.Abhinay Sharma, Advocate, for respondent No.1.
Mr.Vijender Katoch, Advocate, for respondent No.2.

FAO No.181 of 2011:

For the appellant: Ms.Nevadeta Sharma, Advocate.
For the respondents: Mr.Jagdish Thakur, Advocate, for respondent No.1.
Mr.Vijender Katoch, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Both these appeals are the outcome of common award, dated 7th October, 2010, passed by the Motor Accident Claims Tribunal(I), Kangra at Dharamshala, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.12,60,050/, alongwith interest at the rate of 9% per annum, came to be granted in favour of the claimant and the insurer was saddled with the liability, (for short, the impugned award).

2. Feeling aggrieved, the claimant questioned the impugned award by the medium of FAO No.181 of 2011 on the ground of adequacy of compensation, while the insurer has assailed the impugned award in FAO No.1 of 2011 on the ground that the Tribunal has fallen into an error in saddling it with the liability.

3. Facts, as pleaded in the claim petition, are that the claimant, on 24th April, 2005, was traveling in Maruti Car No.HP-19-7000, being driven by respondent No.2, namely, L.R. Sharma. When the said car reached near Banikhet, it rolled down the road and fell into a rivulet, resulting into injuries to the claimant, was taken to Public Health Center Banikhet, Tehsil Dalhousie, fromwhere was taken to Dr.Anil Singh Nursing Home, Pathankot, whereafter to Dr. Kalra's Hospital at Pathankot, underwent medical tests, was referred to Dayanand Medical College and Hospital Ludhiana remained under treatment upto 12th May, 2005 and thereafter from 12th May, 2005 to 19th May, 2005 at IGMC, Shimla. It was also claimed that the claimant sustained permanent injury, was a practicing lawyer and was earning Rs.20,000/- per month. Thus, the claim petition was filed for compensation to the tune of Rs.32,50,000/-, as per the break-ups given in the claim petition.

4. Respondent No.1 resisted the claim petition by filing reply. Respondent No.2 (husband of the claimant) also filed reply wherein it has been admitted that the claimant sustained injuries in the accident in question and that he was holding a valid and effective driving licence at the time of accident.

5. On the pleadings of the parties, the following issues were framed:

"1. Whether the petitioner suffered injuries due to the rash and negligent driven of Maruti car No.HP-19-7000 by respondent No.2? OPP

2. If issue No.1 is proved in affirmative to what amount of compensation the petitioner is entitled to and from whom? OPP

3. Whether the petition is not maintainable? OPR-1

4. Relief."

6. The statement of the claimant as PW-1 was got recorded through Local Commissioner. In addition, the claimant examined Dr.Sandeep Puri as PW-2, HHC Prittam Chand as PW-3, Dr.J.S. Chandel as PW-4, Dr.Viyom Parkash Bhardwaj as PW-5. On the other hand, the insurer examined Ashok Kumar as RW-1.

7. The Tribunal after scanning the pleadings as well as the entire evidence held the claimant entitled to Rs.12,60,050/- as compensation alongwith interest at the rate of 9% per annum, and saddled the insurer with the liability.

8. Feeling aggrieved, the insurer has challenged the impugned award by the medium of FAO No.1 of 2011 on the ground that the compensation awarded by the Tribunal is excessive and that the Tribunal has wrongly fastened the liability on the insurer inasmuch as the insured has committed willful breach.

9. The claimant has challenged the impugned award by way of FAO No.181 of 2011 and prayed for enhancement of compensation.

10. Following questions arise for determination in the instant appeals:

i) Whether the Tribunal has rightly saddled the insurer with the liability?

ii) Whether the amount awarded by the Tribunal is adequate or otherwise?

11. The factum of insurance is not in dispute. The claimant-injured is a third party, therefore, her claim cannot be defeated on flimsy grounds.

12. It is beaten law of the land that the insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms and conditions contained in the policy and mere plea here and there cannot be a ground for seeking exoneration.

13. The Apex Court in case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531,** has taken the similar view**.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

> *"105. ....*
>
> *(i) ....*
>
> *(ii) ....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings*; *but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v)........................*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

14. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or*

thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran ingh case. If despite such information with the owner that the licence possessed by his driver is 8 :*fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

15. Thus, it was for the insurer to plead and prove that the offending vehicle was being driven in violation of the terms and conditions contained in the insurance policy, has not led any evidence to that effect, has failed to discharge the onus.

16. Having said so, question No.i is answered accordingly and it is held that the Tribunal has rightly saddled the insurer with the liability. Accordingly, the appeal filed by the insurer, being FAO No.1 of 2011, is dismissed.

17. PW-2 Dr.Sandeep Puri has stated that the condition of the claimant-injured was critical and she has to carry this injury throughout her life, and that the injury has affected her brain. It has also come on the record that at the first instance, the disability certificate was issued wherein it was mentioned that the claimant suffered 20% permanent disability. Thereafter, the condition of the claimant deteriorated and the claimant was again examined by the Medical Board, which issued the disability certificate whereby the disability was assessed at 51%. The said disability certificate has been proved on record as Ext.PW-1/A. Accordingly, it is held that the Tribunal has rightly relied upon the disability certificate Ext.PW-1/A and held that the claimant suffered 51% permanent disability.

18. Insurer had moved application under Section 170 of the Act before the Tribunal for contesting the claim petition on all grounds, which was granted. Thus, the insurer can question the impugned award on the ground of adequacy of compensation.

19. The learned counsel for the appellant/claimant argued that the compensation awarded by the Tribunal is meager and is required to be enhanced accordingly. It was submitted that the Tribunal has not properly assessed the income of the claimant-injured and also awarded paltry amount under the heads pain and suffering, medical expenses and transportation charges. It was further submitted that the Tribunal has also not taken into account the effect of the disability suffered by the claimant.

20. It appears that the Tribunal has not assessed the compensation properly and rightly. Thus, in the facts of the case, question arises as to what is adequate compensation. In order to determine the said issue, the evidence of the claimant is required to be appreciated.

21. PW-2 Dr.Sandeep Puri, DMC Hospital, Ludhiana, has stated that the claimant remained admitted in the hospital for 25 days, has to undergo medical treatment throughout her life and has to lead her life below normal.

22. PW-4 Dr.J.S. Chandel stated that the disability certificate dated 6th January, 2007 bears the signatures of Dr.Viyom Bhardwaj, examined as PW-5, who stated that Ext.PW-1/A (disability certificate) dated 6th January, 2007 bears his signatures.

23. The disability certificate, dated 6th January, 2007, Ext.PW-1/A, proved on record by the claimant shows that she suffered 51% permanent disability. The said fact has been proved by the claimant through her statement as well as from the statements of PW-4 and PW-5, though it has been pleaded in the claim petition that the claimant suffered 20% permanent disability. Another disability certificate, dated 31st December, 2005, has been proved on record as Ext.RX, which does disclose that the claimant suffered 20% permanent disability. The first disability certificate issued on 31st December, 2005 and the second disability was isused on 6th Janury, 2007. It appears that after the issuance of the first disability certificate, the percentage of the

disability has increased which has affected her physical frame, for which reason the Medical Board examined the claimant afresh and the second disability certificate dated 6th January, 2007 was issued, whereby the disability has been shown to be 51%, which stands proved by the claimant by leading evidence.

24. Having said so, the compensation is to be assessed keeping in view the disability suffered by the claimant i.e. 51%.

25. The Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771,** has clearly laid down the principles as to how compensation has to be awarded in cases where the claimants have suffered permanent disability and how the assessment is to be made.

26. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his/her life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the whole life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
>
> ....
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

27. The claimant-injured was an Advocate by profession. The disability suffered by the claimant has shattered her physical frame and, in all probabilities, she would not be in a position to do the job of an Advocate, as she would have been doing prior to the accident.

28. It has been pleaded by the claimant in the Claim Petition that she, at the time of accident, was earning Rs.20,000/- per month. No evidence has been led by the claimant in support of her assertion that she was earning Rs.20,000/- by practicing as an Advocate.

However, by guess work, it can be said that the claimant-injured was earning not less than Rs.10,000/- per month.

29. The accident had taken place on 24th April, 2005, whereafter, as pleaded in the claim petition, the petitioner remained admitted till 19th May, 2005 in different hospitals, which fact is borne out from the material available on the record. After discharge from the hospital, the claimant would have also remained out of profession for a considerable period, say, for, six months.

30. The discussion in the preceding paragraph shows that the claimant, after sustaining the injury, remained admitted in the hospital for about one month and also would have remained out of profession for about six months, for treatment. The income of the claimant, as has been held above, was Rs.10,000/- per month. The Tribunal has gone astray in not awarding anything for the period during which the claimant remained under treatment. The Tribunal must have appreciated the fact that the claimant was forced to remain out of practice because of the injuries sustained by her and not as per her own choice. Thus, the claimant was to be awarded compensation under the head 'loss of earning during treatment'. Accordingly, the claimant is held entitled to Rs.10,000/- x 7 = Rs.70,000/- under the head 'loss of earning during treatment'.

31. From the above discussion, it can safely be held that the claimant lost earning capacity to the extent of 50%. Thus, after making deduction, future loss of income, per month, to the claimant can be said to be Rs.5,000/-.

32. The claimant was 50 years of age at the time of accident. Having regard to the judgment of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120** read with the 2nd Schedule attached with the Act, it is held that multiplier of '11' is just and appropriate, and is applied accordingly.

33. Having said so, the claimant is held entitled to Rs.5,000 x 12 x 11 = Rs. 6,60,000/- under the head 'loss of future income'.

34. The Tribunal has also lost sight of the fact that the claimant suffered a lot, which fact is evident from the statement of Dr.Sandeep Puri (PW-2). Not only this, because of the disability suffered by the claimant, she has to struggle throughout her life. In the given circumstances, read with the law laid down by the Apex Court, the claimant is held entitled to Rs.1,00,000/- under the head 'pain and sufferings'.

35. The claimant is also deprived of all comforts and amenities of life. The Tribunal has not awarded anything under the head 'loss of amenities of life'. Keeping in view the facts and the law laid down by the Apex Court, the claimant is held entitled to Rs.1,00,000/- under the head 'loss of amenities of life'.

36. The claimant would have also spent at least 100/- per day i.e. Rs.3,000/- per month on account of special diet during the period of treatment. Accordingly, the claimant is held entitled to Rs.3,000/- x 7 = Rs.21,000/- under the head 'special diet'.

37. Keeping in view the expert evidence, the claimant has to undergo medical check-ups/treatment, at intervals, throughout her life and I deem it proper to award Rs.20,000/- under the head 'future medical treatment'.

38. Compensation awarded by the Tribunal under the heads 'medical expenses', 'transportation charges' and 'attendant charges' is maintained.

39. Having glance of the above discussion, the claimant is awarded Rs.11,40,150/-, under different heads as under:

Sl.No.	*Heads*	*Amount*
1	*Loss of earning during treatment*	*Rs.70,000/-*
2.	*Loss of future income*	*Rs.6,60,000/--*
3.	*Pain and sufferings*	*Rs.1,00,000/-*
4.	*Loss of amenities of life*	*Rs.1,00,000/-*
5.	*Attendant charges*	*Rs.25,000/-*
6.	*Special diet*	*Rs.21,000/-*
7.	*Future medical treatment*	*Rs.20,000/-*
8.	*Medical expenses incurred*	*Rs.1,34,150/-*
9.	*Transportation charges*	*Rs.10,000/-*
	Total	**Rs.11,40,150/-**

40. The Tribunal has also wrongly awarded interest at the rate of 9%, which is on the higher side. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,*** **reported in** ***(2002) 6 Supreme Court Cases 281; Santosh Devi versus National Insurance Company Ltd. and others,*** **reported in** ***2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others,*** **reported in** ***(2012) 11 Supreme Court Cases 738; Smt. Savita versus Binder Singh & others,*** **reported in** ***2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,*** **reported in** ***2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,*** **reported in** ***(2015) 4 Supreme Court Cases 433,*** **and** ***Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,*** reported in ***(2015) 4 Supreme Court Cases 434,*** and discussed by this Court in a batch of FAOs, ***FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,*** being the lead case, decided on **19.06.2015**.

41. Accordingly, it is held that the amount of compensation shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till realization.

42. In view of the above discussion, the impugned award is modified. The Registry is directed to release the amount, alongwith interest, in favour of the claimant, forthwith, through her bank account, and the excess amount, if any, be released in favour of the insurer through payee's account cheque.

43. Both the appeals stand disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company ...Appellant
Versus
Smt. Santosh w/o Late Sh. Lekh Ram & Ors. ....Respondents.

FAO (MVA) No. 335 of 2012.
Date of decision: 11th November, 2016.

Motor Vehicles Act, 1988- Section 173- Insurer contended that the vehicle was being driven by S and not by M – held, that the insurer had not taken permission to contest the claim on all grounds and cannot question the adequacy of compensation – moreover, the MACT had rightly

made the discussion and no interference is required with the same- however, the rate of interest reduced to 7.5% per annum from 9%. (Para- 6 to 15)

Cases referred:
United India Insurance co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541
Josphine James versus United India Insurance Co. Ltd. & Anr., 2013 AIR SCW 6633
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others vs National Insurance Company Limited and others, (2012) 11 SCC 738
Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

For the appellant: Mr. Pritam Singh Chandel, Advocate.
For the respondents: Mr. Anirudh Sharma, proxy counsel for respondents No. 1 to 3.
Mr. P.S. Goverdhan, Advocate, for respondent No.4.
Mr.Deepak Bhasin, proxy counsel for respondent No.5.
Mr. Arti Sharma, proxy counsel for respondent No.6.
Nemo for respondent No.7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 7.4.2012, passed by the Motor Accident Claims Tribunal-II, Solan, H.P. hereinafter referred to as "the Tribunal", for short, in MACT Petition No.1-S/2 of 2012/07, titled *Smt.Santosh and others versus Sh. Satpal and others,* whereby compensation to the tune of Rs.4,73,800/- alongwith interest @ 9% per annum came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimants, owners, drivers and insurer of Motor Cycle No. CH-03C-1451, have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The insurer of Bus No. HP-14-5098, has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant argued that the vehicle was being driven by driver Satpal rashly and negligently and not by Maha Singh.

5. Thus, the only question to be determined in this appeal is-whether the insurer can question the said findings? The answer is in negative for the following reasons.

6. Neither driver nor owner has questioned the same. However, I have gone through the record. Claimants have examined Dr. N.K. Gupta as PW1, Sh. Rishi Ram as PW3, Sunil Verma as PW4 and Smt. Santosh claimant No. 1 appeared in the witness-box as PW2.

7. Respondents examined HHC Krishan Dutt RW1 and drivers Maha Singh and Sat Pal stepped into the witness-box as RW2 and RW3 respectively.

8. Vijay Kumar PW5 is an independent witness. He has specifically deposed that he was present on the spot and witnessed the occurrence. Further stated that respondent No. 4 Maha Singh (respondent No.7 herein) has driven the vehicle rashly and negligently and hit the motor cycle which was being driven by Sat Pal, in which deceased sustained the injuries and succumbed to the same. His statement is of great importance and stands relied upon by the learned Tribunal while determining issue No.1. RW3 Sat Pal has deposed that the accident was outcome of rash and negligent driving of Maha Singh. The Tribunal has rightly made the discussion in paras 14 and 15, of the impugned award, needs no interference.

9. Having said so, the Tribunal has rightly held that the accident was outcome of rash and negligent driving of Maha Singh while driving Bus No. HP-14-5098. Accordingly, the findings recorded on issue No.1 by the Tribunal are upheld.

10. The insurer has not sought permission under Section 170 of the Motor Vehicles Act, for short "the Act" for contesting the claim on all grounds thus, is precluded to question the adequacy of compensation.

11. The question arose before the Apex Court in the case titled as **United India Insurance co. Ltd. Versus Shila Datta & Ors.,** reported in **2011 AIR SCW 6541,** and the matter was referred to the larger Bench.

12. The question again arose before the Apex Court in the case titled as **Josphine James versus United India Insurance Co. Ltd. & Anr.,** reported in **2013 AIR SCW 6633.** It is apt to reproduce paras 8, 17 and 18 of the judgment herein:

> *"8. Aggrieved by the impugned judgment and award passed by the High Court in MAC Appeal no. 433/2005 and the review petition, the present appeal is filed by the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi's case and instead, placing reliance upon the Bhushan Sachdeva's case. Nicolletta Rohtagi's case was exhaustively discussed by a three judge bench in the case of United India Insurance Company Vs. Shila Datta, 2011 10 SCC 509. Though the Court has expressed its reservations against the correctness of the legal position in Nicolletta Rohtagi decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside.*
>
> *9. to 16. ....*
>
> *17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (2002) 7 SCC 456 : AIR 2002 SC 3350 : 2002 AIR SCW 3899, and earlier decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to though the correctness of the aforesaid decision is*

referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.

18. In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V. Act. Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to 4,20,000/- under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs. 5,000/- and applying 14 multiplier, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. Delhi Transport Corporation, 2009 6 SCC 121 instead of applying the principle laid down in Baby Radhika Gupta's case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the M.V. Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under section 149(2) of the M.V. Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."

13. I have gone through the impugned award. The Tribunal has rightly made discussion in paras 17 to 20 of the impugned award needs no interference. The amount awarded is adequate, cannot be said to be meager, is upheld

14. The Tribunal has awarded interest @ 9% per annum. However, interest was to be awarded at the rate of 7.5% per annum, for the following reasons.

15. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, reported in (2002) 6 SCC 281; Satosh Devi versus National Insurance Company Ltd. and others, reported in 2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others reported in (2012) 11 SCC 738; Smt. Savita versus Binder Singh & others, reported in 2014, AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn., reported in 2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, reported in (2015) 4 SCC 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, reported in (2015) 4 SCC 434,* and discussed by this Court in a batch of *FAOs, FAO No. 256 of 2010*, titled as *Oriental Insurance Company versus Smt. Indiro and others*, being the lead case, decided on 19.06.2015.

16. Accordingly, interest @7.5% per annum is awarded from the date of claim petition till realization of the amount.

17. The insurer-appellant is directed to deposit the amount alongwith interest @ 7.5% per annum, within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification and excess amount, if any, be refunded to the insurer/appellant through payees' cheque account.

18. Viewed thus, the impugned award is modified as indicated hereinabove and appeal is disposed of alongwith pending applications.

CMP No.583/2012.

19. Learned counsel for the appellant has not pressed this application. Hence the application is dismissed as not pressed.

20. Send down the record forthwith, after placing a copy of this judgment.

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

Shankari Devi and another ..Appellants/Defendants.
Versus
Inder Jeet Singh and another ..Respondents/plaintiffs.

RSA No. 582 of 2006
Reserved on : 4/11/2016
Date of decision: 11/11/2016

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for fixation of boundary and for relief of possession and injunction – it was pleaded that plaintiffs are owners in possession of the suit land- defendants are strangers who threatened to interfere with the suit land – they were found to be encroachers on the portion of the suit land – they were requested to deliver possession but in vain- the suit was decreed by the trial Court- an appeal was filed, which was dismissed- held in second appeal that parties are adjacent owners - the demarcation report shows that defendants have encroached upon a portion of the suit land - however, the demarcation was not conducted in accordance with the binding instructions – the plea of adverse possession was not established satisfactorily – matter remanded to the Appellate Court to appoint a Local Commissioner and thereafter to decide the matter afresh. (Para-7 to 11)

For the appellants: Mr. Bhuvnesh Sharma, Advocate.
For the respondents: Mr. R.K.Gautam, Sr. Advocate with Ms. Megha Gautam, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

Both the learned Courts below recorded concurrent verdicts vis.a.vis. the plaintiffs qua theirs standing entitled to a decree for fixing of boundaries by way of demarcation also both the learned Courts below concurrently rendered a decree for possession by way of demolition of the construction raised on the suit land by the defendants. In sequel thereto with the defendants/appellants herein standing aggrieved by the concurrently recorded verdicts of both the Courts below, they through the instant appeal preferred therefrom before this Court concert to seek reversal of the pronouncements recorded by the learned Courts below.

2. The facts necessary for rendering a decision in the instant appeal are that the plaintiffs had claimed for fixation of boundaries by way of demarcation with consequential relief of permanent prohibitory injunction restraining the defendants from making any type of interference, changing the nature, raising construction cutting and removing the trees from the land comprised in Khata No. 41, Khatoni No. 53 min, Khasra No. 72 as described in the copy of Misal Hakiat for the year 1997-98, situated in Village Thain, Mouza Nauhangi and in case the defendants succeed in raising construction over the suit land or any part of it or taking possession of any portion of it, in that event a decree for possession by way of demolition or otherwise was claimed and further the plaintiffs by way of amendment claimed a decree for possession of land shown in Tatima as Khasra No. 72/2 out of the suit land. The said reliefs had been claimed by the plaintiffs on the grounds that the plaintiffs are the owners in possession of the suit land, whereas the defendants are quite stranger to the same but the defendants started

interference over the suit land by way of digging for the purpose of raising construction, threatened dispossession of the plaintiffs, created boundary dispute and refused to desist from such wrongful acts inspite of repeated requests made by the plaintiffs and during the pendency of the suit on the strength of demarcation of Local Commissioner the defendants were found to have encroached upon Khasra No. 72/2 out of the suit land shown in the Tatima, but refused to deliver the possession of the same to the plaintiffs, hence they were compelled to file the suit and claimed the said reliefs.

3. The defendants resisted and contested the suit by taking preliminary objection qua estoppel and claimed ownership by virtue of adverse possession. On merits, the defendants pleaded that they are owners in possession of the adjoining land. It was pleaded that they are in open, peaceful and hostile possession of the suit land under their Abadi or its portion for the last 100 years, hence they have become its owner by virtue of adverse possession and prayed for dismissal of the suit.

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

1. Whether the plaintiffs are entitled for fixation of boundaries by way of demarcation and also prayed for permanent prohibitory injunction against the defendants, as prayed for? OPP.
2. Whether the plaintiffs are entitled for the relief of mandatory injunction and for possession if the defendants succeed in raising construction during the pendency of the suit as alleged? OPP.
3. Whether the plaintiffs are estopped from filing the suit by their act and conduct? OPD.
4. Whether the defendants are entitled for special costs under Section 35-A CPC? OPD.
5. Whether the defendants have become owners of the suit land by virtue of adverse possession as prayed for? OPD.
6. Whether the suit is not properly valued for the purposes of court fees and jurisdiction? OPD.
7. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the defendants.

6. Now the defendants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 17/04/2007 this Court admitted the appeal on the hereinafter extracted substantial question of law:-

> "1. Whether the findings given by the learned Courts below are perverse, their being either based on no evidence or contrary to the material on record and the same has thus resulted into erroneous decision?
>
> 2. Whether the demarcation report Ext.PW-2/A is contrary to the instructions of the Financial Commissioner and the High Court Rules and orders pertaining to the demarcation of the land and the same has wrongly been relied upon by both the learned Courts below while passing the impugned judgements and decrees?
>
> 3. Whether the adjoining land of the appellants comprising Khasra Nos.73 and 77 to the suit land Khasra No. 72 could be ignored to be measured by the Local Commissioner while demarcating the suit land, if no, whether the report of the Local Commissioner is unsustainable and could not be relied

upon while passing the impugned judgements and decrees by both the Courts below?

Substantial questions of law.

7. Khasra No. 72 stands owned and possessed by the plaintiffs whereas Khasra numbers adjoining thereto bearing field Nos. 73 and 77 stand owned by the defendants appellants. The decree concurrently pronounced by the learned Courts below stand anvilled upon demarcation report proven by PW-2. Demarcation report stands comprised in Ext.PW-2/A, the tatima prepared in consonance therewith stands comprised in Ext.PW-2/B wherewithin reflections occur of the defendants unauthorisedly holding possession of 132 sq.meters held in the suit land. Both the learned Courts below imputed sanctity to the demarcation report comprised in Ext.PW-2/A wherefrom they recorded a conclusion of the plaintiffs standing entitled to the decree as stood rendered qua them. Consequently, the factum of the tenacity of pronouncements occurring in Ext.PW-2/A besides the vigour of reflections communicated in Ext.PW-2/B is enjoined to be determined. Both would enjoy formidable probative sinew despite an abortive concert standing made by the demarcating officer concerned qua theirs preceeding his holding the apposite demarcation proceedings theirs recording before him a consensus qua the fixed points wherefrom he held authorization to conduct the relevant demarcation predominantly when his apposite report besides his testification hold a visible display of his while holding the relevant demarcation his thereat possessing the field Map/Musabee of the village concerned holding therewithin reflections of the relevant fields alongwith their dimensions (Karu kans) besides his unanimously voicing in his report also in his testification qua his therefrom in consonance with the relevant instructions measuring their dimensions, lastly his articulating in his report besides in his testification qua his therefrom thereafter proceeding to relay the relevant measured dimensions held in the relevant field Map/Musabee onto the contiguous khasra numbers of the litigating parties qua which he held demarcation. However, the aforesaid invincible display stands omitted to be bespoken by PW-2 in his demarcation report comprised in Ext.PW-2/A also stands unechoed by him in his testification. Besides the preemptory mandate of the relevant instructions which stand encapsulated in Chapter 10 paragraph IX of the H.P.Land Records Manual, which stands extracted hereinafter, :-

> "IX. In the report to be prepared/submitted by the Revenue Officer/Field Kanungo, it must be explained in detail how he made his measurement. He should submit a copy of the relevant portion of the last settlement field map (musavi) of the village showing the fields with their dimensions(Karu Kan) of which he took measurement as mentioned in instructions supra and the boundary in dispute. There should also be a mention in this report as to what method was adopted and the way he fixed the starting points and the fields he measured and the result of such measurement. All the fields and points measured should be shown in the site plans, within the frame of copy of musavi."

enjoining the demarcating officer to at the relevant time hold the relevant portion of the field map of the village concerned holding reflections of the relevant fields besides their dimensions wherefrom he stands enjoined to in consonance with the relevant instructions hold the relevant measurement of their dimensions whereafter he stands mandatorily injucted to thereafter relay them onto the relevant fields, for reasons aforestated is visibly infracted. Since the mandate held in the relevant portion of the H.P. Land Records Manual, relevant portion whereof stands extracted herebefore, is preemptory also when the relevant mandate enjoins strict compliance therewith by the demarcating officer, in sequel any departure therefrom renders the relevant demarcation held by PW-2 to be legally frail also any reliance thereupon by both the learned Courts below especially when its preparation is evidently in digression of the relevant mandate of the relevant instructions which stands extracted hereinabove, is grossly unwarranted.

8. However, the learned counsel appearing for the plaintiffs has contended of with the defendants voicing in their respective testifications qua theirs perfecting their title to the suit land by adverse possession, plea whereof for concurrently recorded tenable reasons stood

dispelled by both the Courts below, significantly for theirs (a) omitting to spell with certainty the date of its commencement, besides the territorial extent whereon they adversely held the suit land contrarily rather with DW-1 and DW-2 contradictorily testifying qua the territorial extent of the suit land whereon they propagate qua theirs adversely holding it rendered their espousal on facet aforesaid to remain unsatiated reiteratedly when (b) the commencement of the period with an apposite communication with precision qua the time since whereon they asserted qua theirs holding possession of the suit land with an animus possidendi remaining unpleaded besides untestified whereupon they stood disabled to espouse qua theirs hereat completing the mandatorily enjoined period of limitation prescribed in the relevant statute for theirs standing construed to perfect their title qua the suit land (c) DW-1 and DW-2 evidently contradictorily deposing qua the territorial extent of the suit land whereon they espoused qua theirs becoming owners by adverse possession, wherefrom an inference is erectable qua theirs acquiescing qua the defendants holding possession of the suit land rendering hence the vice if any gripping the report of the Local Commissioner comprised in Ext.PW2/A being overlookable. However, the aforesaid submission addressed herebefore by the counsel for the plaintiffs is unamenable for acceptance by this Court conspicuously when both aforesaid DW-1 and DW-2 contradictorily depose qua the territorial extent of the suit land whereupon they stake a claim qua theirs perfecting their title by statutory prescription whereas occurrence with precision in their respective testifications qua the apposite territorial extent of the suit land whereon they asserted qua theirs perfecting their title thereon by adverse possession was imperative for hence affirmatively facilitating their apposite espousal. In aftermath with lack of concurrence inter se DW-1 and DW-2 qua the territorial extent whereupon they purportedly hold adverse possession of the suit land would naturally interdict a Civil Court to with aplomb pronounce an apposite decree holding revelations with precision besides exactitude vis.a.vis the area whereon the suit land stands unauthorisedly held by the defendants also lack of specificity with unanimity in the respective depositions of DW-1 and DW-2 qua the relevant facet aforesaid would prohibit a Civil Court to render an apposite decree qua thereupon the defendants standing encumbered with an apposite decree. However, both the learned Courts below despite conflicts occurring in the testifications of DW-1 and DW-2 qua the territorial extent of theirs adversely holding possession of the suit land also with demarcation report comprised in Ext.PW-2/A though apparently infracting the mandate of the relevant extracted portion of the apposite instructions, they yet proceed to inaptly pronounce the impugned decree hereat which obviously is ridden with a gross inherent fallacy.

9. Be that as it may, an apposite decree holding embodiments therein with precision qua the area whereon the defendants unauthorizedly hold possession of the suit land was renderable only when a valid demarcation was held of the suit property by the demarcating officer besides of the khasra numbers in contiguity thereof owned by the defendants. However, when for reasons aforestated PW-2 did not hold any valid demarcation of the suit property besides of the Khasra Numbers located in contiguity thereof, there was no worthwhile material available before both the Courts below to emphatically pronounce qua the area/dimensions reflected therein constituting the area of the suit land whereon the defendants unauthorisedly hold possession. The corollary thereof is of the concurrently recorded apposite decrees by both the Courts below suffering from an inherent fallibility.

10. Be that as it may for facilitating the rendition of an efficacious decree holding delineations therein with specificity qua the area whereon the suit land stands subjected to encroachment by the defendants also for conclusively clinching/resting the controversy engaging the parties at lis, it is deemed fit and appropriate to remand the matter to the learned First Appellate Court for facilitating it to appoint the Tehsildar concerned of the area wherewithin suit land is located for holding demarcation of the suit property. However the learned first Appellate Court after receiving the demarcation report besides after considering the objections filed thereto by the contesting parties shall pronounce a fresh decision only qua the area of the suit land encroached upon by the defendants within six months hereafter.

11. For the foregoing reasons, the substantial questions of law are answered in favour of the defendants. The judgements and decrees rendered by both the Courts below are quashed and set-aside. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of. Records be sent back forthwith. However, as aforestated, in the interest of justice and also for perennially setting at rest the controversy engaging the parties at lis, it is deemed fit and appropriate to remand the matter to the learned First Appellate Court for facilitating it to appoint the Tehsildar concerned of the area wherewithin suit land is located for holding demarcation of the suit property. However the learned first Appellate Court after receiving the demarcation report besides after considering the objections filed thereto by the contesting parties shall pronounce a fresh decision only qua the area of the suit land encroached upon by the defendants within six months hereafter.

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

Suresh Kumar .....Petitioner.
Versus
Mamta Rani ....Respondents.

Cr.MMO No.224 of 2014
Reserved on: 03.11.2016.
Date of Decision: 11th November, 2016.

Code of Criminal Procedure, 1973- Section 125- The marriage between the parties was solemnized – the husband started beating the wife – a petition for maintenance was filed and maintenance of Rs.5,000/- per month was awarded by Additional Sessions Judge while reversing the order of Judicial Magistrate- held in revision that the wife had left her matrimonial home and was residing with her parents- the husband had instituted a petition for restitution of conjugal rights but mere institution of the petitionfor restitution of conjugal rights will not have any effect on the proceedings under Section 125 of Cr.P.C – the wife had left the home due to beatings given to her and she had a reasonable cause to reside separately – the income of the wife was not proved – the maintenance was rightly granted. (Para-2 to 9)

For the Petitioner: Mr. Ajay Sharma, Advocate.
For the Respondents: Mr. Anoop Rattan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant petition stands directed against the impugned order recorded on 13.08.2014 by the learned Additional Sessions Judge (II), Una, Camp at Amb, District Una, H.P., in Crl. Revision RBT No. 6/2013/2011 whereby he reversed the verdict pronounced by the learned Judicial Magistrate 1st Class, Court No.1, Amb, District Una, H.P. on an application preferred therebefore by the respondent herein under Section 125 of the Code of Criminal Procedure. Under the impugned rendition, the learned Additional Sessions Judge assessed qua the respondent herein maintenance quantified in a sum of Rs.5000/- per month. He pronounced therein qua the aforesaid per mensem amount of maintenance being payable w.e.f. 21.04.2010. Standing aggrieved, the petitioner herein has assailed herebefore the impugned rendition.

2. Uncontrovertedly, the litigating parties herebefore are married partners. An obligation under law is cast upon the husband to maintain his lawfully married wife. On emphatic proof standing adduced qua his neglecting to maintain his wife or refusing to maintain her, would entail upon the trial Magistrate concerned to assess maintenance qua the married

spouse unless evidence of immense vigour stands adduced therebfore by the husband qua his married spouse possessing sufficient means to maintain herself. An inference of the husband refusing besides neglecting to maintain his lawfully wedded wife would stand spurred even when his lawfully married spouse stands precluded by strong exceptional compelling reasons to alienate herself from the matrimonial company of her husband. However, the learned trial Magistrate on incisively traversing through the evidence as stood adduced before him, has concluded of the purported incident(s) of physical cruelty perpetrated upon the respondent herein by her husband during the former's stay at her matrimonial home remaining unproven whereupon he concluded of the departure of the respondent herein to her parental home not standing emphatically established to stand founded upon any reasonable ground rather her stay thereat being pretextual whereupon he refused to assess maintenance per mensem qua the respondent herein.

3. Dehors the tenacity or otherwise of the evidence adduced before the learned trial Magistrate displaying the factum of the respondent herein during her stay at her matrimonial home standing subjected to belabourings by her husband, the imperative fact which was enjoined to be pronounced upon was qua the petitioner herein, since his married spouse leaving for her parental home on 17.01.2009 whereat she since thereat has been continuously staying, making sincere genuine efforts to retrieve her to her matrimonial home, efforts whereof standing spurned by the respondent herein, would foster an inference of the respondent herein without any reasonable cause staying at her parental home whereupon she would be dis-entitled to claim maintenance from her husband. Contrarily, on emergence of evidence in display of her husband not making any genuine sincere efforts to retrieve her to her matrimonial home would entail upon him an obligation to maintain her thereat also necessarily with his omitting to retrieve her to her matrimonial home would galvanize an inference of his abandoning her company, concomitantly, thereupon he cannot refuse or neglect to maintain his married spouse despite the latter staying with her parents.

4. For determining the aforesaid factum probandum, an allusion to the evidence germane to it warrants advertence. Though the husband in portrayals of his making sincere efforts to retrieve his married spouse to her matrimonial home has testified qua the factum of the respondent staying at her parental home against his wish standing brought to the notice of Nagar Panchayat and Community Health Sabha. However, the aforesaid testification in display of the husband concerting to retrieve the respondent herein to her matrimonial home lacks vigour for want of it acquiring corroboration from the official concerned of the Nagar Panchayat or Community Health Sabha. The apt sequel arising from the aforesaid omission of the husband to lend corroborative succor to his testification qua his soliciting the support of the functionaries of the Nagar Panchayat and the Community Health Sabha, for retrieving the respondent herein to her matrimonial home warranting a deduction qua his contriving the factum of his making genuine sincere efforts to retrieve his married spouse to his matrimonial company.

5. Furthermore in display of the husband making an arduous, genuine attempt to retrieve his married spouse to her matrimonial home he propagates in his testification qua his standing accompanied by the members of Sawarankar Sudhar Sabha to the parental home of the respondent, visit whereof to the parental home of the respondent not acquiring any success arising from the factum of PW-2 not permitting the visitors to his house to egress his homestead. However, the aforesaid propagation loses its vigour for the reason that an apposite suggestion qua the aforesaid factum stood not put to PW-2 besides with none of the members of Swarankar Sudhar Sabha, who purportedly accompanied the petitioner herein to the parental house of the respondent herein, who however were purportedly not allowed by PW-2 to enter his house not standing examined for thereupon lending succor to the aforesaid propagation. An inevitable sequel of the aforesaid want of adduction of the relevant germane best evidence by the husband in portrayal of his making sincere, genuine efforts to retrieve his married spouse to his matrimonial company, foments an inference of the petitioner herein abandoning the company of the respondent herein whereupon it is to be concluded of his being the errant spouse whereas the respondent herein not being amenable to any imputation of any fault for hers living at her

parental home nor also her stay thereat being without any reasonable cause whereupon it is apt to conclude of the husband being enjoined to maintain her even when she is staying at her parental home whereas his neglecting or refusing to maintain her, entails a command upon him from this Court qua his being amenable to pay maintenance to her in the manner as pronounced by the learned Additional Sessions Judge.

6. It is relevant to advert to the submission made herebefore by the counsel for the respondent qua the petitioner herein instituting before the learned Addl. Sessions Judge a petition for restitution of conjugal rights wherefrom he contends of it personifying the factum of the petitioner herein endeavouring to retrieve the respondent herein to his matrimonial company whereupon he contends of the impugned order warranting interference. However, the mere institution of a petition for restitution of conjugal rights by the petitioner before the learned District Judge would not per se tantamount to his proving the factum of his thereupon making sincere endeavours to retrieve the respondent herein to his matrimonial company unless a verdict thereupon stood pronounced by the learned District Judge. However, the apposite verdict pronounced by the learned District Judge on a petition preferred before him under Section 9 of the Hindu Marriage Act by the petitioner herein remains unadduced in evidence. For lack of adduction into evidence of the apposite verdict pronounced by the learned District Judge on the apposite petition preferred therebefore by the petitioner, cannot constrain a conclusion of its mandate standing infracted by the respondent herein whereas only on hers provenly infracting besides disobeying the verdict pronounced by the learned District Judge on an apposite petition constituted before him under Section 9 of the Hindu Marriage Act would stir an inference qua thereupon the respondent herein standing dis-entitled to claim maintenance from her husband in a petition under Section 125 of the Cr.P.C. Contrarily, for reiteration, for lack of its standing adduced into evidence warrants an inference of its mere institution not galvanizing any thrust to the espousal of the petitioner herein qua his making sincere efforts to retrieve the respondent herein to his matrimonial company nor also it can be concluded qua on its mere institution the respondent herein standing enjoined to return to the matrimonial company of her husband. On the other hand, it appears of the aforesaid apposite petition standing speciously preferred by the petitioner herein before the learned District Judge as a mere contrivance to defeat the claim of the respondent herein for maintenance, conspicuously, when it stood instituted subsequent to the institution of the instant petition by the respondent herein before the learned trial Magistrate concerned.

7. Be that as it may, the factum of the petitioner herein possessing sufficient financial means to defray to his married spouse the quantum of per mensem maintenance as assessed in the impugned order is garnerable from the factum of the father of the petitioner herein disclosing in his testification qua his rearing from his business of a goldsmith an income ranging from 2700 to 2800 whereas with the petitioner herein deposing his earning a salary of Rs.2500/- per month while his standing employed as a helper in the jewelery shop of his father at Naudan, makes a palpable upsurgence of the factum of both the petitioner herein besides his father contriving the factum of the former standing employed as a helper in the goldsmith shop, established by his father at Naudan wherefrom the petitioner is purportedly drawing monthly wages quantified at Rs.2500/-. Also it appears hence of the petitioner in collusion with his father by falsely displaying qua the petitioner herein not possessing sufficient financial means his hence concerting to thwart the claim for maintenance of the respondent herein from him. Furthermore, the factum of the petitioner rearing a false plea of his standing employed as a helper in the goldsmith shop of his father located at Naudan wherefrom he purportedly draws a salary of Rs.2500/- per month stands generated by the factum of (a) bag Ex. P1 holding therein the mobile number of the petitioner herein; (b) with a display occurring in ex.P1 qua the business of a goldsmith shop located at Naudan running in the name and style of Suresh Jewellers, name whereof occurring in Ex.P-1 holds synonymity with the name of the petitioner herein, dispels the factum of the petitioner herein standing employed as a helper in the jewelery business of his father. Contrarily, it portrays of the relevant business of goldsmith standing operated by the

petitioner herein wherefrom the ensuing sequel is qua his rearing an income sufficient to maintain his married spouse, the respondent herein.

8. Though, the respondent herein had for discountenancing the claim reared by the respondent herein in a petition under Section 125 of the Cr.P.C., espoused qua the latter drawing and earning Rs.4000/- per month by working in Swami Viveka Nand Public School besides hers earning another sum of Rs.5000/- per month by doing tuition work yet the aforesaid espousal does not hold any probative worth for want of adduction of relevant best evidence in support thereof comprised in his examining the official concerned of Swami Viveka Nand Public School also for want of his examining the parents of the wards tuitioned by the respondent herein. In sequel, thereto it is apt to conclude qua the respondent herein not possessing sufficient financial means to support herself.

9. For the foregoing reasons, there is no merit in the instant petition and it is accordingly dismissed. In sequel, the order rendered on 13.08.2014 in Crl. Revision RBT No. 6/2013/2011 by the learned Additional Sessions Judge (II) Una, H.P. is maintained and affirmed. The learned trial Magistrate is directed to, given the evident recalcitrance of the petitioner herein to beget compliance with the orders of this Court ensure by all lawful means forthwith expeditious execution of the orders of this Court. All pending applications also stand disposed of. Records be sent back forthwith.

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

Surinder Singh ……….Petitioner
Versus
State of Himachal Pradesh and others ……….Respondents

CWP No. 1006/2008
Reserved on : September 27, 2016
Decided on : November 11, 2016

H.P. Town and Country Planning Act, 1977- Section 31(5)- The mother of the petitioner applied seeking planning permission for the construction of commercial building – no intimation was received and the sanction is deemed to have been granted – however, a notice was issued to which a reply was sent – a writ petition was filed, which was disposed of with a direction to pass a speaking order- a detailed order was passed and the appeal was rejected against which a present writ petition has been filed- held, that if no decision is conveyed on the application for reconstruction, sanction is deemed to have been given – documents show that the plan submitted by the mother of the petitioner was not complete and sanction could not have been granted- the case for construction of three storeyed commercial building over existing single storey plus parking was rejected on the ground that proposal falls in the banned area of Shimla and proposed construction would obstruct vision and cause congestion - petitioner failed to reply to the observations made by the respondent and no decision could be taken on the plan- the period of 6 months cannot be counted from the date of submission of original application- the dispute regarding the receipt of the documents cannot be looked in exercise of the writ jurisdiction- petition dismissed. (Para-16 to 48)

Cases referred:

Live Oak Resort (P) Ltd. v. Panchgani Hill Station Municipal Council, (2001) 8 SCC 329
Municipal Corpn. Shimla v. Prem Lata Sood, (2007) 11 SCC 40
M/s. Verma Traders and others v. The State of Himachal Pradesh and another, AIR 1983 HP 81

For the petitioner : Mr. G.C. Gupta, Senior Advocate with Mr. Surender Thakur, Advocate.

For the respondents : Mr. Rajat Chauhan, Law Officer, for respondents No.1 to 3.
Mr. Hamender Singh Chandel, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant petition has been filed against order dated 18th March, 2008 passed by the Additional Chief Secretary (TCP) on an appeal under Section-32 of the HP Town and Country Planning Act, 1977 preferred by the petitioner against order dated 29.12.1997 of the Director, Town and Country Planning, Himachal Pradesh, whereby proposal of the petitioner for construction of three storeyed commercial building over existing single storey + parking and addition in ground floor on Khasra Nos. 281, 284, 288 to 310, 312 to 318, at Bright Land, Shimla-3, was rejected being in banned/core area of Shimla Planning Area and on the ground that said proposed construction will obstruct the vision and create more congestion in the already developed area.

2. However, this is second round of litigation between the parties as the petitioner has already approached this Court by filing CWP No. 398 of 1997, which was disposed of on 24.12.2007. The petitioner had filed aforesaid CWP against decision dated 1.3.2000, whereby appeal filed by the petitioner against order dated 29.12.1997 passed by Director, Town and Country Planning was rejected by respondent No.1. While disposing of CWP No. 398 of 1997, this Court quashed and set aside order dated 1.3.2000 and observed that order dated 1.3.2000 was not a speaking order, as such respondent No.1 was directed to pass a speaking order on the appeal of the petitioner within three months of the passing judgment dated 24.12.2007.

3. In pursuance to above, Additional Chief Secretary (TCP) passed a detailed order dated 18.3.2008, thereby rejecting the appeal of the petitioner, against which now the instant petition has been filed.

4. Matrix of the case, as emerge from the petition, is that the mother of petitioner namely Shanti Devi applied on 26.12.1994 seeking planning permission for the construction of the commercial building, as noticed above. As per the petitioner, he/his mother did not receive any communication till 22.4.1996, when letter was written to the Executive Engineer, Town and Country Planning. Another letter was written on 25.9.1996, which was received on 26.9.1996 in the office of Town and Country Planning. In between another letter dated 23.6.1995 was sent to the respondents, which too was not replied by them. On 20.11.1996, another letter was sent by Shanti Devi for invoking deemed sanction in her favour, on account of having received no response by her after 26.12.1994. Thereafter, on 5.5.1997a notice was sent to the Director, Town and Country Planning and Executive Engineer, Development Control Division No.4 through advocate, in reply to letter dated 11.3.1997, advising the respondents to withdraw letter dated 11.3.1997 and to accord sanction under deeming provision in her favour. This notice was also not replied to by the respondent. In the meantime, Shanti Devi expired, and, accordingly, the present petitioner filed CWP No. 398/1997 before this Court.

5. In reply to the averments contained in the writ petition, respondent-State put up a different case altogether. As per the reply, petitioner was intimated about the shortcomings in the proposal dated 26.12.1994 on the same date, to which the petitioner replied on 23.6.1995 that too without attending the shortcomings. Petitioner was again advised to attend to the shortcomings, on 22.6.1996. Petitioner replied on 31.7.1996 and again failed to submit the complete documents. On 17.9.1996, again petitioner was asked to meet the observations, which was replied by the petitioner on 26.9.1996, again leaving some of the formalities unattended. Respondents conveyed their observations on 17.10.1996 and 11.3.1997 to the petitioner. Provisions of deemed sanction having come into play, has been denied by the State. It is also averred that in response to the letter dated 23.11.1996 of petitioner, respondents asked petitioner to furnish original copy of revenue record on 11.3.1997. Factum of notice dated 5.5.1997 is not

denied, however, it is averred that the same was withdrawn on 26.8.1997. Stand as taken by the respondent-State is that the plan/proposal of petitioner was rejected in view of para 10.4.1.2 of the Interim Development Plan Shimla, to avoid congestion in the area. Further objection was taken that as per proposal, the set back left in the previous plan was also proposed to be used for construction, which would lead to congestion in the area. It was also averred that the site in question fell in the banned/core area of Shimla. They have vehemently denied the stand of the petitioner that the provisions of Interim Development Plan are applicable to vacant plots only. They also stressed that the Interim Development Plan was applicable to vacant as well as existing constructions. The main contention of the respondent-State is that provisions of deemed sanction would not be applicable since there is continuous correspondence between the petitioner and the respondents, besides the fact that the petitioner never submitted a complete proposal.

6. Petitioner filed rejoinder to the reply filed by respondents No.1 to 3 and refuted the averments made by the respondents. It is reiterated that the proposal submitted by the petitioner/ his predecessor-in-interest, was complete in all respects and further the petitioner attended to all the observations made by the respondents in subsequent communications. It is averred that during 23.6.1995 to 22.6.1996, for one year, there was no response/communication from the respondents rejecting/accepting the proposal of the petitioner and as such there is deemed sanction in favour of the petitioner as per para 31 of the Town and Country Planning Act. Factum of withdrawing notice dated 5.5.1997 is denied. It is reiterated that provisions of para 10.4.1.2 of the Plan are not applicable to the existing construction. It is also stated that no obstruction of vision would take place as the area behind the proposed construction site belongs to the petitioner only.

7. During the pendency of the petition, State also placed on record additional documents i.e. copies of letters/communications during the period 26.12.1994 to 29.12.1997 in order to show that correspondence has taken place between the petitioner and the office of Town and Country Planning during this period and there was no period, when there was no response given by the department to the communications received from the petitioner.

8. During the pendency of petition, Municipal Corporation, Shimla was arrayed as respondent No.4. The Corporation also filed is reply to the petition stating therein that the petitioner had submitted a proposal thereby exceeding the maximum floor area i.e. 1982.18 sq metres as against the maximum admissible area of 1074.48 sq metres. It was also averred that these facts had been concealed in the petition and as such same could not be dealt in the order passed by respondent No. 3 and respondent No.1. Deemed sanction in favour of petitioner was denied.

9. Petitioner filed rejoinder to the affidavit/ reply filed by Municipal Corporation, Shimla reiterating the stand taken in the petition and denying the averments made in the reply affidavit by the Municipal Corporation, Shimla. Factum regarding exceeding floor area was denied.

10. Interestingly, respondent State filed an application being CMP No. 8517/2014 thereby seeking amendment of reply on the ground that some relevant documents could not be filed during earlier reply. Paras No. 3 to 6 of reply were amended. Reply to the same was also filed. Yet another application was filed by the State for placing on record certain other documents.

11. Mr. G.C. Gupta, learned Senior Advocate duly assisted by Mr. Surender Thakur, Advocate, vehemently argued that the impugned order dated 18.3.2008, passed by the Additional Chief Secretary (TCP), while disposing of the appeal under Section 32 of the Town and Country Planning Act, 1977, is not sustainable in the eyes of law, as the same is not based on correct appreciation of facts as well as provisions of law and same deserves to be quashed and set aside. He further stated that the order passed by respondent No. 3, which was further upheld by respondent No.2, is against the provisions of Town and Country Planning Act, 1977 because neither the provisions of Para 10.4.1.2 of Interim Development Plan under the Act ibid are applicable in the present case nor the ground, on which plan has been rejected by respondent

No.3 falls in the ambit of the Act ibid. With a view to substantiate his aforesaid argument, he forcefully contended that since there was already a construction, qua which planning permission was sought, it was only a addition to existing construction. There is no force in the findings returned by the authority below that there would be congestion in the area in case permission is granted to the petitioner. As per Mr. Gupta, provisions of Interim Development Plan are applicable only in case planning permission is sought for construction on vacant plot and in this case, even no permission was required from State Government. Final authority for grant of permission vested with respondent No.2. Mr. Gupta, further contended that respondent No.2 while passing impugned order failed to take note of the deeming provisions as contained in Section 31(5) of the Act and wrongly arrived at conclusion that provisions of deemed sanction are not applicable in the present case. As per Mr. Gupta, besides the provisions contained in Section 31 of the Town and Country Planning Act, there is no other provision for grant/refusal of permission with respect to applications received under Section 30 of the Act, irrespective of the fact that recommendation is to be sent to respondent No.1. With a view to substantiate his aforesaid argument, Mr. Gupta invited attention of this Court to letter dated 26.12.1994, whereby predecessor-in-interest of the petitioner applied to respondent No.3 and submitted plan seeking planning permission for the construction of three stories over existing structure (single storey) plus parking, to demonstrate that plan, complete in all respects, was submitted with the authorities for according approval but the authorities failed to acknowledge aforesaid letter till 22.4.1996, when she sent another letter to the Executive Engineer, TCP to know about the fate of the plan submitted by her. Since the authorities failed to take action on her plan, same would be deemed to have been sanctioned as per provisions of Section 31 (5) of the Act immediately following the expiry of six months. Mr. Gupta, with a view to substantiate his argument that no communication after submission of plan vide letter dated 26.12.1994 was ever sent to the petitioner, made this Court to travel through various letters placed on record by way of annexures P-2 dated 22.4.1996, P-3 dated 26.9.1996, P-4 dated 20.11.1996 and P-5 notice dated 5.5.1997, to demonstrate that since there was no response by the authorities pursuant to submission of plan vide letter dated 26.12.1994, plan submitted by the predecessor-in-interest of the petitioner was bound to be sanctioned in terms of provisions of Section 31 (5) of the Act. While concluding his arguments, Mr. Gupta made this Court to peruse various letters purportedly sent by the petitioner to the respondents requesting therein to accord sanction to the plan as submitted by her vide letter dated 26.12.1994. Mr. Gupta, strenuously argued that since there was no communication from the side of respondents from 23.6.1995 to 22.6.1996, for more than the stipulated period of six months, plan submitted by the predecessor-in-interest of the petitioner is deemed to have been sanctioned as per Section 31 (5) of the Act. He placed reliance on judgment passed by Hon'ble Apex Court reported in (2001) 8 SCC 329 and judgment of this Court reported in AIR 1983 Himachal Pradesh 81. Mr. Gupta, further stated that bare perusal of impugned order passed in appeal by the appellate authority nowhere suggests that documents placed on record by the petitioner were ever taken into consideration by the appellate authority while disposing of the appeal, which clearly suggests that impugned order is not based upon correct appreciation of material documents made available on record by the petitioner, as such, same deserves to be quashed and set aside.

12. Mr. Rupinder Singh Thakur, Additional Advocate General duly assisted by Mr. Rajat Chauhan, Law Officer, supported the order passed by the appellate authority. While referring to the impugned order dated 18.3.2008, passed by Additional Chief Secretary (TCP), Mr. Thakur stated that same is based on correct appreciation of documents adduced on record as well as law and as such there is no illegality or infirmity in the same. Mr. Thakur, with a view to refute the contentions put forth by the petitioner that no communication after submission of plan by Shanti Devi, predecessor-in-interest of the petitioner, was sent to the petitioner by the respondents for more than six months, as a result of which plan submitted was deemed to have been sanctioned, invited attention of this Court to various documents placed on record by the respondent-State to demonstrate that letter dated 26.12.1994 was suitably replied and petitioner was advised to attend all the observations in a time bound manner to enable authorities to proceed ahead to sanction plan in accordance with law. Mr. Thakur, with a view to substantiate

his aforesaid contention also invited attention of this Court to various documents placed on record suggestive of the fact that after submission of plan vide letter dated 26.12.1994, respondents repeatedly requested the petitioner to attend to other observations made in various letters. Mr. Thakur, specifically invited attention of this Court to communications dated 17.10.1996 (annexure R-1/H and annexure R-1/J, addressed to the petitioner, wherein she was advised to make available structural design, to demonstrate that there is no force in the submissions having been made by the petitioner that after submission of plan dated 26.12.1994, no communication was ever addressed to the petitioner. Mr. Thakur, on the basis of aforesaid documents vehemently argued that since at no point of time, petitioner submitted plan complete in all respect, there was no occasion, whatsoever, for the authorities to take action in the matter. Mr. Thakur, while inviting attention of this Court to impugned order dated 18.3.2008, contended that bare perusal of same suggests that order is reasoned one and same has been passed after due appreciation of the facts. He specially stated that provisions of para 10.4.1.2 of Interim Development Plan under Town and Country Planning Act, 1977 were rightly applied in the case of petitioner because if plan submitted by petitioner is seen vis-à-vis spot, there would be congestion as has been defined in the provisions of para 10.4.1.2 of Interim Development Plan. He also refuted the claim of the petitioner that no permission is required from State Government and provisions of Interim Development Plan are applicable to vacant plots and not to existing construction. In this case, he stated that provisions are applicable to the construction whether on vacant plots or on existing constructions. In the aforesaid background, Mr. Thakur, while supporting the impugned order, prayed for dismissal of the petition.

13. Mr. Hamender Chandel, Advocate, appearing for Municipal Corporation, Shimla also supported the impugned order passed by the appellate authority and stated that the petitioner had submitted proposal thereby exceeding the maximum floor area i.e. 1982.18 sq metres as against admissible area of 1074.48 sq metres and as such same was rightly not accepted by the authorities. He also stated that at the time of furnishing plan with the Department, petitioner concealed material facts and proposal was not furnished as per position existing on the spot. Mr. Chandel, further argued that since there are ample documents on record suggestive of the fact that letter dated 26.12.1994 vide which plan was submitted, was suitably replied by the Town and Country Planning, there is no question of application of Section 31 (5) of the Act.

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

15. After carefully perusing the pleadings of the parties as well as submissions having been made by respective counsel, following questions arise for determination by this Court:

1. Whether plan submitted by the predecessor-in-interest of the petitioner on 26.12.1994 seeking planning permission for construction of three storied building over the existing construction (single storey) plus parking in the ground floor of Khasra Nos. 281, 284 and 288 to 310 and 312 to 318 at Bright Land Hotel, Shimla, is deemed to have been sanctioned in terms of Section 31 (5) of the Town and Country Planning Act, 1977?
2. Whether impugned order dated 18.3.2008 passed by Additional Chief Secretary (TCP) is based on correct appreciation of documents as well as law on the point?

16. Before adverting to merits of the case, it would be appropriate to reproduce Para 31(5) of the Himachal Pradesh Town and Country Planning Act, 1977, as under:

> Grants or refusal of permission. 31(5) If the Director does not communicate his decision whether to grant or refuse permission to the applicant within two months from the date of receipt of his application, such permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of two months:

Provided that in computing the period of two months the period in between the date of requisitioning any further information or documents from the applicant and date of receipt of such information or documents from the applicant shall be excluded.

17. Para 10.4.1.2(iii) of the Interim Development Plan, Shimla reads as under:

No building or other structure thereafter be erected or re-erected or materially altered: -

1. to exceed the height;
2. to accommodate or house a greater number of families;
3. to occupy a greater percentage of plot area;
4. to have narrower or smaller rear years, front yards, side yards, or other open spaces

   Other than required or any other manner contrary to provisions of these regulations.

18. Perusal of Section 31 (5) suggests that on receipt of application under Section 30, Director, TCP may either grant permission unconditionally or grant permission subject to such condition as deemed necessary in the circumstances or refuse permission. Section 31(5) further suggests that further order granting permission subject to condition or refusing permission shall state grounds for imposing such condition or such refusal. But most importantly, Section 31 (5) provides that if the Director does not communicate his decision whether to grant or refuse permission to the applicant within two months (amended) from the date of receipt of application, permission shall be deemed to have been granted to the applicant on the date immediately falling on the expiry i.e. two months, provided that in computing period of two months, period between the date of requisitioning of any further information or documents from the applicant and date of receipt of same from applicant, would be excluded.

19. In the instant case, in nutshell, the case of the petitioner is that his predecessor-in-interest namely Smt. Shanti Devi submitted plan to respondent No.3 vide communication dated 26.12.1994 seeking planning permission for construction of three storied building over the existing structure (single storey + parking in ground floor) of the property known as Cosy Nook Estate, Shimla-3, which was diarized as No. HIM-TP-case-471. Petitioner has placed on record drawings submitted by Smt. Shanti Devi on 26.12.1994. As per the petitioner, his predecessor-in-interest did not receive any communication till 22.4.1996 and as such she was compelled to send another communication to the Executive Engineer, TCP on 22.4.1996 i.e. annexure P-2. Perusal of aforesaid communication suggests that the petitioner had submitted case for planning permission for addition to existing building on 26.12.1994 and certain points were raised but the fact remains that the same were attended by Smt. Shanti Devi and submitted in the office of TCP on 23.6.1995. Since one year had passed after re-submission of plan on 23.6.1995, Smt. Shanti Devi vide letter dated 22.4.1996, claimed that permission shall be deemed to have been granted to the petitioner immediately on expiry of six months in terms of Section 31 (5). But perusal of annexure P-3 suggests that communication dated 25.9.1996 placed on record by the petitioner itself suggests that the respondent-department had called for structural designs from Smt. Shanti Devi because, admittedly, all these letters suggest that petitioner vide communication dated 23.6.1995 had informed the respondents that structural designs would be submitted in the department after approval of the Government is conveyed. Further, this letter suggests that structural designs were submitted vide communication dated 25.9.1996. It would be relevant to reproduce letter dated 25.9.1996 as under:

"To

The Executive Engineer,
Dev. Control Division No. IV,
Town and Country Planning Department,

Shimla-1(H.P.)

Sub: Planning permission/addition and alteration to the exiting structure in Cosynook Estaet vide your First observation letter No. HIM/TP-Case Diary No. 471/94 dated 26.12.94 and your third observation letter No. HIM/TCP-D-IV/Case No. Dy. 471/98-572 dated 17.9.96.

Dear Sir,

As I have already pointed out in my letter dated 23.6.95 that structural designs will be submitted in your Department after approval from the government is coveyed to us. Anyhow, I am submitting the structural designs which are enclosed herewith.

All the Tatima, jamabandhi and demarcation certificate are all submitted in your office on 26.12.94 and in my site plan 600/B is already deleted which I had submitted in your office on 31.7.96 showing all setbacks. As far as the setbacks are concerned, the building will be constructed on the existing structure where ground floor having parking lot is not to be demolished in any case.

Kindly refer to my letter dated 23.6.95. Your office neither raised any objection nor any rejection, infact no reply at all was received from your end. Further I also wrote a letter dated 22.4.95 sent under postal certificate requesting that my plan be sanctioned immediately, to which also no reply was received.

Kindly send me the approval letter of my plans as early as possible.

Thanking you.

Yours faithfully,

Sd/-

Shanti Devi

Encl: Structural designs.

(Total pages Twenty-six).

Recd.

Dtd. 26.9.96"

20. This Court, after perusing aforesaid communication is convinced that till 25.9.1996, plan submitted by predecessor-in-interest of the petitioner vide letter dated 26.12.1994 was not complete in all respects and as such there was no occasion for the respondent authorities to grant sanction, if any. Perusal of annexure P-5 placed on record by petitioner suggests that legal notice was got served upon Director, TCP, through advocate calling upon authorities to withdraw leter dated 11.3.1997, whereby Smt. Shanti Devi, predecessor-in-interest of the petitioner, was asked to furnish copies of revenue records. Since petitioner has not placed on record communication dated 11.3.1997, it would be apt to reproduced paras 3 to 5 of the legal notice dated 5.5.1997 as under:

"3. That no sanction or refusal was communicated to Smt. Shanti Devi with respect to the building plan submitted by her on 26-12-1994 within a period of 6 months from the date of receipt of application seeking permission, therefore, the building plan was "deemed to have been sanctioned" within the meaning of Section 31(5) of H.P. Town & Country Planning Act, 1977. This fact was brought to your notice by Smt. Shanty Devi mother of my client vide her notice dated 21-11-1996 and was diarised on 23-11-1996 in your office vide diary No. 7596.

4. That since the building plan submitted by Smt. Shanti Devi for carrying out additions/alterations in the building was "deemed to have been sanctioned", therefore, she was within her right to carry out construction.

5. That my client has received letter No.HIM/TCP/D-iv/Case No.471/96-97-1202-03 dated 11-3-1997 whereby my client has been asked to furnish copies of revenue records. It is brought to your notice that since no objection was raised by your department within the stipulated period of 6 months from the date of submissions of the plan, therefore, the letter dated 11-3-1997 issued by you, referred to above, is totally uncalled for and it has been issued just to harass my client. You have no right at this stage to call upon my client to submit any documents as the plan stands already deemed sanctioned as per law."

21. Perusal of aforesaid averments contained in the legal notice suggests that vide communication dated 11.3.1997, predecessor-in-interest of the petitioner was asked to furnish revenue records but she instead of supplying the same, stated that since no objection was raised by the department within stipulated period of six months from the date of submission of plan, letter dated 11.3.1997 needs to be withdrawn.

22. Finally, respondents vide letter dated 29.12.1997, rejected the case of the petitioner for construction of three storied commercial building over existing single storey + parking, submitted by the predecessor-in-interest of the petitioner, on the ground that the proposals falls in the banned area of Shimla and proposed construction would obstruct vision and cause congestion.

23. Petitioner being aggrieved with the issuance of aforesaid rejection letter issued by the respondents filed an appeal under Section 32 of the Town and Country Planning Act, 1977, which was also rejected. Being further aggrieved, petitioner filed CWP No. 398/1997 before this Court, which was decided on 24.12.2007, when this Court quashed order passed by appellate authority on 1.3.2000 and directed it to decide the appeal afresh and to dispose of the same by passing speaking/reasoned order reflecting due application of mind. In the aforesaid background, appellate authority again decided the appeal under Section 32 of the Town and Country Planning Act, 1977 and passed order dated 18.3.2008, which is impugned before this Court, in the present petition.

24. This Court, with a view to ascertain correctness and genuineness of the order passed by appellate authority, examined the same, perusal whereof suggests that the respondents while refuting claim of the petitioner stated before the appellate authority that pursuant to submission of the plan vide letter dated 26.12.1994, Executive Engineer, advised the predecessor-in-interest of the petitioner to attend to the observations which were with respect to challan fee, planning permission of the Municipal Corporation, Shimla qua existing construction and to submit structure stability certificate. Aforesaid submissions/ contentions having been made by the respondents before appellate authority are strengthened by communication dated 23.6.1995 placed on record by petitioner, whereby observations made by Executive Engineer were addressed by the petitioner but the fact remains that the petitioner neither furnished structural design details nor submitted copies of sanction as was asked by the Executive Engineer. Respondents vide letter dated 22.6.1996 again advised the petitioner to submit site/location plan and structural designs, meaning thereby, after furnishing of plan, on 26.12.1994, predecessor-in-interest of the petitioner failed to attend the observations made by the authorities, as a result of which, plan submitted by Smt. Shanti Devi remained pending with the authorities.

25. Close perusal of communication dated 1.8.1996 placed on record by the petitioner itself suggests that no structural designs as were called for by Executive Engineer, were submitted because perusal of communication dated 1.8.1996 clearly suggests that at that time, petitioner submitted that structural designs would be submitted as and when necessary approval is granted by the Government. Hence, after careful perusal of aforesaid communications, which have been discussed hereinabove, this Court is compelled to conclude that the case of the petitioner remained incomplete and same could not be considered by the authorities for want of necessary documents. Respondents vide letter dated 17.91996, again advised the petitioner to submit structural designs and copies of revenue papers. It was specifically stated in the aforesaid letter that site plan was not proper as set backs were not shown therein but there is no document

available on record suggestive of the fact that pursuant to aforesaid communication dated 17.9.1996, petitioner submitted structural designs as well as copies of revenue papers. Similarly, there is letter dated 17.10.1996, placed on record by respondents, perusal whereof suggests that petitioner was again requested to submit revenue papers/requisite designs. Again vide communication dated 11.3.1997, reminder was sent regarding communication dated 17.10.1996 but no response was sent by the petitioner. Finally, on 5.5.1997, petitioner issued notice to the respondents calling upon them to withdraw letter dated 11.3.1997 and to accord sanction in terms of Section 31 (5) of the Act to the plan submitted on 26.12.1994. But interestingly, aforesaid legal notice dated 5.5.1997 was withdrawn vide communication dated 26.8.1997, which, reads as under:

> "To
>
> The Executive Engineer,
> Development Control Visn. No.4
> Shimla.
>
> Sub: Planning permission case No. Him/TCP/D-IV/case No.471/96-97
>
> Dear Sir,
>
> I hereby withdraw the notice given by my advocate dated 5-5-1997, which were given under my instruction, for the case mentioned above.
> Thanking you,
> Yours faithfully
> Sd/-
> (Surinder Singh)
> 26/8/97"

26. Since the petitioner failed to responded to the various communications sent by the respondents, his case was rejected on 29.12.1997, as has been stated herein above.

27. During arguments having been made by the parties, Mr. G.C. Gupta, learned Senior Advocate disputed the correctness and genuineness of the letters placed on record by the respondents and as such this Court summoned the original record pertaining to the case.

28. At this stage, before proceeding ahead to decide the matter on merits, it would be apt to reproduce paras 3 to 6 of the reply filed by respondents No.1 to 3:

> "3. That the contents of this para are wrong hence denied. It is submitted that Smt. Shanti Devi, the predecessor in interest of the petitioner had applied for construction of three and half storey commercial building over existing structure on old kh. No. 602, 602/1 & 602/2 (New Khasra nos. 281, 284, 288 to 310 & 312 to 318 at bright Land Hotel on dated 26.12.1994. The applicant Smt. Shanti Devi was informed about the short comings in the plan on 26.12.1994 and the applicant submitted his reply on 23.6.1995 without attending all the observations and the applicant was again advised to attend all the observations vide letter on 22.6.1996 vide which the applicant was asked to submit the site plan, location plan and structural design. The applicant attended the aforesaid observations partly vide letter 31.7.1996 (Diarised in the office dated 1.8.1996) and submitted only site and location plan. The applicant was again asked to attend the complete observations vide letter dated 17.9.1996 which was replied by the applicant on dated 25.9.1996, (diarised in the office vide diary No. 557 dated 26-9-1996), but this time also the applicant did not attended all the observations and submitted only structural design and accordingly observation

conveyed to applicant./ petitioner on dated 17.10.1996 and 11.3.1997. It is further submitted that provision of deemed sanction would have come into play only if the department would not have responded and the applicant would have fulfilled all requisite necessary codal requirements.

4. That the contents of this para are wrong hence denied and it is submitted that during the period 26.12.1994 to 17.10.1996 lot of correspondence was done with the petitioner. After receiving a letter dated 23.11.1996 (regarding Deemed Sanction) from the petitioner the replying respondent had asked the petitioner to furnish the original copy of revenue record vide letter dated 11.3.1997. (Copy of letter attached as annexure A-1) The contents of para are admitted to the extent that petitioner through his counsel issued a notice on dated 5.5.1997 but the same was withdrawn by the petitioner Sh. Surinder Singh no dated 26.8.1997.

5. That the contents of this para are partly denied to the extent that no communication regarding the plan submitted was conveyed to him but rest of the contents of para are admitted that CWP No. 398/1997 was filed by him in this Hon'ble Court. The petitioner had submitted three plans out of which two were sanctioned and third was rejected.

6. That the contents of para 6 and sub para are admitted to the extent that Director, Town and Country planning filed reply to the petition in the CWP No. 298/97 on dated 23.12.1997. The plan submitted by the applicant was rejected by the director on dated 29.12.1997. The petitioner challenged the rejection before the Secretary (TCP) to the Govt. of Himachal Pradesh but the same was dismissed vide order on dated 1.3.2000."

29. Perusal of aforesaid reply filed by the respondents suggests that despite there being several reminders, petitioner failed to attend the observations made by the respondents as far as plan submitted by petitioner and as such respondents were not in a position to take decision on the same. Petitioner, by way of rejoinder, refuted the aforesaid claim of the respondents. Respondents placed on record certain documents in the shape of annexure P-15 (original plan) i.e. letter dated 26.12.1994 and 25.9.1996, annexure P-17 dated 23.6.1996. Perusal of aforesaid letter dated 26.12.1994 whereby original plan was submitted before authorities for consideration, clearly suggests that structural design was not furnished alongwith original plan. Similarly, perusal of communication dated 25.9.1996, suggests that department had raised certain queries with regard to structural designs having been not furnished by the petitioner alongwith original plan and pursuant to these queries, petitioner vide communication dated 23.6.1995, informed the respondents that structural designs would be submitted in the department, after approval of the government is conveyed to the petitioner. It also emerges from letter dated 25.9.1996 that structural designs were submitted vide communication dated 25.9.1996. Similarly, perusal of communication dated 23.6.1998(annexure P-17) clearly suggests that information called for by the respondents could not be submitted by the petitioner since she had to leave for Delhi for medical treatment. At this stage, it would be relevant to reproduce communication dated 23.6.1998 (annexure P-17) as under:

"BRIGHTLAND HOTEL, COSY NOOK ESTATE, SHIMLA-171003, TEL:72659, 213659

To,
The Executive Engineer III,
Town & Country Planning Deptt.,
Division No. III, Khalini, Shimla-2.

Sub: Planning permission/additions & alterations to the existing structure, observation letter No HIM/TP-Case No.Dy.471/94 Dt. 26/12/1994

Sir,

I am submitting the documents as required vide the observation letter mentioned above about.
This is to inform you that due to my old age and severe cold weather I had to leave for Delhi for medical treatment and, therefore, I could not submit the information /documents required vide the above mentioned letter received from your office. I am now submitting the following documents: -

1. Challan Fee acknowledgement
2. As per as the structural design details are concerned it is submitted that the same will be submitted in your office/dept. after the approval from the Govt. is conveyed.
3. The copies of completion /sanctioned plans have already been submitted as enclosures along with the case files case No.3475 recommended/ approved by the Govt. & the dept of H.P.T.C.P.
It is requested that the planning permission may kindly be granted.
Thanking you.

Yours faithfully,
Sd/-
(Smt. Shanti Devi)
Dt.23/6/95"

30. Perusal of annexure P-18 dated 25.7.1997 also suggests that since petitioner failed to submit relevant revenue record, Executive Engineer, Division No. 4, Town and Country Planning Department himself applied to Naib Tehsildar (Urban) Settlement of land, HP Shimla-6, for issuance of Jamabandi and Tatimas. Perusal of aforesaid letter suggests that revenue authorities were requested to issue copies of Jamabandi as well as Tatimas in respect of Khata/Khatauni No. 45/61 situate at Up-Mohal Station Ward, Shimla Main falling under Station Ward, Shimla, Main. Annexure P-19, letter dated 28.8.1997 further suggests that the petitioner failed to furnish documents relating to revenue record with the plan permission case and as such no inquiry, if any could be conducted by the authorities concerned. Accordingly, Executive Engineer, Division No. 4, TCP, sent a communication to Director, Town and Country Planning informing therein that since requisite documents have been received and case has been examined. Record further reveals that the petitioner withdrew her legal notice in the case and proposed to raise construction of ground floor besides three additional stories on it. Perusal of communication dated 28.8.1997 suggests that the planning permission complete in all respects was submitted to the Director, TCP on 28.8.1997 and petitioner withdrew her notice dated 5.5.1997 wherein authorities were advised to withdraw letter dated 11.3.1997 and to accord permission under 'deeming provisions'. Perusal of annexure P-20 placed on record i.e. affidavit filed by Shri Ali Raza Rizvi, the then Director, Town and Country Planning, further suggests that petitioner had submitted two building plans, which are as follows:

"(i) Construction of one additional storey over existing 3 storey hotel building on Khasra No. 314 to 318 and 320 to 327 or Old Khasra No. 602/1.

(ii) Construction of a 4 storey + 1 parking floor hotel building on Khasra No. 297 to 299, 281, 284, 288 to 290, 300, 305 to 308 or old Khasra No. 602 and 602/2"

31. It also emerges from the affidavit that Director, Town and Country Planning made recommendations in each of the above plans in following terms:

"(i) not to allow any additional storey over existing 3 storey hotel building.

(ii) to allow 2 storey + 1 parking floor instead of 4 storey + 1 parking floor."

32. Government, vide letter dated 8.1.1998, conveyed planning permission without mentioning the number of stories to be allowed to the petitioner. Consequently, respondent No.2 made further reference to the Government on 29.1.198 and 24.4.1998 to intimate the correct position about the case in respect of number of storeys allowed. Finally, vide letter dated 23.5.1998, Government decided to consider the case of the petitioner afresh but as far as third case i.e. case No. 471/94, which is subject matter of the present petition, same was rejected vide letter No. HIM/TP-PP(P.Reg.)/97-300-Case No.471/94-15719-20 dated 29.12.97.

33. After careful perusal of aforesaid averments contained in the affidavit of Director, TCP, it clearly emerges that matter remained pending with the authorities from 26.12.1994 till 29.12.1997, for want of certain documents as well as clarification of the Government.

34. At the cost of repetition, it may be again observed that petitioner vide communication dated 23.6.1995 (annexure P-17), informed the authorities that structural design details would be submitted to the respondents after approval from the Government is conveyed, meaning thereby other cases as have been mentioned herein above, in affidavit of Shri Ali Raza Rizvi, the then Director, were pending before the authorities and petitioner wanted to file structural designs after approval of the government in those cases. This court, after perusing aforesaid communication placed on record by the petitioner, is fully convinced and satisfied that the matter was under active consideration with the authorities after submission of plan on 26.12.1994 and same could not be decided finally for want of documents from the side of the petitioner, who despite there being several communications failed to submit the same and finally the Government decided to consider the case of the petitioner afresh vide communication dated 23.5.1998, after withdrawal of legal notice dated 5.5.1997, wherein petitioner unconditionally withdrew the legal notice with the prayer to consider the plan submitted on 26.12.1994.

35. Respondents No.1 to 3, in terms of order passed by this Court placed on record certain documents to demonstrate that original plan submitted by petitioner vide communication dated 26.12.1994 was duly replied to and predecessor-in-interest of the petitioner was asked to attend to the observations so that case is approved at the earliest. Perusal of annexures R-1/B dated 26.12.1994, R-1/D dated 22.6.1996, R-1/F dated 17.9.1996, R-1/H dated 17.10.1996 and R-1/J dated 11.3.1997, clearly suggests that the matter remained under active consideration of the authorities and same could not be decided finally for want of certain documents from the side of the petitioner.

36. Careful perusal of documents annexure R-1/C dated 23.6.1995, R-1/E dated 31.7.1996, R-1/G dated 25.9.1996, R-1/K legal notice dated 5.5.1997, R-1/L communication dated 26.8.1997, also suggests that aforesaid communications sent by the petitioner were suitably replied by the department and repeatedly time was taken by the petitioner to submit structural design details.

37. Interestingly, in the aforesaid communications sent by the petitioner, in reply to letter issued by the respondents, petitioner has nowhere claimed that his plan submitted on 26.12.1994 stands sanctioned under deeming provisions of Section 31 (5). Vide annexure P-5, legal notice dated 5.5.1997, respondents were advised to withdraw letter dated 11.3.1997, whereby petitioner was asked to furnish revenue record. But the fact remains that vide letter dated 26.8.1997, same was withdrawn, meaning thereby contents of letter dated 11.3.1997 were duly admitted by the petitioner. It may be noticed here that after withdrawal of legal notice, Government vide letter dated 23.5.1998, decided to consider the case of the petitioner afresh.

38. After careful perusal of pleadings available on record as well as the original record submitted before this Court, I am unable to accept the contention of the petitioner that his case deserves to be allowed in terms of Section 31 (5) of the Act, under deeming provisions, because close scrutiny of documents as have been discussed in detail, clearly suggests that after furnishing original plan on 26.12.1994, matter remained under active consideration with the

authorities, who were not in a position to process the case of the petitioner for want of certain documents from the side of the petitioner.

39. There are ample documents available on record suggestive of the fact that after submission of plan on 26.12.1994, respondents advised the predecessor-in-interest of the petitioner to submit certain documents i.e. structural designs and revenue papers and plans pertaining to existing building approved by Municipal Corporation, Shimla. Finally vide communication dated 11.3.1997, petitioner was advised to make available revenue record. Apart from above, when petitioner himself withdrew legal notice dated 5.5.1997, plea having been made by petitioner can not be accepted because, admittedly, after withdrawal of notice, government decided to consider the case afresh. This Court also perused impugned order dated 18.3.2008, perusal whereof suggests that same is based on correct appreciation of documents made available on record by the respective parties. It also suggests that both the parties were given due opportunity of hearing and to place on record documents.

40. Now, this Court would advert to the judgments having been relied upon by Mr. Gupta in support of his claim vis-à-vis facts of the present case. Mr. Gupta, has vehemently argued that since the respondents failed to respond to the plan submitted by the petitioner within stipulated period of six months, plan is deemed to have been sanctioned in terms of Section 31 (5) of the Act.

41. Petitioner, in support of his claim has relied upon judgment of the Hon'ble Apex Court in **Live Oak Resort (P) Ltd. v. Panchgani Hill Station Municipal Council** reported in (2001) 8 SCC 329, wherein their lordships have held as under:

> "29. As regards the issue of deemed sanction, the High court answered it in the negative recording therein that the appellants were refused of any sanction though beyond the period as such deemed sanction would not arise. Unfortunately, we cannot lend our concurrence thereto. Panchgani Municipal Council being a 'C' Class Municipal Council of Maharashtra in its Standardised Buildings Bye-laws, in particular, bye-law 9.2 records that while the authority may sanction or refuse a proposal, there stands an obligation on the part of the authority to communicate the decision and where no orders are communicated within 60 days from the date of submission of the plan either by way of a grant or refusal thereto, the authority shall be deemed to have permitted the proposed construction. In view of our observations noticed hereinbefore, we are not inclined to go into this issue in any detail suffice however to record that the submissions pertaining to deemed sanction has substance and cannot be brushed aside in a summary fashion. Eventual rejection does not have any manner of correlation with deemed sanction - it is only that expiry of the 60 days that the sanction is deemed to be given, subsequent rejection cannot thus affect any work of construction being declared as unauthorised. The deeming provision saves such a situation. As noticed above, we are not inclined to detain ourselves any further on this score."

42. Aforesaid judgment having been relied upon by the petitioner has been duly taken into consideration by the Hon'ble Apex Court, in case titled **Municipal Corpn. Shimla v. Prem Lata Sood** reported in (2007) 11 SCC 40, wherein their lordships have held as under:

> 33. Section 247 no doubt provides for a legal fiction specifying a period of sixty days, within which the application for grant of sanction of a building plan should be granted, but the said period evidently has been considered to be providing for a reasonable period during which such application should be disposed of. However, only because the period of sixty days has elapsed from the date of filing of application, the same by itself would not attract the legal fiction contained in Section 247 of the 1994 Act. When such an application is attended to and the defects in the said building plans are pointed out, there cannot be any doubt whatsoever that the applicant must satisfactorily answer the queries and/or remedy the defects in the building plans pointed out by the competent authority.

36. It is now well-settled that where a statute provides for a right, but enforcement thereof is in several stages, unless and until the conditions precedent laid down therein are satisfied, no right can be said to have been vested in the person concerned. The law operating in this behalf, in our opinion is no longer res integra.

38. The question again came up for consideration in Howrah Municipal Corpn. and Others v. Ganges Rope Co. Ltd. and Others [(2004) 1 SCC 663], wherein this Court categorically held:

> "37. The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in relation to ownership or possession of any property for which the expression vest is generally used. What we can understand from the claim of a vested right set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a legitimate or settled expectation to obtain the sanction. In our considered opinion, such settled expectation, if any, did not create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such settled expectation has been rendered impossible of fulfilment due to change in law. The claim based on the alleged vested right or settled expectation cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules and not by the Corporation against whom such vested right or settled expectation is being sought to be enforced. The vested right or settled expectation has been nullified not only by the Corporation but also by the State by amending the Building Rules. Besides this, such a settled expectation or the so-called vested right cannot be countenanced against public interest and convenience which are sought to be served by amendment of the Building Rules and the resolution of the Corporation issued thereupon."

44. There cannot be any doubt whatsoever that an owner of a property is entitled to enjoy his property and all the rights pertaining thereto. The provisions contained in a statute like the 1994 Act and the building bye-laws framed thereunder, however, provide for regulation in relation to the exercise and use of such right of an owner of a property. Such a regulatory statute must be held to be reasonable as the same is enacted in public interest. Although a deeming provision has been provided in sub-section (1) of Section 247 of the 1994 Act, the same will have restricted operation. In terms of the said provision, the period of sixty days cannot be counted from the date of the original application, when the building plans had been returned to the applicant necessary clarification and/or compliance of the objections raised therein. If no sanction can be granted, when the building plan is not in conformity with the building bye-laws or has been made in contravention of the provisions of the Act or the laws, in our opinion, the restriction would not apply despite the deeming provision.

45. A legal fiction, as is well-known, must be construed having regard to the purport and object of the Act for which the same was enacted. [See Ishikawajma-Harima Heavy Industries Ltd. v. Director of Income Tax, Mumbai 2007 (1) SCALE 140 Para 36].

47. The said decision having been rendered in the fact situation obtaining therein, which has no similarity to the facts of the present case, which in our opinion, cannot be said to have any application whatsoever. The submission of Mr. Ganguli that despite expiry of the period of sanction of the development plan by the State under the 1977 Act, the same should be held to be extended, in our opinion, cannot be accepted.

Reliance has been placed by Mr. Ganguli on M.C. Mehta (Badkhal and Suraj Kund Lakes Matter) v. Union of India and Others [(1997) 3 SCC 715]. Therein, it was held :

"2. No construction of any type shall be permitted, now onwards, in the areas outside the green belt (as shown in Ex. A and Ex. B) up to one km radius of the Badhkal lake and Surajkund (one km to be measured from the respective lakes). This direction shall, however, not apply to the plots already sold/allotted prior to 10-5- 1996 in the developed areas. If any unallotted plots in the said areas are still available, those may be sold with the prior approval of the Authority. Any person owning land in the area may construct a residential house for his personal use and benefit. The construction of the said plots, however, can only be permitted up to two and a half storeys (ground, first floor and second half floor) subject to the Building Bye-laws/Rules operating in the area. The residents of the villages, if any, within this area may extend/reconstruct their houses for personal use but the said construction shall not be permitted beyond two and a half storeys subject to Building Bye-laws/Rules. Any building/house/commercial premises already under construction on the basis of the sanctioned plan, prior to 10-5-1996 shall not be affected by this direction"

50. Furthermore, since special regulations have been framed in the town of Shimla, the core area as provided for in the regulation is required to be protected. The area in question has been declared to be a heritage zone, and hence no permission to raise any construction can be issued, which would violate the ecology. Such regulations have been framed in public interest. Public interest, as is well-known, must override the private interest. [See Friends Colony Development Committee v. State of Orissa and Others AIR 2005 SC 1 para 22].

43. Careful perusal of aforesaid judgment passed by Hon'ble Apex Court in Municipal Corporation vs. Prem Lata Sood case, clearly suggests that deeming provisions as provided under Section 31 (5) of TCP Act, would have restricted operation and period of six months can not be counted from the date when original application was submitted, especially when building plan had been returned to applicant for necessary clarification and/or compliance of objections raised therein. Hon'ble Apex Court specifically held in the said judgment that If no sanction can be granted, when the building plan is not in conformity with the building bye-laws or has been made in contravention of the provisions of the Act or the laws, the restriction would not apply despite the deeming provision. Apex Court has specifically held that since special regulations have been framed in the town of Shimla, the core area as provided for in the regulation is required to be protected.

44. Petitioner further has relied upon judgment of this Court rendered in **M/s. Verma Traders and others v. The State of Himachal Pradesh and another**, reported in AIR 1983 HP 81, wherein it has been held as under:

"9 Under Section 17(2) (f), the terms and conditions subject to which, and the manner in which, the permit may be granted under Section 19 (1) has been prescribed. In the absence of any rules framed under Section 17 of the Act, it is not possible to ascertain whether the above condition could be imposed or not. Even the guidelines are not indicated anywhere. An authority cannot assume arbitrary, unguided and unbridled power in a matter relating to the rights of a citizen. By imposing the above condition, the State Government indirectly made Section 4 of the Act applicable by defeating the purpose of Section 19 (1) thereof. Such a course cannot be considered legal or reasonable. The State Government cannot be permitted to achieve an object indirectly which is not permissible in terms of an enabling provision of the Act. Section 19 (1) being an exception to Section 4 of the Act, the action could be only taken in consonance with the spirit of the said section. It is strange that in the one hand the State Govt. permitted the petitioners to get the area demarcated, get the trees marked allowed their

felling and to convert timber therefrom and on other hand when the forest produce reaches the stage of sale in the shape of timber, a condition like the one referred to above is imposed. Such an action is not justified and the principle of equitable and promissory estoppel will apply to the facts of the case. It is a matter of common knowledge that in the process of felling of trees and converting timber therefrom, a person has to incur heavy expenses. Now, when the timber is ready for sale, without any price having been fixed and without action having been taken under Sections 6 and 7 of the Act, it is not just and proper to impose such a condition. Since such a condition is not in consonance with the essence and spirit of Section 19 (1) of the Act, the same cannot be sustained Moreover, no such material has been placed on record to show that the restriction imposed is in the interest of general public. Since no rules are prescribed and nothing cap be spelled out from the record to justify the imposition of such a condition, the same is unwarranted under the law. The record reveals that the final decision of the imposition of the above condition has been taken at the final stage, without any material on record."

45. Aforesaid judgment relied upon by the petitioner, if read in its entirety, may be of no help to the petitioner. As has been discussed in detail, there was no occasion for the respondents to act within stipulated period as envisaged under Section 31 (5) of the Act, intimating therein ground for refusal because, at no point of time, petitioner submitted his plan complete in all respects. There is no quarrel that once authority in terms of Section 31 (5) of the Act had a provision of deemed sanction, it was incumbent upon it to sanction or refuse proposal within stipulated period. But in the case in hand, as has been noticed in detail, plan was not submitted complete in all respects, rather there are communications available on record suggestive of the fact that repeatedly petitioner failed to submit structural design and sought time from the authorities. Thus, it is not the case where deeming provisions would apply. Petitioner has also relied upon judgment of this Court rendered in **Smt. Kanta Sharma and others v. State of H.P. and another** decided on 18.10.2004. However, same is also not applicable to this case.

46. Hence, this Court after carefully examining the law laid down in **Municipal Corpn. Shimla v. Prem Lata Sood**, is fully convinced and satisfied that plan submitted by petitioner can not be held to sanctioned under deeming provisions especially in view of the fact that the petitioner has failed to remove the objections/ supply the documents called for by the respondents and during this period, petitioner never submitted plan, complete in all respects, to the authorities.

47. At this stage, Mr. G.C. Gupta, learned Senior Advocate disputed the correctness of the documents filed by the respondents by stating that none of these documents were ever received by the petitioner and as such same can not be taken into consideration. But this Court, after carefully perusing the documents placed on record by respondents juxtaposing same with the documents placed on record by the petitioner is satisfied and convinced that documents having been relied upon by the respondents were received and suitably replied by the petitioner. Moreover, dispute, if any, with regard to genuineness and correctness of the documents placed on record by respondents, can not be looked into by this Court in the present proceedings and this Court sees no reason to disbelieve the correctness and genuineness of the government record, which suggest that matter remained under active consideration and the case of petitioner could not be considered for want of certain clarifications from the petitioner.

48. Consequently, in view of detailed discussion made herein above, there is no merit in the petition and the same is dismissed. Pending applications are also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

The New India Assurance Company Limited …Appellant.
Versus
Smt. Resha Devi and others …Respondents.

FAO No. 364 of 2012
Decided on: 11.11.2016

Motor Vehicles Act, 1988- Section 149- No evidence was led by the respondents and the evidence led by the claimant remained unrebutted – it was for the insurer to plead and prove that the insured had committed willful breach of the terms and conditions of policy – drivinglicence was exhibited and no objection was raised at the time of exhibition – the issues were rightly decided against the insurer – appeal dismissed. (Para- 11 to 19)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, 2013 AIR SCW 6505
Rakesh Kumar & Etc. Etc. versus United India Insurance Company Ltd. & Ors. Etc. Etc., JT 2016 (6) SC 504

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Nemo for respondents No. 1 to 3.
Mr. Dheeraj K. Vashisth, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 24th March, 2012, made by the Motor Accident Claims Tribunal-cum-Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 06/2005 (79/2002), titled as Smt. Resha Devi and others versus Vijay Kumar and others, whereby compensation to the tune of ₹ 3,27,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

2. The claimants, owner-insured and driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has called in question the impugned award on the grounds taken in the memo of the appeal.

4. Learned counsel appearing on behalf of the appellant-insurer argued that the Tribunal has fallen in an error in saddling it with liability on the following two counts:

(i) That the driver of the offending vehicle was not having a valid and effective driving licence at the time of the accident; and

(ii) That the risk of the deceased was not covered.

5. The arguments advanced by the learned counsel appearing on behalf of the appellant-insurer are not legally tenable for the reasons to be recorded hereinafter.

6. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, which have given birth to the appeal in hand.

7. The claimants invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation to the tune of ₹ 15 lacs, as per the break-ups given in the claim petition, on the ground that they became the victims of the vehicular accident, which was caused by the driver, namely Shri Balbir Singh, while driving tanker, bearing registration No. HP-20-8293, rashly and negligently on 13th June, 2002, near Village Karsal, in which Shri Bal Ram sustained injuries and succumbed to the said injuries.

8. The claim petition was resisted by the respondents by the medium of the replies and following issues came to be framed:

(i) Whether deceased Bal Ram died on 13-06-2002 near Karsal in motor accident due to rash and negligent driving of driver of vehicle No. HP-20-8293 as alleged? OPP

(ii) If issue No. 1 is proved in affirmative, as to whether the petitioners are entitled for compensation, if so, to what amount and from whom? OPP

(iii) Whether respondent No. 2 was not having valid and effective driving licence at the time of accident and vehicle was driven in contravention of the policy as alleged?

(iv) Relief.

9. The claimants led evidence, examined Shri Pyar Chand as PW-2, Dr. Nirdosh as PW-3 and one of the claimants, namely Smt. Resha Devi, herself stepped into the witness box as PW-1.

10. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation in favour of the claimants in terms of the impugned award and saddled the insurer with liability. Hence, the appeal.

11. It is apt to record herein that the respondents in the claim petition, i.e. appellant-insurer, owner-insured and driver of the offending vehicle have not led any evidence. Thus, the entire evidence led by the claimants have remained unrebutted.

12. It was for the insurer to plead and prove that the owner-insured of the offending vehicle has committed willful breach as per the mandate of Sections 147 and 149 of the MV Act read with the terms and conditions of the insurance policy, has not led any evidence, thus, has failed to do so.

13. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. ....

(i) ....

(ii) ....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but

must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v)........................

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

14. The Apex Court in another case titled as **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **2013 AIR SCW 6505,** has laid down the same principle. It is profitable to reproduce para 10 of the judgment herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the insurance company is not liable for the compensation."

15. So far as the question of valid and effective driving licence is concerned, the driving licence of the driver of the offending vehicle has been exhibited as Ext. R-2. The appellant-insurer has not raised any objection at the time when the same was exhibited, thus, is precluded from raising the same at this stage.

16. My this view finds support from the judgment rendered by the Apex Court in the case titled as **Rakesh Kumar & Etc. Etc. versus United India Insurance Company Ltd. & Ors. Etc. Etc**., reported in **JT 2016 (6) SC 504**, wherein it has been held that once the license was proved and marked in evidence without any objection by the Insurance Company, it has no right to raise any objection about its admissibility at a later stage. It is apt to reproduce paras 19 to 22 of the said judgment herein:

"19. In our considered opinion, the Tribunal was right in holding that the driver of the offending vehicle possessed a valid driving license at the time of accident and that the Insurance Company failed to adduce any evidence to prove otherwise. This finding of the Tribunal, in our view, should not have been set aside by the High Court for the following reasons:

20. First, the driver of the offending vehicle (N.A.-2) proved his driving license (Exhibit-R1) in his evidence. Second, when the license was proved, the Insurance Company did not raise any objection about its admissibility or manner of proving. Third, even if any objection had been raised, it would have had no merit because it has come on record that the original driving license was filed by the driver in the Court of Judicial Magistrate First class, Naraingarh in a criminal case arising out of the same accident. <u>Fourth, in any event, once the license was proved by the driver and marked in evidence and without there being any objection by the Insurance Company, the Insurance Company had no right to raise any objection about the admissibility and manner of proving of the license at a later stage</u> (See Oriental Insurance Company Ltd. Vs. Premlata Shukla & Ors. [JT 2007 (8) SC 575 : 2007 (13) SCC 476] and lastly, the Insurance Company failed to adduce any evidence to prove that the driving license (Ex.R1) was either fake or invalid for some reason.

21. In the light of foregoing reasons, we are of the considered opinion that the High court was not right in reversing the finding of the Tribunal. Indeed, the High Court should have taken note of these reasons which, in our view, were germane for deciding the issue of liability of the Insurance Company arising out of the accident.

22. We, therefore, find no good ground to concur with the finding of the High Court. Thus while reversing the finding, we hold that the driver of the offending vehicle was holding a valid driving license (Exhibit-R1) at the time of accident and since the Insurance Company failed to prove otherwise, it was liable to pay the compensation awarded by the Tribunal and enhanced by the High Court." (emphasis added)

17. Viewed thus, the Tribunal has rightly decided all the issues against the appellant-insurer . The impugned award is well reasoned and legal one, needs no interference.

18. Having said so, the impugned award is upheld and the appeal is dismissed.

19. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts.

20. Send down the record after placing copy of the judgment on the Tribunal's file.

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

State of H.P. .....Appellant.
Versus
Santosh Kumar .....Respondent.

Cr. Appeal No.687 of 2008
Decided on : 12/11/2016

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989- Section 3(1)(x)- Informant stated that accused called him Chamar and Dagi in presence of many people – the accused was tried and acquitted by the trial Court- held in appeal that the informant and PW-2 had a grouse against the accused and the motive to implicate the accused falsely– there was a delay of 32-34 days in reporting the matter to police, which makes the prosecution case suspect- the trial Court had rightly acquitted the accused- appeal dismissed. (Para-10 to 14)

For the Appellant: Mr. R.S.Thakur, Addl. A.G.
For the Respondent: Mr. Lovneesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 17.07.2008 by the learned Special Judge, Hamirpur, Himachal Pradesh, in Sessions Trial No. 08 of 2007, whereby the learned trial Court acquitted the respondent (for short 'accused') for the offences charged.

2. The brief facts of the case are that the complainant Bohra Ram is a member of a Scheduled Castes known as "Chamar" as per the certificate of Caste Ex. PW-1/F on record. He was posted as Head Teacher at Government Primary School, Garsian. On 15th November, 2006, he made a statement Ex. PW-1/A under Section 154 Cr.P.C. before the police that on 11th October, 2006 at about 10.30 a.m., he was present in his school on duty. At that time, accused Santosh Kumar, Pradhan, Gram Panchayat, Hanoh approached him. The complainant offered him a chair and also showed him the Sarv Shiksha Abhiyan register on demand. The accused checked the register. The complainant had spent Rs. 350/- vide Resolution No. 32 in accordance with the rules. The accused asked him as to why he had spent the amount without his permission. The complainant told him that he had spent the amount as per the directions received from the Centre. Santosh Kumar was enraged by this reply and called him "TU BIGRA HUA HAI, TU CHAMAR HAI, TU DAGI HAI" and told him that he would see him and get him transferred. It was further stated that Salochna Devi, Lady Teacher, Kashmir Singh, Water carrier, Jayanti Devi and Gian Chand were also present there who witnessed the incident. It was further reported that he had referred the matter to the Director of Education also. It was requested that action may be taken against the accused in accordance with law. On the basis of the aforesaid statement, a case was registered against the accused vide formal FIR Ex. PW-7/A. During the investigation of the case, the police prepared the site plan Ex. PW-8/A. The police also took into possession the Caste Certificate Ex. PW-1/F, copy of Resolution No. 32, Ex. PW-1/C, copy of Bill of expenditure of Rs. 350/- Ex. PW-1/D, copy of compromise deed Ex. PW-1/E, copy of Circular issued by the Director Land Records carrying the letter of Scheduled Castes and Scheduled Tribes for H.P. Statements of witnesses were recorded and the challan was prepared against the accused under Section 3(I)(x) of the Act and the same was put up in the Court of Judicial Magistrate 1st Class, Court No. II, Hamirpur on 13th December, 2006. The learned Magistrate committed the trial to the Court of learned Special Judge, Hamirpur vide order, dated 7th May, 2007 after supplying copies of the challan to the accused.

3. After completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused, a challan was prepared and filed before the learned trial Court.

4. A charge stood put to the accused by the learned trial Court for his committing offences punishable under Sections 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 10 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He chooses to lead evidence in defence.

6. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal in favour of the accused. 7. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record by the learned trial Court and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The purported vituperative penal casteist utterances pronounced upon the complainant by the accused-respondent herein, stood testified by the complainant while deposing as PW-1. His testification has attained corroborative vigour from the testifications of other prosecution witnesses wherebeforewhom they stood purportedly pronounced by the accused-respondent herein. The testification of the complainant whereto corroborative vigour stood purveyed by the testifications of prosecution witnesses wherebefore whom the penal vituperative casteist utterances stood pronounced by the accused upon the complainant, would per se, if unbereft of any taint of inter se or intra se contradictions facilitate this Court to record an order of conviction upon the accused/respondent. However, even if the complainant besides Gian Chand, Kashmir Singh and Jayanti Devi wherebeforewhom the penal vituperative casteist utterances stood purportedly pronounced by the accused/respondent upon the complainant are bereft of any stain of any inter se or intra se contradictions occurring in their respective examinations in chief vis.a.vis. their respective cross-examination besides in their respective testifications, would not for reasons hereafterstated, foment, any conclusion from this Court qua the findings of acquittal recorded by the learned trial Court warranting interference, significantly when on an incisive reading of their testifications visible upsurgences occur qua theirs holding inimicality towards the accused whereupon hence they stand denuded of their probative tenacity conspicuously when given their evident proven inimicality vis.a.vis the accused/respondent herein spurs an inference qua theirs thereupon standing goaded to falsely testify qua the guilt of the accused. Also their proven inimicality erodes the truthfulness besides the creditworthiness of the prosecution witnesses whereupon obviously even if their respective testifications are bereft of any other uncreditworthy taint, their respective testifications merely on anvil of proven evident inimicality nursed by them qua the accused hence stand denuded of their vigour.

10. An incisive traversing of the record unfolds qua the accused while holding the office of Pradhan of the Gram Panchayat concerned his making a complaint against the complainant herein, complaint whereof stands comprised in Ext.DW-1/A wherewithin recitals are held qua the complainant herein unauthorisedly denying the respondent herein to access the school register. It is evident qua Ext.DW-1/A standing transmitted to the Chief Minister. Obviously thereupon it is inevitable to record a conclusion of prior to the institution of the instant complaint by PW-1 against the accused, the former nursing a grouse besides rearing a vendetta against the accused/respondent, expression whereof found its outlet in his recording a complaint against the accused-respondent, complaint whereof when stands obviously stained with a vice of vendetta besides malafides it holds no vigour besides the testification of PW-1 in consonance therewith stands denuded of its probative sinew.

11. Likewise, the testimony of PW-2 in whose presence the penal vituperative casteist utterances stood purportedly made by the accused/respondent also acquires a taint of interestedness besides a taint of its standing generated by malafides arising from the factum of his in his cross-examination acquiescing qua his wife lodging a complaint against him in the Gram Panchayat concerned embodying therein a grouse qua his not maintaining her. Also with his acquiescing in his cross-examination qua the aforesaid complaint on the aforesaid ground made against him by his wife before the Gram Panchayat concerned generating issuance of notice upon him by the accused/respondent significantly renders his testimony to be discardable especially when it stands reared by his thereupon nursing a vendetta against the respondent herein. Moreover, the vigour, if any, carried by the testification of PW-3 in purported corroboration to the testifications of PW-1 and PW-2 qua the charge to which the accused

respondent stood subjected to trial also stands belittled arising from the fact of his in his cross-examination acquiescing to the suggestion of one Manohar instituting a complaint before the accused/respondent against his mother alleging therein qua the latter uprooting his plants. In aftermath when alike the testimonies of PW-1 and PW-2 his testimony when also stands coloured by a taint of vendetta nursed by him against the accused respondent spurring from the latter holding an inquiry upon the complaint aforesaid made before him by one Manohar Lal against his mother rendering it hence to not acquire any probative sinew.

12. Apart therefrom the purported vituperative penal casteist utterances stood made by the accused respondent upon the complainant on 11th October, 2006 whereas an F.I.R qua the aforesaid factum comprised in Ext.7/A stood registered at the Police Station concerned on 15th November, 2006. Obviously a delay of 32 to 34 days has visibly occurred since the penal misdemeanor ascribed by PW-1 to the respondent vis.a.vis. it standing reported to the Police Station concerned. The aforesaid delay has remained inexplicated by way of any tangible sound explanation standing purveyed by the complainant. As a corollary, the omission of the complainant to with promptitude report the penal misdemeanor ascribed by him to accused respondent when construed in entwinement with the factum of the prime prosecution witnesses testifying qua the relevant occurrence with evident inimicality nursed by them vis.a.vis the accused/respondent herein begets an obvious inference of the entire incident unraveled by them holding no truth rather it being a sequel of concoction and invention.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned Special Judge has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Special Judge does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Dharam Singh ...Appellant.

Versus

Braham Dass ...Respondent.

RSA No.244 of 2008.
Reserved on : 07.11.2016.
Decided on : 15.11.2016.

Code of Civil Procedure, 1908- Section 100- Father of the plaintiff was murdered by the defendant- an injury was also caused to the plaintiff- plaintiff had become handicapped and was unable to work - a sum of Rs.1 lac was sought as damages – the suit was partly decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that version of the plaintiff was duly proved by his witnesses while the version of the defendant was not proved- a sum of Rs.50,000/- was rightly awarded as damages- judgment in the criminal case is relevant for establishing that defendant was convicted by the Criminal Court- appeal dismissed.

(Para-10 to 13)

For the appellant: Mr. Raman Sethi, Advocate.
For the respondent : Mr. N.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Regular Second Appeal under Section 100 of the Code of Civil Procedure is maintained by the appellant against the judgment and decree dated 29.3.2006, passed by the learned Additional District Judge, Presiding Officer, Fast Track Court, Hamirpur, in Civil Appeal No.12 of 2000/303 of 2004, whereby the learned Appellate Court has affirmed the judgment and decree passed by learned Civil Judge (Junior Division), Court No.1, Hamirpur, in Civil Suit No.82 of 1992, dated 26.11.1999.

2. Briefly stating facts giving rise to the present appeal are that respondent/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for recovery of Rs. 1,00,000/- against the appellant/defendant (hereinafter referred to as 'the defendant') on account of the damages suffered by him due to the act and conduct of the defendant. It is averred that plaintiff's father late Shri Basant Ram, was murdered by the defendant intentionally on 11.5.1991 and defendant caused grievous and dangerous injuries to the plaintiff, as a result of which, he has become handicapped from his right hand and unable to work. Due to these grievous and dangerous injuries suffered by him, he remained in District Hospital, Hamipur, from where he was referred to IGMC, Shimla and further referred to Chandigarh, for treatment and for this travelling, he had to spend about Rs. 14,000/- in all including the treatment. In addition to it, he had to spend about Rs. 10,000/- for performing the last rites of his father, who was murdered by the defendant. It has been further averred that his deceased father was able bodied person, being Carpenter, earning Rs. 70/- per day. The father of the plaintiff suffered loss of income approximately amounting to Rs. 20,000/- to Rs. 25,000/-. Plaintiff has also claimed that the act and conduct of the defendant rendered the plaintiff, as handicapped seeking medical advise and so, unable to earn his livelihood as Carpenter, as the plaintiff has claimed to be earning Rs. 70/- per day before the occurrence and in addition to that the plaintiff has been forced to seek medical treatment and thereby suffered loss of Rs. 25,000/-, by getting treatment in PGI, Chandigarh, as the plaintiff has to be accompanied by one attendant for coming and going to PGI, Chandigarh. The plaintiff has also claimed to have suffered mental agony and torture, as he has been deprived of the love and affection of his father and thereby the plaintiff has claimed total damages of Rs. 1,00,000/- from the defendant. The plaintiff has further averred that the defendant was tried and sentence to life imprisonment for an offence punishable under Section 302 of the Indian Penal Code as well as under Section 326 of the Indian Penal Code.

3. The suit was resisted and contested by raising preliminary objections qua limitation and cause of action. On merits, it has been contended that the defendant has denied the factum of committing murder to the father of the plaintiff as well as causing injuries to the plaintiff. However, the defendant has admitted the relationship between of the plaintiff and his father. The defendant has also denied the capacity to earn to the father of the plaintiff as well as to the plaintiff. The defendant has denied that the plaintiff and his father were working as Carpenter and claimed that the plaintiff was living separately from his deceased father. There is no question of depriving the plaintiff from the earning of his father as well as the loss of any love and affection. The defendant has admitted that in a case of murder registered against him, he has been convicted and sentenced to undergo life imprisonment, but the appeal against the same is pending before Hon'ble Apex Court. The defendant has denied any liability to pay any damages to the plaintiff.

4. The learned trial Court framed following issues on 27.12.1993 :

"1. Whether the plaintiff is entitled to damages as claimed, if so, to what extent? OPP.

13. Whether the suit is time barred ? OPD.

14. Relief."

5. The learned trial Court has decided Issue No.1 partly in favour of the plaintiff, Issue No.2 against the defendant and partly decreed the suit. Thereafter, the appeal was maintained by the defendant before learned Addl. District Judge, Presiding Officer, Fast Track Court, Hamirpur and the same was dismissed. Hence, the present regular second appeal, which was admitted on the following substantial questions of law:

> "1. Whether the judgment of both the Courts below can be upheld as it ignores important documents/oral evidence on record of the case ?
>
> 2. Does the conviction of the appellant have any bearing on the damages granted by the Civil Court ?"

6. Learned counsel appearing on behalf of the plaintiff has argued that the learned Courts below has failed to take into consideration the fact that the plaintiff was not in a position to make the payment of damages, as he was in jail. He has further argued that the damages awarded are on the higher side.

7. On the other hand, learned counsel appearing on behalf of the defendant has argued that the learned Court below has only awarded damages of Rs. 50,000/-, for such a great loss to the plaintiff i.e. Rs. 25,000/- for expenditure on the treatment, physical and mental agony due to the injuries inflicted by the defendant including the loss of love and affection and Rs. 25,000/- for loss of future earnings, as a result of which the injuries inflicted on his both hands. There is no ground to interfere with the well reasoned judgment passed by the learned Courts below. He has argued that the appeal deserves dismissal alongwith costs.

8. In rebuttal, learned counsel appearing on behalf of the plaintiff has argued that the plaintiff has already suffered imprisonment, so the appeal may be allowed.

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

10. The plaintiff in order to prove its case has examined as many as ten witnesses. PW-1 MHC Sukhdev Singh to prove the FIR. PW-2 Dhian Singh, who is taxi driver to prove the expenses for transportation. PW-3 Dina Nath, has deposed that Basant Ram was murdered by defendant Dharam Singh, as Basant Ram was working as Carpenter, who was earning Rs. 60/- or Rs. 70/- per day and was aged about 45 years having good health. He has also deposed that the defendant has cut both the hands of the plaintiff and the plaintiff also used to work as Carpenter and earning Rs. 80/- to Rs. 100/- per day. He has also stated that the plaintiff got treatment of his hands from Chandigarh by spending Rs. 50,000/- or Rs. 60,000/-. PW-4 Amar Nath, has also deposed that Basant Ram used to work as Carpenter and was earning Rs. 70/- per day, who was having good health having 45 to 50 years of age. He has deposed that the last rites of the father of the plaintiff were performed by the plaintiff by spending about Rs. 20,000/- to Rs. 25,000/-. He has further deposed that both the hands of the plaintiff were cut, the plaintiff is unable to work and has been deprived earn Rs. 60/- to Rs. 100/- per day, while working as Carpenter and in addition to that the plaintiff was forced to get treatment at Chandigarh. PW-5 Dr. N.K. Galoda, has proved on record that the plaintiff was referred to PGI, Chandigarh, for getting treatment. PW-6 Kamal Dev Sharma, also a witness to the receipt Ex.PW6/A, vide which the plaintiff was taken to Chandigarh. PW-8 Dr. M.K. Pathak, has proved on record the injuries on the person of plaintiff, vide MLC Ex.PW8/A, as injury No.1 on the left arm a curbed incised injury in which muscle, nerves, arteries and veins were found to be severed and the injuries have been opined to be grievous in nature and another incised injury on the right arm in which the muscles, veins, arteries and lower aspect of ulna were found to be severed and these injuries have been opined to be grievous in nature with sharp edged weapon like 'darat'. PW-9 Pritam Singh, has proved on record the discharge slip of the plaintiff from Chandigarh hospital with compound fracture of right ulna and cut flexar tendons and crush in its blend between the period of 12.5.1991 to 16.5.1991 and 21.6.1991 to 29.6.1991.

11. PW-10 Braham Dass (plaintiff), has specifically deposed with respect to the expenses, he has incurred for his treatment as well as for the loss of earning because both the

hands were cut and ultimately led to the disability, as he was Carpenter and even after treatment, he could not work properly. Taking into consideration the fact that the plaintiff was working as an unskilled labourer and the defendant has cut his both hands and killed his father. So, in these circumstances, it cannot be said that the amount awarded on account of the loss of future earning to the extent of Rs. 25,000/-, is at all excessive. At the same point of time, the plaintiff has proved that he has spent an amount not less than Rs. 25,000/-, for his treatment in various hospitals on transportation. So, I find that an amount of Rs. 25,000/-, awarded on account of the expenditure of treatment, physical and mental agony due to the injuries inflicted by the defendant, loss of love and affection of his father, who was killed by the defendant cannot be said to be excessive. So, substantial question of law No.1 is decided accordingly holding that the learned Courts below has considered all the documents oral as well as documentary evidence in totality and the judgments of the learned Courts below cannot be said to be perverse. Substantial question of law No.2 is decided accordingly holding that the conviction of the plaintiff, as one ingredient and other evidence which has come on record is considered. The plaintiff examined as many as ten witnesses and proved his case. Though, the defendant has also examined Smt. Sharda Devi and himself, as witness, but has failed to establish his case. So, this Court finds that the damages to the extent of Rs. 50,000/- granted by the Civil Court is after appreciating the facts which are brought on record. However, the judgment of conviction has only bearing in the case to the extent that the defendant was convicted in the case and nothing else.

12. From the above, it is clear that the findings arrived at by the learned Courts below are just, reasoned and after appreciating the evidence, which has come on record to its true perspective. Hence, needs no interference.

13. With these observations, the appeal of the appellant/plaintiff being without any merit deserves dismissal, hence the same is dismissed. However, in the peculiar facts and circumstances of this case, parties are left to bear their own cost (s). Pending application (s), if any shall also stands disposed of.

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

Jagdish Chand and others ….Petitioners.
Versus
State of Himachal Pradesh and another ….Respondents.

Cr.MMO No.141 of 2016.
Reserved on : 08.11.2016.
Date of Decision : 15.11.2016.

Code of Criminal Procedure, 1973- Section 498- An FIR was registered for the commission of offences punishable under Section 498-A and 406 read with Section 34 of Indian Penal Code – the matter has been compromised between the parties- hence, the prayer was made for quashing the proceedings- held that criminal proceedings can be quashed to meet ends of justice - where the Court is satisfied that parties have settled the dispute amicably, FIR, complaint and subsequent proceedings can be quashed – petition allowed and the FIR and subsequent proceedings quashed. (Para-6 to 12)

Cases referred:

B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58

For the petitioners Mr. Rahul Jaswal, Advocate.

For the respondents	Mr. Virender Kumar Verma, Addl. Advocate General, Mr. Pushpinder Singh Jaswal, Dy. Advocate General and Mr. Rajat Chauhan, Law Officer, for respondent No.1. Mr. Sunny Modgill, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

This petition under Section 482 of the Code of Criminal Procedure (*for short 'Code'*) has been preferred by the petitioners for quashing of FIR No.201 of 2013, dated 27.12.2013, registered at Police Station, Amb, District Una, under Sections 498-A, 406 read with section 34 of the Indian Penal Code, pending before learned Addl. Chief Judicial Magistrate, Amb, District Una, H.P.

2. Briefly stating facts giving rise to the present petition are that because of the matrimonial dispute and the petitioners have been implicated in the aforementioned FIR, on the statement of Smt. Kanta Devi (respondent No.2) alleging therein that the marriage between petitioner No.3 and respondent No.2 was solemnized on 5.5.2011, according to Hindu rites and ceremonies. Out of the said wedlock one male child, namely, Surinder was born. The father of respondent No.2 gave a sufficient 'Istridhan' to the petitioners at the time of marriage. After the birth of son of petitioner No.3, all the petitioners started ill treating and maltreating with respondent No.2 regarding insufficient dowry articles given to them at the time of marriage as well as the birth of son of respondent No.2 and also started false allegations towards her character and using unsocial language, as respondent No.2 having illicit relation with some other person in her parental village and during the period of delivery. Respondent No.2 got decease and made request to petitioner No.3 to get treatment from some good hospital in District Kangra, H.P, but petitioner No.3, who is very clever person linger on the matter on one pretext or another. Respondent No.2 refused to took the treatment from the local "*Dongi Chela*", then all the petitioners mercilessly beaten respondent No.2 in the presence of other family members. Respondent No.2 in that compelling circumstances complaint about the behaviour of petitioner No.3 to her parents and the parents of respondent No.2 inquired from the petitioners regarding their inhuman behaviour. In the month of November, 2012 when respondent No.2 came in her parental house at village Ripoh Munchlian, Tehsil Amb, District Una, H.P, with the consent of petitioner No.3, on the occasion of "Tikka" ceremonies, thereafter father of respondent No.2 asked petitioner No.3 for the aforesaid illegal act and conduct towards her and also discuss about the decease of respondent No.2. The petitioners have treated respondent No.2 in such a cruelty manner and have deserted her from a matrimonial house and have caused mental and physical torture and also neglected to maintain respondent No.2 alongwith her minor son and so, respondent No.2 also filed a petition under Section 125 Cr. P.C before the learned Court below. After registration of the case, petitioners and respondent No.2 have compromise the matter. Roop Lal (petitioner No.3) and Smt. Kanta Devi (respondent No.2) recorded their statement before the learned Court below on 18.11.2015 in a Criminal Petition under Section 125 Cr. P.C, for granting maintenance allowance filed by respondent No.2. Now, both the parties have entered into compromise and do not want to pursue the case against each other.

3. Learned counsel for the petitioners has argued that as the parties have compromised the matter, vide Mutual Divorce Deed (Annexure P-3), no purpose will be served by keeping the proceedings against the petitioners and the FIR/Challan pending before the learned Court below may be quashed and set aside.

4. On the other hand, learned Additional Advocate General has argued that the offence is not compoundable, so the petition be dismissed.

5. Learned counsel for respondent No.2 has argued that the parties have entered into compromise and so, the proceedings pending before the learned Court below be quashed.

6. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

7. Their Lordships of the Hon'ble Supreme Court ***B.S. Joshi and others*** vs. ***State of Haryana and another***, (2003) 4 SCC 675, have held that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, section 320 would not be a bar to the exercise of power of quashing. It is well settled that the powers under section 482 have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers. Their Lordships have held as under:

> [6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.
>
> [8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.
>
> [15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.

8. Their Lordships of the Hon'ble Supreme Court ***in Preeti Gupta and another*** vs. ***State of Jharkhand and another***, (2010) 7 SCC 667, have held that the ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. The tendency of implicating the husband and all his immediate relations is also not uncommon. At times, even after the conclusion of the criminal trial, it is difficult to ascertain the real truth. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. The criminal trials lead to immense sufferings for all concerned. Their Lordships have further held that permitting complainant to pursue complaint would be abuse of process of law and the complaint against the appellants was quashed. Their Lordships have held as under:

> [27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-
>
> "Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.

[35] The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.

36. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful.

[38] The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law. It is imperative for the legislature to take into consideration the informed public opinion and the pragmatic realities in consideration and make necessary changes in the relevant provisions of law. We direct the Registry to send a copy of this judgment to the Law Commission and to the Union Law Secretary, Government of India who may place it before the Hon'ble Minister for Law & Justice to take appropriate steps in the larger interest of the society.

9. Their Lordships of the Hon'ble Supreme Court in ***Jitendra Raghuvanshi and others*** vs. ***Babita Raghuvanshi and another,*** (2013) 4 SCC 58, have held that criminal proceedings or FIR or complaint can be quashed under section 482 Cr.P.C. in appropriate cases in order to meet ends of justice. Even in non-compoundable offences pertaining to matrimonial disputes, if court is satisfied that parties have settled the disputes amicably and without any pressure, then for purpose of securing ends of justice, FIR or complaint or subsequent criminal proceedings in respect of offences can be quashed. Their Lordships have held as under:

[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application

filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.

[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

[15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.

[16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.

[17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.C.R.C. No. 2877 of 2012 and quash the proceedings in Criminal Case No. 4166 of 2011 pending on the file of Judicial Magistrate Class-I, Indore."

10. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice will be met, in case, the proceedings are quashed, as the parties have already compromised the matter, which is placed on record. However, it is made clear that Smt. Kanta Devi (respondent No.2) doesn't want to continue with the present complaint in view of the compromise, the proceedings pending before the learned Court below are quashed, but as far as the right of the son of Roop Lal (petitioner No.3) and Smt. Kanta Devi (respondent No.3) is concerned, he can claim for maintenance from his parents out of the property of paternal as well as maternal side by way of inheritance. So, this fact cannot be compromised by anyone in this

world. As far as Roop Lal (petitioner No.3) is concerned, though as per the compromise Smt. Kanta Devi (respondent No.2) is taking the care of her son, but his right to inherit his father, paternal grand father, his coparcenary right, will remain intact and his father will never take any action in a manner so as to reduce or limit of the share of son of Roop Lal (petitioner No.3) and Smt. Kanta Devi (respondent No.2) in the ancestral property.

11. Accordingly, taking holistic view of the matter and looking into all attending facts and circumstances, I find this case to be a fit case to exercise powers under Section 482 of the Code and accordingly FIR No. 201 of 2013, dated 27.12.2013, under Sections 498-A, 406 read with section 34 of the Indian Penal Code, registered at Police Station, Amb, District Una, is ordered to be quashed. Since FIR No. 201 of 2013, dated 27.12.2013, under Sections 498-A, 406 read with section 34 of the Indian Penal Code, registered at Police Station, Amb, District Una, has been quashed, consequent proceedings/Challan pending before the learned Addl. Chief Judicial Magistrate, Amb, District Una, H.P. against the petitioners, are thereby rendered infructuous. However, the same are expressly quashed so as to obviate any confusion.

12. The petition stands allowed in the aforesaid terms. Pending application (s), if any, also stand (s), disposed of.

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

Krishan Lal Khimta ……Petitioner.
Versus
State of Himachal Pradesh ……Respondent.

Cr.MMO No. 282 of 2016
Reserved on: 07.11.2016
Decided on: 15.11.2016

Code of Criminal Procedure, 1973- Section 482- Accused V met with an accident and was in a coma for one month – Medical Board concluded that he was unable to defend himself – trial was ordered to be stayed – it was ordered that the accused be examined every three months-aggrieved from the order, father of the accused filed a petition – held, that as per Medical Board V is not showing any sign of improvement – the petitioner submitted that he is incurring expenses on bringing V to the Medical Officer after three months- direction issued to the trial judge to re-consider the period of three months. (Para-8 to 10)

For the petitioner: Mr. Nitin Thakur, Advocate.
For the respondent: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner under Section 482 of Criminal Procedure Code (hereinafter referred to as 'Cr.P.C') seeking modification of order dated 29.05.2014, passed by the learned Sessions Judge (Forest), Shimla, in Sessions Trial No. 15-S/7 of 2012/09, whereby the trial against the son of the petitioner, who was booked as an accused alongwith another co-accused, was ordered to be stayed, as he was not found to be in a fit mental condition to defend himself. The other co-accused was acquitted by the learned Sessions Judge (Forest) Shimla, through its judgment dated 19.06.2016.

2. Briefly stating the facts giving rise to the present case, as per the petitioner, are that son of the petitioner (hereinafter referred to 'Vijay Kumar') was named as an accused in FIR No. 1 of 2008, dated 01.01.2008, registered under Sections 148, 307, 326, 324/149 of the Indian Penal Code (hereinafter referred to as 'IPC'). During the pendency of the trial, Vijay Kumar met with an accident on 09.03.2009 and remained hospitalized and was in a state of coma for a month. In order to ascertain his mental condition, the learned Sessions Judge considered the medical reports from Medical Superintendent, IGMC and Director/Medical superintendent, PGI, Chandigarh, and the learned Court below on 29.05.2014, to its satisfaction after recording the statement of the Chairman of the Medical Board, who conducted the examination of the son of the petitioner, after considering the report of the Medical Board, concluded that the son of the petitioner was not in a condition to defend himself. By medium of impugned order dated 29.05.2014, the trial against the son of the petitioner was ordered to be stayed.

3. Pursuant to the direction of the learned Court below, the petitioner herein, after an interval of every three months, medically examined his son from the Medical Board at IGMC, Shimla, and also from the Department of Psychiatry PGIMER, Chandigarh, however, the conditions of his son did not improve. The latest reports suggest that his mental condition is unlikely to improve. The petitioner has further submitted that he is the only bread winner of his family and is also suffering from heart disease. He is looking after an unmarried daughter of 36 years age, who was born as an unhealthy child, and as on date she is suffering from meningoencephalitis, which is the inflammation of the brain. As per the petitioner he is now being saddled with medical expenses of his ailing son. The income of the petitioner is wholly dependent upon the apple crop and his income fluctuates due to climatic conditions affecting the crop.

4. As per the petitioner, the trial against the co-accused stands completed and he is acquitted. This fact is fortified by Annexure P-5 (judgment of the trial Court, dated 19.06.2016). As the mental condition of Vijay Khimta (son of the petitioner), who is an accused in the above referred Sessions Trial, is very unlikely to improve, the petitioner is seeking modification of impugned order dated 29.05.2014.

5. The respondent filed reply to the petition, wherein it is contended that son of the petitioner (Vijay Khimta) was involved in FIR No. 1 of 2008, registered in Police Station East, Shimla, under Section 148, 307, 326, 324 and 149 IPC. As per the respondent, the allegations against the son of the petitioner and his accomplice were that on 31.12.2007 at about 6:30 p.m., complainant, Akshay Bhardwaj, received a call from one Naveen Jasal asking him to come to Brockhost, but he refused. On relentless requests, the complainant alongwith his friends Joginder and Rishi Dhawan went to Brockhost, at about 07:45 p.m., where Vijay Khimta and his companions were present. Vijay Khimta attacked the complainant and his friends by inflicting *darat* (sickle) blows, causing serious injuries to them. Police registered an FIR against the accused persons and as some of the accused persons were juvenile, *challan* against them was filed before the Juvenile Justice Board, Shimla. It is further contended that during the pendency of the trial accused Vijay Khimta was found mentally unsound to defend himself, so the trial against him was stayed. The learned Sessions Judge (Forest), acquitted the other accused, namely, Sunny vide judgment dated 19.06.2014 and observed that file after its due completion be consigned to Record Room to be recalled as and when accused Vijay Khimta recovers from his mental illness and is declared fit to defend himself.

6. The respondent has averred that the learned Court below passed the impugned order after taking into consideration all the germane medical record of accused Vijay Khimta. As per the respondent, the son of the petitioner inflicted *darat* blows on the person of Akshay and Joginder, due to which they suffered serious injuries. Latest medical record has not been annexed with the petition so as to highlight his current mental condition and the annexed medical record is of the years 2011-2012. In view of settled legal proposition of Cr.P.C. the trial against the son of the petitioner will resume as and when he ceases to be of unsound mind and capable of defending himself.

7. I have heard the learned counsel for the petitioner as well as learned Additional Advocate General for the respondent/State and have also gone through the record carefully.

8. At this stage, this Court takes into consideration the facts that as per the Medical Board, the son of the petitioner is not showing any signs of improvement and the averments made by the learned counsel for the petitioner that it is quite difficult for the petitioner to bring his son after every three months from his village to IGMC Hospital for his medical examination. The petitioner has also prayed that this period of three months may be enhanced. Evidently, the trial against the accused is pending adjudication before the learned Sessions Judge (Forest), Shimla, though the co-accused stands acquitted and some of the accused, who were juveniles at the time of the occurrence, are being proceeded before the learned Juvenile Justice Board, Shimla. As far as the son of the petitioner is concerned, this Court finds that the learned Sessions Judge (Forest), Shimla, after hearing the learned counsel for the parties, passed the impugned order dated 29.05.2014, which is extracted in *extenso* as under:

> *"Statement of Dr. Ramesh Chand, Chariman of the Medical Board recorded. In view of the statement of dr. Ramesh Chand, Chairman of the Medical Board and the report of the Medical Board Ext. CA, at this stage it is proved to the satisfaction of this Court that accused Vijay Khimta is not fit to defend himself due to his mental health. Therefore, the trial of the accused Vijay Khimta is stayed till he recovered from his mental illness. The father of the accused Shri Krishan Lal, who has taken the custody of accused Vijay Khimta is directed through Sh. Pawan Thakur Counsel for the accused to submit status report of the accused after every three months commencing from 01.06.2014. However, the trial against accused Sachin will continue."*

9. This Court finds that the ends of justice would be subserved in case the impugned order dated 29.05.2014 is set-aside and the learned Sessions Judge (Forest) Shimla, is directed to consider the matter afresh with respect to mental illness of the son of the petitioner as well as the time gap of three months for production of the accused before the Medical Board.

10. Keeping in mind the above set of circumstances, the impugned order dated 29.05.2014 is set-aside with a direction to the learned District Judge (Forest), Shimla, to decide the matter afresh with respect to mental illness of the accused and his production before the Medical Board after interval of every three months.

11. The parties are directed to appear before the learned Sessions Judge (Forest), Shimla, on ***5th December, 2016.*** In view of the above, the petition, as also pending application(s), if any, stand(s) disposed of. However, the parties are left to bear their own costs.

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

CWPs No. 3326 & 3820 of 2015
Reserved on: 09.11.2016
Decided on: 15.11.2016

CWP No. 3326 of 2013:

Neelam Sharma & another. .....Petitioners.
Versus
State of Himachal Pradesh & others. ......Respondents.

CWP No. 3820 of 2015:

Meena Sharma & others. ......Petitioners.
Versus
State of Himachal Pradesh & others. ......Respondents.

Constitution of India, 1950- Article 226- Petitioners had done B.Sc. Medical Lab Technology from respondent No.4 – it was mentioned in the prospectus and the notice that students would be eligible for obtaining degree in B.Sc. in para medical – petitioners approached respondent No.2 for registration of their names as medical Lab Technologists, however, respondent No.2 refused to enter their names on the basis that petitioners had not done higher secondary in science stream and they are ineligible for registration- the petitioners had done B.Sc. after fully understanding the fact that they would be registered with respondent No.2- hence, direction issued to respondent No.1 to issue appropriate guidelines –respondent No.2 directed to consider the case of the petitioners in accordance with the guidelines. (Para-9 to 12)

CWP No. 3326 of 2015:

For the petitioners:	Mr. S.D. Gill, Advocate.
For the respondents:	Mr. Virender K. Vrma, Adl. AG, with Mr. Rajat Chauhan, Law Officer, for respondent No. 1/State.
	Mr. S.K. Banyal, Advocate, for respondent No. 2.
	Mr. V.B. Verma, Advocate, for respondent No. 3.
	Mr. Arun Kumar, Advocate, for respondent No. 4.

CWP No. 3820 of 2015:

For the petitioners:	Mr. S.D. Gill, Advocate.
For the respondents:	Mr. Virender K. Vrma, Adl. AG, with Mr. Rajat Chauhan, Law Officer, for respondent No. 1/State.
	Mr. S.K. Banyal, Advocate, for respondent No. 2.
	Mr. V.B. Verma, Advocate, for respondent No. 3.
	Mr. Arun Kumar, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

Since common questions of facts and law are involved in the both these writ petitions, they are taken up together for disposal.

2. The petitioners have maintained these petitions seeking appropriate writ or directions to the respondents, especially to respondent No. 2, Para Medical Council (hereinafter referred to as 'PMC') to give registration numbers to the petitioners in PMC as Medical Lab Technologists. The petitioners are also seeking a direction to respondent No. 1/State for registration of their names with the PMC.

3. Succinctly, as per the petitioners, the facts giving rise to the present petitions are that they had done B.Sc. in Medical Lab. Technology from respondent No. 4/University. It is further contended by the petitioners that in the notice published by respondent No. 4 as well as in the prospectus it was clearly mentioned that students of any stream are eligible for obtaining degree in B.Sc. Para Medical. Classes were conducted by respondent No. 3 on behalf of respondent No. 4/University and the petitioners successfully qualified all the examinations. After completion of the degree, the petitioners approached respondent No. 2 for registration of their names with PMC as Medical Lab. Technologists, however, respondent No. 2 refused to enter their names solely on the basis that the petitioners have not done higher secondary in science stream, hence rendered them ineligible for the registration.

4. Reply to the petitions were filed by the respondents and respondent No. 2 (PMC) in its reply has averred that Para Medical Council is a statutory organization of Himachal Pradesh Government under Section 3 of the H.P. Para Medical Council Act, 2003. As per respondent No. 2, the primary functions of the Council is to register Himachal Pradesh para-medicals and the staff working in the government hospitals, private institutions and private hospitals within the state of Himachal Pradesh. It also registers various para medical officials as per qualifications

mentioned in the Schedule of H.P. Para Medical Council Act. On merits, respondent No. 2, has submitted that PMC vide its meeting dated 23.02.2008 decided that para-medicals are required to register their qualification.

5. Though the petitioners have specifically averred that the similarly situated persons before 2008 were registered with the Para Medical Council, but in reply thereto, respondent No. 2 has stated that in its meeting held on 23.02.2008 it was decided as under:

> *"Registration of Para-Medicals w.e.f. 2008*
>
> *It has been decided that the registration of Para-Medicals (laboratory Technician and Radiographer) shall be done if they fulfill the qualification 10+2 (medical) with 2 year Diploma from recognized institution. Candidates possessing BSc Medical laboratory Technology qualification should have 3 years Degree course from recognized institution after 10+2 qualification."*

6. From this it is clear that it is three years' degree course after 10+2 from a recognized institution. It is nowhere mentioned that 10+2 qualification is required to be in science stream only. Now whether it is an omission or the respondents wanted to have only 10+2/Higher Secondary qualification in any stream is not clarified, though from the stand of the respondents it seems that they wanted 10+2/Higher Secondary in medical stream.

7. At the same point of time, if prospectus of respondent No. 4 /University is seen, under the head salient features, it specifically states as under:

> *"Salient Features*
>
> *UGC Nomenclature*
>
> *All courses offered by PTU are as per the nomenclature and guidelines of University Grants Commission that makes these courses universally acceptable.*
>
> *DEC Approval*
>
> *All courses offered by PTU under this program had been approved by DEC, Distance Education Council, IGNOU, New Delhi, vide its letter no. F.1-1/2006(JS/SU) dated 6th January, 2006 with retrospective effect."*

8. Likewise, Indira Gandhi National Open University (IGNOU) has issued a letter (Annexure R-4/2) which reads as under:

> *"With reference to your letter dated 20th August, 2009, regarding the above subject, I am conveying herewith the decisions of the Distance Education Council taken at its meeting held on 10th March, 2010:*
>
> *i) Territorial jurisdiction for Distance Education Programmes: (Item 35.01). the Council resolved that Distance Education and On-line Education cannot have the territorial jurisdiction and in the case of Central universities and State Universities, the territorial jurisdiction shall be as per the Act, Statutes and Distance Education regulations of the respective Universities for all their programmes.*
>
> *ii) Recognition of PTU Distance Education Programmes: The Distance Education Council noted the acceptance of the compliance report submitted by the Punjab Technical University in response to the UGC-AICTE-DEC joint committee's recommendations. The Council ratified the decision (item 35.06.vi) taken by the Chairman in accepting the compliance report and 2012 for all programmes through Distance Mode, as recommended by the joint committee. The University may offer the programmes following these provisions.*
>
> *All courses offered by PTU are as per the nomenclature and guidelines of University Grants Commission that makes these courses universally acceptable.*
>
> *DEC Approval*

All courses offered by PTU under this program had been approved by DEC, Distance Education Council, IGNOU, New Delhi, vide its letter no. F.1-1/2006(JS/SU) dated 6th January, 2006 with retrospective effect."

9. Manifestly, the petitioners have done B.Sc. degree after fully understanding the fact that they will be registered with respondent No. 2. In these circumstances, this Court is not going into the stand taken by respondent No. 2 that the petitioners cannot be registered, as Government of Himachal Pradesh has not decided to part this education in the private colleges in Himachal Pradesh, but the above discussion shows that the petitioners are either eligible for registration or they are misguided/misled by respondents No. 3 and 4 and their precious time of three years is wasted. In these circumstances, this Court finds that as it is for respondent No. 2 (PMC) to take a decision in this matter with regard to registration of the petitioners and respondent No. 1 has to issue appropriate guidelines for this purpose, which has not been issued, therefore, respondent No. 1 is directed to consider the case of the petitioners in the light of the observations made hereinabove as well as in the writ petition and issue appropriate directions and respondent No. 2 (PMC) is directed to consider the case of the petitioner in right perspective in view of the observations made hereinabove, as well as seek guidance for respondent No. 1.

10. Respondent No. 3 (Institution) is functioning within the State of Himachal Pradesh under respondent No. 4 (Punjab Technical University) and it was incumbent upon respondents No. 1 and 2 to have monitored this institution and if the institution is awarding degree which is not recognized then respondents No. 1 and 2 must have taken proper care. At this stage, the only direction, which this Court deems fit in the facts and circumstances of the case, can be passed is that respondents No. 1 and 2 will treat these writ petitions as representations of the respective petitioners and after considering the available material and the observations made hereinabove, take appropriate decision in the matter within a period of two months from today. Needless to say, if the degrees of the petitioners, after spending three precious years of their lives, are not of any value, then respondents No. 1 and 2 should take appropriate action against respondents No. 3 and 4. It is also needless to say that the petitioners have right to get compensation under the ordinary law, if their degrees are not recognized, after leading cogent and reliable evidence in appropriate civil proceedings.

11. The petitioners (in CWP No. 3326 of 2015) have also filed an application, bearing CMP No. 7982 of 2015, before this Court for allowing them to participate in the test/interview which was published/notified for the post of Medical Lab. Technologists. As the petitions have already been ordered to be treated as representations of the petitioners, this prayer of the petitioners be also considered by respondents No. 1 and 2.

12. In view of the above, the petitions stand disposed of. However, in view of peculiar facts and circumstances of the case, parties are directed to bear their own costs. Pending application(s), if any, stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Shri Rajiv Bansal son of late Shri Mohinder Kumar Bansal ..Revisionist/Judgment Debtor

Versus

Shri Mange Ram Chaudhary son of Shri Prittam Singh & others ..Non-Revisionists/Decree Holder

Civil Revision No. 57 of 2015
Order Reserved on 29th September 2016
Date of Order 15th November 2016

Code of Civil Procedure, 1908- Order 21 Rule 1- Section 47- Objections were filed to the execution petition, which were dismissed by the Executing Court – held in revision that Executing

Court cannot go behind the decree – plea that provisions of Section 118 of H.P. Tenancy and Land Reforms Act were violated could have been taken in a suit but was not taken – this objection cannot be taken before the Executing Court – Court cannot disturb finding of fact in exercise of revisional jurisdiction- revision dismissed. (Para- 8 to 12)

Cases referred:
Narinder Singh vs. Kishan Singh, AIR 2002 SC 2603
V.D. Modi vs. R.A.Rehman, AIR 1970 SC 1475
Hira Lal vs. Kali Ram AIR 1962 SC 199
E.T.G.U.S. Society vs. M/s S.W.Corporation AIR 1971 Bombay 91
H.Rahim-Ud-Din vs. Tirlok Singh AIR 1971 Delhi 319
Manohar Lal vs. Topan Ram, AIR 1964 Punjab 311
Narmada Devi vs. Ram Nandan Singh AIR 1987 Patna 33 (Full Bench)
Masjid Kacha Tank Nahan vs. Tuffail Mohammed, AIR 1991 SC 455
Municipal Corporation Indore vs. K.N. Palsikar AIR 1969 SC 580
P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another AIR 1995 SC 1357
Gurdial Singh vs. Raj Kumar Anjela AIR 2002 SC 1004.

For the Revisionist: Mr. P.S. Goverdhan, Advocate
For Non-Revisionist No. 1: Mr. Neeraj Gupta Advocate
For otherNon-revisionists.: None.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 115 of the Code of Civil Procedure 1908 against order passed by learned Executing Court dated 6.12.2013 and against order passed by learned Appellate Authority whereby learned Appellate Authority affirmed the order of learned Executing Court.

Brief facts of the case

2. Decree holder namely Mange Ram filed civil suit No. 213/1 of 1991 title Mange Ram vs. Mohinder Kumar pleaded therein that judgment debtor has illegally raised the retaining wall upon the land of decree holder measuring 11 sq. metres. Mange Ram also filed civil suit No. 214/1 of 1991 title Mange Ram vs. Hem Lata pleaded therein that judgment debtor Hem Lata has encroached 8 sq. metres of land owned by decree holder. Decree holder sought relief of mandatory injunction in both civil suits and in alternate decree holder also sought relief of compensation.

3. Learned Trial Court clubbed civil suits No. 213/1 of 1991 and civil suit No. 214/1 of 1991 and disposed of both civil suits by way of common judgment. Learned Trial Court dismissed both civil suits filed by Mange Ram. Thereafter Mange Ram filed appeal before learned Appellate Court. Learned Appellate Court also dismissed both appeals filed by Mange Ram. Thereafter Mange Ram filed RSA No. 143 of 2002 title Mange Ram vs. Hem Lata and also filed RSA No. 144 of 2002 title Mange Ram vs. Mohinder Kumar Bansal (died) through LRs Vikas Bansal and others before Hon'ble High Court of H.P. Hon'ble High Court on 4.9.2012 disposed of both RSAs bearing Nos. 143 of 2002 and 144 of 2002 by way of common judgment. Hon'ble High Court of H.P. set aside the judgment and decree passed by learned Trial Court and Appellate Court and decreed both civil suits filed by Mange Ram. Hon'ble High Court of H.P. passed decree for compensation of Rs. one lac in civil suits No. 213/1 of 1991 and passed decree of compensation of Rs.75000/- (Rupees seventy five thousand) in civil suit No. 214/1 of 1991.

4. Thereafter decree holder filed execution petition before learned Trial Court. Judgment debtors filed objections before learned Executing Court and objections were dismissed

by learned Executing Court and thereafter order of learned Executing Court was affirmed by learned Additional District Judge Solan on 27.11.2014.

5. Feeling aggrieved against order of learned Executing Court and learned Appellate Court revisionist/judgment debtor namely Rajiv Bansal filed present civil revision petition under Section 115 of Code of Civil Procedure 1908.

6. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist No.1 and Court also perused entire record carefuly.

7. Following points arise for determination in civil revision petition:-

Point No.1 Whether revision petition filed under Section 115 of Code of Civil Procedure 1908 is liable to be accepted as mentioned in memorandum of grounds of civil revision petition?

Point No.2 Relief.

Findings upon point No.1 with reasons

8. Submission of learned Advocate appearing on behalf of revisionist that decree holder has flouted Section 118 of H.P. Tenancy and Land Reforms Act 1972 and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that in RSA No. 144 of 2002 Mohinder Kumar died during pendency of RSA and thereafter his legal representatives were impleaded as co-party in RSA No. 144 of 2002 before Hon'ble H.P. High Court. It is also proved on record that Rajiv Bansal was also impleaded as legal representative of deceased Mohinder Kumar in RSA No. 144 of 2002 before Hon'ble High Court of H.P. Court is of the opinion that plea regarding violation of Section 118 of H.P. Tenancy and Land Reforms Act 1972 ought to be taken by revisionist in RSA No. 144 of 2002 because in RSA No. 144 of 2002 revisionist Rajiv Bansal was impleaded as co-party. RSA No. 143 of 2002 and RSA No. 144 of 2002 were finally disposed of by Hon'ble High Court of H.P. on 4.9.2012 by way of consolidated judgment and same attained the stage of finality. Revisionist did not file any SLP before Hon'ble Apex Court of India against judgment and decree passed by Hon'ble High Court of H.P. in RSA No. 143 of 2002 and RSA No. 144 of 2002.

9. It is well settled law that learned Executing Court cannot question correctness or validity of decree except where decree is passed without jurisdiction and where decree is passed against dead person. Judgment debtor cannot be allowed to prevent decree holder from getting full benefit of decree. ***See AIR 2002 SC 2603 Narinder Singh vs. Kishan Singh. See AIR 1970 SC 1475 V.D. Modi vs. R.A.Rehman. See AIR 1962 SC 199 Hira Lal vs. Kali Ram. See AIR 1971 Bombay 91 E.T.G.U.S. Society vs. M/s S.W.Corporation. See AIR 1971 Delhi 319 H.Rahim-Ud-Din vs. Tirlok Singh. See AIR 1964 Punjab 311 Manohar Lal vs. Topan Ram.***

10. It is well settled law that after amendment in CPC vide Act No. 104 of 1976 w.e.f. 1.2.1977 order passed under Section 47 by learned Executing Court is not decree as define in Section 2 (2) CPC. Section 47 of Code of Civil Procedure 1908 is omitted from definition of decree vide amendment No. 104 of 1976. ***See AIR 1987 Patna 33 (Full Bench) Narmada Devi vs. Ram Nandan Singh.***

11. Submission of learned Advocate appearing on behalf of revisionist that grave miscarriage of justice has been caused to revisionist by learned Executing Court and further submission of learned Advocate appearing on behalf of revisionist that order of learned Executing Court is *ipso facto* contrary to law is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law High Court cannot reverse the findings of facts of learned Executing Court in revision petition unless findings of facts are perverse. ***See AIR 1991 SC 455 Masjid Kacha Tank Nahan vs. Tuffail Mohammed. See AIR 1969 SC 580 Municipal Corporation Indore vs. K.N. Palsikar. See AIR 1995 SC 1357 P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another. See AIR 2002 SC 1004 Gurdial Singh vs. Raj Kumar Anjela.*** Hence it is held that orders of learned Executing Court is not perverse but is

based upon judgment and decree passed by Hon'ble High Court of H.P. in RSA No. 143 of 2002 and RSA No. 144 of 2002 decided on 4.9.2012. In view of above stated facts and case law cited supra point No.1 is answered in negative.

Point No. 2 (Relief)

12. In view of findings upon point No.1 revision petition is dismissed. Parties are left to bear their own costs. Record of learned Executing Court and learned Additional District Judge Solan be sent back forthwith along with certified copy of order. Revision petition is disposed of. All pending miscellaneous application(s) if any also disposed of.

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

State of H.P. and another ……Appellants.
Versus
Rakesh Kumar ……Respondents.

LPA No.162 of 2016.
Decided on: November 15, 2016.

Industrial Disputes Act, 1947- Section 17(B)- Writ Court had fallen in error in granting the wages from 16.8.2012 as they were to be granted from the date of filing of the affidavit as per the judgment of the Supreme Court in **Uttaranchal Forest Development Corporation Versus K.B. Singh, (2005) 11 SCC 449**- however, the writ petition has already been dismissed and the benefits are to be granted as per the order of the Labour Court- writ petition dismissed as infructuous. (Para-2 to 4)

Case referred:

Uttaranchal Forest Development Corpn. and Another vs. K.B. Singh and others, (2005) 11 SCC 449

For the appellants: Mr.Shrawan Dogra, Advocate General, with Mr.Anup Rattan & Mr.Varun Chandel, Addl.A.Gs., and Mr.Kush Sharma, Dy.A.G.

For the Respondent: Mr.Subhash Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

This Letters Patent Appeal is directed against the order, dated 19th August, 2015, passed in CMP No.7560 of 2015, (filed in CWP No.7122 of 2012), by the learned Single Judge of this Court, whereby application under Section 17(B) of the Industrial Disputes Act, 1947 (for short, the Act), came to be determined.

2. During the course of hearing, Mr.Anup Rattan, learned Additional Advocate General, submitted that the Writ Court has fallen into an error in granting wages from 16th August, 2012, whereas the same were to be granted from the date of filing of the affidavit in terms of Section 17(B) of the Act. In support of his submission, he has relied upon the decision of the Apex Court in **Uttaranchal Forest Development Corpn. and Another vs. K.B. Singh and others, (2005) 11 SCC 449.**

3. We are in agreement with the submission made by the learned Additional Advocate General that benefits under Section 17(B) of the Act are to be granted from the date of filing of the affidavit.

4. At this stage, the learned counsel for the respondent stated that the main writ petition filed by the appellant-State has already been dismissed and the writ respondent is entitled to the benefits as per the award passed by the Labour Court.

5. In view of the above stated position, the instant appeal has become infructuous and the same stands disposed of as such alongwith pending CMPs, if any.

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

Subhash Chand ....Petitioner.
Versus
State of Himachal Pradesh. ...Respondent.

Cr. MP (M) No.1339 of 2016.
Decided on: 15th November, 2016.

Code of Criminal Procedure, 1973- Section 439- 30 bottles of Relaxcof were recovered from the possession of the accused, which were containing 100 ml. each codeine phosphate- 60 strips of Tramadol Hydrochloride Paracetamol, each containing 10 tables were also found – two bottles were recovered during investigation- held, that the petitioner is involved in a crime, which affects the society at large – many numbers of cases were registered against the petitioner for the similar offences- hence, the discretion to admit the petitioner on bail cannot be exercised in favour of the petitioner- petition dismissed. (Para-6 to 8)

For the petitioner	:	Ms. Shetal Vyas, Advocate.
For the respondent	:	Mr. Virender Kumar Verma, Addl. Advocate General with Mr. Rajat Chauhan, Law Officer. SI Roshan Lal, Police Station Ghumarwin, District Bilaspur, present in person.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral).

The present bail application is maintained by the petitioner under Section 439 of the Code of Criminal Procedure for releasing him on bail in case FIR No.43 of 2016, dated 9.3.2016, under Sections 21 and 29 of Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act'), registered at Police Station, Ghumarwin, District Bilaspur, H.P.

2. As per the petitioner, he is innocent and is falsely implicated in this case.

3. As per the prosecution story, 30 bottles of Relaxcof were recovered from the conscious and exclusive possession of the accused, having 100 ml. each codeine phosphate. Accused was also found in possession of 60 strips of Tramadol Hydrochloride Paracetamol tablets containing 10 tablets in each strip i.e. 600 tablets. During the course of investigation, two bottles of Relaxcof was also recovered from the possession of accused Subhash Chand son of Ram Parkash without any valid permit or licence. Total 32 bottles of Relaxcof containing 100 ml. each recovered alongwith 600 tablets.

4. Learned counsel for the petitioner has argued that the petitioner is innocent, falsely implicated in this case and may be released on bail.

5. Learned Additional Advocate General has argued that the petitioner has committed serious crime and in fact is spoiling the atmosphere of new generation by supplying narcotics to the small children and otherwise also the quantity is commercial in nature.

6. After going through the record of this case, this Court finds that the petitioner is involved in the crime which is affecting the society. It has also come on record that so many cases were registered against the accused by the police for the similar offences.

7. Taking into consideration the above facts, it is clear that the offence is affecting a very large number of people and there is every possibility that accused shall repeat such offence. This Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail is not required to be exercised in favour of the petitioner.

8. In view of the above, the petition, being devoid of any merits, deserves dismissal and is accordingly dismissed.

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

The Executive Engineer, HPSEB Electrical Division, Joginder Nagar. …Petitioner.
Versus
Shri Jagdish Chand. …Respondent.

CWP No. 9825 of 2013
Reserved on: 08.11.2016
Decided on: 15.11.2016

Industrial Disputes Act, 1947- Section 25- The workman was engaged as beldar – he was given fictional break and his services were terminated orally on the pretext that funds were not available and he would be re-engaged on the availability of the funds- the reference petition was allowed by the Industrial Tribunal –workman was ordered to be re-engaged with seniority and continuity in service - direction was issued for regularization of the services –held in writ petition, the engagement of the workman was not disputed – it was admitted that no notice was issued to the workman – plea of abandonment of the service is not acceptable in absence of notice – workman had completed 240 days – new person was appointed after terminating the services of the workman – the Tribunal had rightly ordered the re-engagement- petition dismissed.
(Para- 6 to 11)

Case referred:
Uptron India Ltd. Vs. Shammi Bhan and another, (1998) 6 Supreme Court Cases 538

For the petitioner: Mr. Satyen Vaidya, Sr. Advocate, with Mr. Vivek Sharma, Advocate.
For the respondent: Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner/HPSEB/employer (hereinafter referred to as 'the employer') laying challenge to the award of the learned Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., dated 15.10.2013, passed in Reference No. 281 of 2012, whereby the reference petition of the petitioner therein, who was workman and respondent herein (hereinafter referred to as 'the workman'), was partly allowed and he was held entitled to seniority, continuity in service from the date of his termination i.e. 25.04.1998 except back wages and the petitioner herein was also directed to regularize the services of the workman.

2. Briefly stating, the facts giving rise to the petition are that the learned Tribunal below determined and adjudicated the following reference:

"Whether termination of the services of Shri Jagdish Chand s/o sh. Tulsi Ram, Village & Post Office Chalarag, Tehsil Joginder Nagar, Distt. Mandi by the Executive Engineer, H.P.S.E.B. Electrical Division, Joginder Nagar, Distt. Mandi, H.P. w.e.f. 25.4.1998 without following the provisions of the Industrial Disputes Act, 1947, is legal and justified? If not, to what amount of back wages, seniority, past service benefits and compensation the above workman is entitled to from the above employer?"

3. As per the workman, he was engaged by the respondents/employer as *Beldar* on and w.e.f. 25.11.1997 and he worked as such upto 24.04.1998 under the supervision of the Assistant Engineer, HPSEB Sub Division, Makriri. The workman was given fictional breaks and on 25.04.1998 his services were terminated by verbal orders. Before his alleged termination, neither notice was served upon him nor he was charge sheeted. No inquiry of misconduct was ever conducted and no compensation was paid to him by the employer. As per the workman his services were terminated only on the pretext that work and funds are not available and he will be re-engaged as and when the same will be available. The workman has further contended that he approached the authorities for his re-engagement, but in vain. The workman approached the H.P. State Administrative Tribunal by filing an original application, but the same was dismissed on 27.02.2002 for want of jurisdiction. The fact qua dismissal of the original application was not conveyed to the workman by his counsel and he only came to know about this when he personally visited his counsel. Subsequently, a demand notice under Section 2-A of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') was served to the employer by him. Conciliation proceedings failed and the failure report was submitted to the appropriate Government, but the appropriate Government did not refer the matter to the learned Court on the ground that the workman did not complete 240 days preceding his retrenchment. The workman challenged the same order of not referring the matter in the Hon'ble High Court of H.P. by way of maintaining CWP No. 2758 of 2008, which was decided on 14.05.2012. The Hon'ble High Court of H.P. through its judgment dated 14.05.2012, set aside the order, dated 04.04.2008, of the Labour Commissioner, Shimla, whereby the Commissioner refused to refer the matter to the Court. Thus, the above said reference was referred by the appropriate Government to the learned Tribunal below for determination and adjudication. The workman has further contended therein that some of his juniors were retained at the time of his termination and some fresh hands have also been engaged by the respondent/employer. The workman was not re-engaged and persons, whose services were engaged by the respondent/employer on daily wage basis w.e.f. 25.11.1997, were regularized by them. The workman had also contended that the act and conduct of the respondent was not only illegal and unjustified but was also violative of Sections 25-F, 25-G and 25-H of the Act. Lastly, the workman prayed for the substantives reliefs, viz., setting aside the termination order dated 25.04.1998, reinstatement, full back wages, seniority and continuity of service from the date of his initial appointment i.e. 25.11.1997.

4. In reply to the reference petition, the petitioner herein, (employer) averred that the workman was engaged as daily waged *beldar* on 25.11.1997 and he worked as such upto 24.04.1998. As per the employer, the workman was never disengaged, in fact, he left the job voluntarily and he did not approach Assistant Engineer or Junior Engineer for re-engagement. It is further contended that against the termination order, workman firstly approached the H.P. State Administrative Tribunal then Hon'ble High Court of H.P. The workman abandoned the job despite availability of work and thus he cannot claim parity with the workmen, who have been named by the workman, since they worked continuously. The workman, as per the knowledge of the employer, had undertaken SSB training at Sarahan after abandoning the job. The employer has further contended that no provision has been violated and now re-engagement of the workman is not possible due to unavailability of work. Ultimately, the respondent therein prayed for dismissal of the reference petition.

4. The learned Tribunal below has framed the following issues for determination:

"1. Whether the termination of services of the petitioner by the respondent w.e.f. 25.04.1998 is illegal and unjustified as alleged? OPP

2. Relief."

After deciding issue No. 1 in favour of the workman, the reference was partly allowed by the learned Tribunal below and the workman was ordered to be re-engaged forthwith with seniority, continuity in service from the date of his illegal termination, i.e. 25.04.1998, except back wages, and the respondent was also directed to consider the case of the workman for regularization of service. The learned Tribunal below also clarified that if the services of any person junior to the workman have already been regularized, the workman shall be entitled to regularization from the date/month of the regularization of the services of his juniors.

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

6. The workman tendered in affidavit, Ex. PW-1/A, wherein he reiterated the contents of the reference petition. In his cross-examination he has denied that he was not disengaged. He had undergone SSB training at Sarahan in the year 1994-95. On the other hand, Shri Atul Mehta, Executive engineer, HPSEB, Jogindernagar (RW-1) also tendered his affidavit, Ex. RW-1/A. He, in his cross-examination, has deposed that no notice was served to the petitioner for resuming the duties and no departmental proceedings were initiated. This witness has admitted that persons junior to the workman are serving under him. He has also admitted that after 25.04.1998, new/fresh hands have been employed and no opportunity was afforded to the workman.

7. Both workman and the employer acknowledge that the workman was engaged as a daily waged *beldar* on 25.11.1997 and he continued as such upto 24.04.1998. As per the workman, he was terminated on and w.e.f. 25.04.1998, whereas as per the employer, he abandoned the job on his own. Abandonment is to be established and not to be presumed lightly. In the given facts and circumstances, when no notice was ever served upon the workman by the employer calling him to resume his duties, abandonment cannot be attributed to the workman. Moreover, nothing is emanating from the record that proceedings were ever initiated against the workman for willful absence. Thus, the plea of willful abandonment by the workman raised by the employer goes unestablished. The workman, in his cross-examination, deposed that he had undergone SSB training during the years 1994-95, then also there is no question of abandonment of services by him.

8. Mandays chart, Ex. RW-1/B, portrays that the workman did not complete 240 days in a calendar year preceding the date of his termination, i.e. 25.04.1998, as mandated by Section 25-B of the Act. Therefore, the provisions of Section 25-B are not attracted. A bare perusal of seniority list of daily waged *beldars,* Ex. PW-1/B, reveals that persons junior to the workman were retained. This fact is further fortified by RW-1 that persons junior to the workman are working under him and new persons have also been appointed. Thus, after perusal of seniority list and scrutiny of statement of RW-1, it clearly and unambiguously stands established that there had been violation of the provisions of Sections 25-G and 25-H of the Act, rendering the termination of the workman illegal. It is not at all obligatory for a workman to have completed 240 days in a calendar year preceding his termination to take benefits of the provisions of Sections 25-G and 25-H of the Act.

9. In ***Uptron India Ltd. Vs. Shammi Bhan and another, (1998) 6 Supreme Court Cases 538,*** the Hon'ble Apex Court has held that the employer cannot terminate the services of the workman until and unless principles of natural justice have been followed and the workman has been provided reasonable opportunity to explain himself before terminating his services on the basis of abandonment of job.

10. In view of what has been discussed hereinabove, I find no infirmity in the award passed by the learned Tribunal below. The award passed by the learned Tribunal below is just,

reasoned and after properly appreciating the facts to their right perspective and the law has been applied correctly. The petition being devoid of merits, deserves dismissal and is accordingly dismissed. However, in view of peculiar facts and circumstances of the case, the parties are directed to bear their own costs.

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

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

CWPs No. 9241 & 9789 of 2013
Reserved on: 08.11.2016
Decided on: 15.11.2016

CWP No. 9241 of 2013:

Shri Udham Singh. .....Petitioner.

Versus

Himachal Pradesh State Electricity Board Limited and others. ......Respondents.

CWP No. 9789 of 2013:

The Executive Engineer (E) Division HPSEB Rajgarh & another. .....Petitioners.

Versus

Shri Udham Singh. ......Respondent.

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged by the respondent as Beldar- his services were terminated without assigning any reason- the Tribunal allowed the reference and the petitioner was ordered to be reinstated with seniority but without back wages- held, that the plea of the petitioner was not supported by documents- the plea of the respondent that the petitioner had left the job on his own was not supported by the repeated requests for re-engagement- the case was dismissed in default and the workman had not taken steps to get the same restored- the order was passed rightly by the Industrial Tribunal-cum-Labour Court- appeal dismissed.(Para-6 to 13)

Case referred:

Uptron India Ltd. Vs. Shammi Bhan and another, (1998) 6 Supreme Court Cases 538

CWP No. 9241 of 2013:

For the petitioner: Mr. V.D. Khidta, Advocate.

For the respondents: Mr. Ashok Thakur, Advocate, vice Ms. Sharmila Patial, Advocate, with Mr. Satyen Vaidya, Sr. Advocate.

CWP No. 9789 of 2013:

For the petitioners: Mr. Ashok Thakur, Advocate, vice Ms. Sharmila Patial, Advocate, with Mr. Satyen Vaidya, Sr. Advocate.

For the respondent: Mr. V.D. Khidta, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition (CWP No. 9241 of 2013) is maintained by the petitioner/workman (hereinafter referred to as 'the workman') laying challenge to the award of the learned Industrial Tribunal-cum-Labour Court, Shimla, dated 17.09.2013, passed in Reference No. 4 of 2008, whereby he was not granted full back-wages and seniority w.e.f. 07.07.2009 to 22.08.2012. On the other hand, the petitioners (in CWP No. 9789 of 2013), being employer (Himachal Pradesh State Electricity Board) of the workman (hereinafter referred to as the

respondents), have also assailed the same award by way of another writ petition, on the ground that the same may be quashed in entirety and the claim of the workman is required to be disallowed.

2. Briefly stating, the facts giving rise to both the petitions are that as per the workman, he was engaged by the respondents/employer as *Beldar* on and w.e.f. 21.08.1994 and he worked as such in the office of Junior Engineer, HPSEB, Section Chandal, Division Rajgarh, District Sirmour, till 15.06.1996, when verbally the respondents illegally terminated his services. As per the workman, he had completed 240 days in a calendar year. The respondents did not comply the obligatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') and no reason was assigned for the termination of the workman. The workman time and again visited the office of the respondents in a hope that he will be re-engaged, but despite written requests no action was taken. The respondents assured him that he will be re-engaged and he waited till September, 2003, and ultimately he issued a demand notice before the Labour-cum-Conciliation Officer, Solan. The respondents remained obstinate during the conciliation proceedings and lastly the reference was made to the learned Tribunal below. As per the workman, the respondents had engaged new persons in contravention of Section 25-H of the Act and the provisions of Sections 25-N, 25-F, 25-G and 25-H of the Act have also been contravened. The workman has further averred that no notice had been issued to him nor any compensation was paid. The workman prayed for setting aside his oral termination order dated 15.06.1996 with simultaneous prayer for his reinstatement in service on and w.e.f. 15.06.1996 with all consequential benefits, including back wages, seniority etc.

3. In reply to the reference petition, the respondents have taken preliminary objections, viz., maintainability, estoppel, delay and laches. It is contended by the respondents that the workman was engaged as *Beldar* on daily wage basis on and w.e.f. 16.11.1993 by SDO (E) HPSEB, Rajgarh, and he had worked upto 15.03.1994. As per the respondents, since the workman was not regular in his duties, he did not complete 240 days in any calendar year, so no notice was required to be served upon him in view of the Standing Orders, Clause 14(2) A under the Act. The respondents had further averred that the workman had left the job on his own without informing the respondents and he was casual in attending his duties, therefore, there had been no violation of Sections 25-G and 25-H of the Act.

4. The learned Tribunal below has framed the following issues for determination:

"1. Whether the services of the petitioner have been illegally terminated by the respondents without complying with the provisions of the Industrial Disputes Act, 1947. If so, its effect? OPP

2. If issue No. 1 is proved in affirmative, to what relief the petitioner is entitled to? OPP

3. Whether the petitioner has no locus standi and the application is not maintainable? OPR

4. Relief."

After deciding issue No. 1 in favour of the workman and issue No. 3 against the respondents, the reference was allowed and the workman was ordered to be reinstated with seniority and continuity w.e.f. 15.03.1994 till passing of the award, except from 07.07.2009 to 22.08.2012, however, without back-wages.

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

6. As per the workman (petitioner) he was engaged as *beldar* on and w.e.f. 21.08.1994 and was terminated on 15.06.1996. However, as per reply of the respondents, the workman was engaged as *beldar* by SDO (E), HPSEB, Rajgarh on 16.11.1993 and he worked upto 15.03.1994. The workman left the job on his own without informing the respondents. Thus,

manifestly the workman had worked upto 15.03.1994 and not 15.06.1996 when he was allegedly terminated.

7. The workman while deposing as PW-1 has stated that he was engaged as *beldar* by the Junior Engineer, HPSEB, Section Chandal and he worked upto 15.06.1996 when he was disengaged/terminated without any notice and compensation. As per the workman, he had been engaged by the Junior Engineer, as *beldar.* Meaning thereby, the contention of the workman that he was engaged on 21.08.1994 is false. PW-2 (Shri Adhoya Kumar) has deposed that the workman worked under his control during the year 1993-94. Nothing is emanating from the record that the workman had been engaged on 21.08.1994. Conversely, the stand of the respondents is fortified by a document pertaining to the detail of the working days qua the workman, which demonstrates that as per Muster Roll No. 876 he had been engaged on 16.11.1993.

8. RW-1 (Shri Shashi Kant) deposed that the workman had been engaged as *beldar* on 16.11.1993, and he worked for three days in that year. Thus from the close scrutiny of the testimonies of PW-1 and RW-1, it is crystal clear that the workman had been engaged, as *beldar,* on 16.11.1993 and not on 21.08.1994.

9. It can easily be construed from the analysis of the record that the petitioner had worked as *beldar* on and w.e.f. 16.11.1993 to 15.03.1994. As the workman did not complete 240 days in a calendar year preceding his disengagement, the provisions of Section 25-F are not at all applicable to the present case. The workman had further contended that after his disengagement new persons, who were junior to him, were engaged/retained by the respondents in utter violation of the provisions of Sections 25-G and 25-H of the Act. However, it is imperative to take into consideration the fact that whether the workman left the job on his own or his services were terminated by the respondents. As per the workman, his services were terminated and he wrote letter, Ex. PW-1/A to Ex. PW-1/C, requesting the respondents to re-engage him. On examination of these letters, it stands testified that letters, Ex. PW-1/A, Ex.PW-1/B and Ex. PW-1/C are dated 14.04.1997, 26.06.1997 and 25.07.2000, respectively. RW-1 (Shri Sashi Kant) in fact, admitted that after termination of the workman, workman wrote letters, Ex. PW-1/A to Ex. PW-1/C, to the respondents. Therefore, patently the workman had been requesting the respondents, orally and through letters, to re-engage him. Thus, given the fact that the workman had been making repeated requests to the respondents for his re-engagement, it cannot be said the workman had left the job on his own.

10. The evidence in the present case suggests that after termination of the workman, he ran from pillar to post for his re-engagement that is by way of writing letters and making oral requests to the respondents. Thus, the workman made himself available for re-engagement. Manifestly, the respondents engaged new workers, who are junior to the workman. As the workman time and again requested the respondents for his re-engagement and his juniors were engaged, there is clear cut violation of Section 25-H of the Act. Therefore, the most probable ratiocination which emerges is that after termination of the workman, persons junior to him were engaged by the respondents, which action of the respondents is not only erroneous, but in violation of Sections 25-G and 25-H of the Act.

11. It has also come on record that the workman did not pursue his case between 07.07.2009 to 05.04.2013 and the same remained dismissed in default during this period. As the respondents had violated the provisions of Sections 25-G and 25-H of the Act and it is the workman who did not pursue his case w.e.f. 07.07.2009 to 22.08.2012 and only on 22.08.2012 the workman, for the first time, moved an application for restoration of his reference after 07.07.2009, this Court finds no illegality in the order passed by the learned Tribunal below in not granting back wages for the period and break in service. As the workman did not care to get his case restored as well as he also did not prove before the Court by leading cogent and reliable evidence that he was not doing anything during all these years and it is otherwise also not acceptable that a person will remain sleeping in his house for such a substantial time.

12. In ***Uptron India Ltd. Vs. Shammi Bhan and another, (1998) 6 Supreme Court Cases 538,*** the Hon'ble Apex Court has held that the employer cannot terminate the services of the workman until and unless principles of natural justice have been followed and the workman has been provided reasonable opportunity to explain himself before terminating his services on the basis of abandonment of job.

13. In view of what has been discussed hereinabove, I find no infirmity in the award passed by the learned Tribunal below. The award passed by the learned Tribunal below is just, reasoned and after properly appreciating the facts to their right perspective and the law has been applied correctly. The petitions being devoid of merit, deserve dismissal and are accordingly dismissed. However, in view of peculiar facts and circumstances of the cases, the parties are directed to bear their own costs.

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

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

Karan Singh ...Revisionist.
Versus
State of Himachal Pradesh ...Respondent.

Cr. Revision No.:18 of 2009.
Date of Decision: 16.11.2016

Code of Criminal Procedure, 1973- Section 482- Petitioner was convicted for the commission of offence punishable under Section 325 of I.P.C – an appeal was preferred, which was dismissed – the matter was compromised during the pendency of the revision and a prayer was made for acquitting the accused in view of the compromise – held, that the accused and the informant have stated that the matter has been compromised between them in order of maintain peace and promote good will- the permission granted to compound the offence – revision petition allowed- conviction and sentence imposed upon the accused/convict by both the Courts set aside and the accused/convict is acquitted. (Para-2 to 4)

For the petitioner: Mr. Anup Chitkara, Advocate.
For the respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The learned Chief Judicial Magistrate, Lahaul-Spiti at Kullu, pronounced an order of conviction upon the revisionist herein qua commission of an offence punishable under Section 325 IPC. In an appeal preferred therefrom by the accused before the learned Additional Sessions Judge, Fast Track Court, Kullu, sequelled the latter affirming the pronouncement recorded upon the accused by the learned Chief Judicial Magistrate, Lahaul-Spiti. The accused/convict standing aggrieved by the concurrently recorded renditions of both the Courts below proceeded to assail them by preferring a revision herebefore.

2. During the pendency of the revision before this Court the learned counsel for the accused/convict revisionist herein, has instituted an application under Section 320 read with Section 482 Cr.P.C. whereby he seeks permission of this Court for compounding the offence committed by him under Section 325 IPC. The application aforesaid also holds the signatures of the complainant.

3. The offence qua which a concurrent order of conviction stood pronounced upon the accused/convict is compoundable yet the accused/convict and the complainant while

endeavouring to seek composition of the offence whereupon an order of conviction stood concurrently pronounced upon the accused/convict, are enjoined to obtain the permission of this Court.

4. Be that as it may, this Court would proceed to accord the apposite permission to them only when satiation stands begotten qua the relevant principles encapsulated in the pronouncement of the Hon'ble Apex Court reported in Ramji Lal and another Vs. State of Haryana, 1983(1) SCC 368, Mohd. Rafi vs. State of U.P., *1998(2) R.C.R.(Criminal 455,* M.D.Balan Mian and another vs. State of Bihar and another *2001 AIR (SCW) 5190,* Khursheed and another vs. State of U.P in Appeal (Crl.) No. 1302 of 2007, Dasan vs. State of Kerala and another *2014(2) ECrC 384*. The aforestated pronouncements of the Hon'ble Apex Court empower Courts of law to proceed to permit the accused/convict and the informant/complainant to enter into a compromise also empower the Court concerned to grant the apposite permission to them for compounding the offence(s) only on vivid display occurring qua its facilitating restoration of harmony in society besides its promoting goodwill and amity amongst them.

5. Since both the accused/convict and the complainant/informant in their respective statements recorded on oath reduced into writing and respectively signatured by them echo therein qua their apposite conjoint endeavour intending to promote goodwill and peace amongst them necessarily hence the aforesaid principle encapsulated in the aforereferred judgements of the Hon'ble Apex Court for thereupon this Court holding a facilitation to permit them to compound the offence whereupon the accused stood concurrently convicted by both the Courts below stands visibly satiated.

6. Consequently, this Court accepts their joint proposal to compound the offence committed by the accused/convict. In sequel thereto the revision petition is allowed. The conviction and sentence concurrently imposed upon the accused/convict by both the Courts below is set aside. The accused/convict is acquitted. Bail bonds are cancelled.

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

Kewal Ram Siranta & Ors. …Petitioners.

Versus

HP Voluntary Health Association & Anr. …Respondents.

Civil Revision No.150 of 2016.
Reserved on: 27.10.2016.
Decided on: November 16, 2016.

Code of Civil Procedure, 1908- Order 7 Rule 11- A civil suit for declaration was filed challenging the election of various office bearers of the society – an application for rejection of the plaint was filed, which was dismissed – held, that the application was filed belatedly – the time for which the office bearers were elected has lapsed but that is not sufficient to dismiss the suit – the Court has already framed issue regarding the maintainability which is yet to be adjudicated- petition dismissed. (Para-4 to 8)

For the Petitioners: Mrs. Pratima Malhotra, Advocate.
For the Respondents: Mr. Sandeep Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

Sanjay Singh Chauhan in the capacity of Secretary of Himachal Pradesh Voluntary Association instituted a suit wherein on the ground of the apposite elections

contravening the constitution of the "Society" he hence constituted a challenge to the election of respondents No.1 to 9, as President, vice President, Secretary, Treasurer besides Members and office bearers of the aforesaid association. He also canvassed therein qua rendition of a declaratory decree qua the election of the afore-stated defendants being quashed and set aside. The suit aforesaid stood instituted in the year 2011.

2. The defendants contested the suit by instituting a written statement thereto wherein they raised a trite objection qua with the aforesaid plaintiff not at the apposite stage donning the capacity of Secretary of the Himachal Pradesh Voluntary Health Association, a registered Society under the Societies Registration Act, 1860 (for short 'the Society') rather the capacity afore-stated standing extantly manned by its newly elected Secretary rendering hence the frame of array of plaintiff(s) being mis-constituted also a contest was made therein qua the relief canvassed therein being unaffordable to the plaintiff. Also on anvil of omission of joinder of the "Society" in the array of defendants, an apposite objection qua the maintainability of the suit stood raised therein.

3. On the contentious pleadings of the parties, the learned trial Court under its orders made on 10.01.2014 struck the relevant issues arising from the contentious pleadings of the parties at contest where-amongst one, is an issue qua the plaintiff holding a legally enforceable cause of action vis-à-vis the defendants. Previous thereto an application under the provisions of Section 151 of the CPC stood instituted by the defendants before the learned trial Court holding a prayer therein qua the suit of the plaintiffs being ordered to be dismissed. On the afore-stated application the learned trial Court below pronounced the impugned orders whereby the relief as canvassed therein stood refused to the defendants wherefrom the defendants stand aggrieved, hence are constrained to prefer herebefore the instant petition for quashing them.

4. The application preferred under Section 151 CPC subsequent to completion of pleadings inter se the litigating parties before the Court concerned purportedly appears to stand instituted under the provisions of Order 7 Rule 11 CPC, provisions whereof embody therein the grounds whereupon a civil Court can order for rejection of plaint, one amongst which is non-existence of a disclosure therein qua any cause of action accruing to the plaintiff, ground whereof stands apparently reared in the apposite pleadings of the defendants, whereon an apposite issue also stands struck by the learned trial Court. The availment of the aforesaid provisions of Order 7 Rule 11 CPC by the defendants, provisions whereof stand extracted hereinafter:-

> **"11. Rejection of plaint.-** The plaint shall be rejected in the following cases:—
>
> (a) where it does not disclose a cause of action;
>
> (b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;
>
> (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;
>
> (d) where the suit appears from the statement in the plaint to be barred by any law;
>
> (e) where it is not filed in duplicate;
>
> (f) where the plaintiff fails comply with the provision of Rule 9.
>
> Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the

> requisite stamp papers, as the case may be within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff."

stood enjoined to occur at the outset, precisely at the stage whereat they stood efficaciously served by the learned trial Court. However, visibly the defendants procrastinated theirs availing the aforesaid provisions of the CPC comprised in theirs constituting besides rearing pleadings in their written statement with a disclosure therein qua no cause of action subsisting vis-à-vis the plaintiff. The learned trial Court had concluded qua with an apposite issue qua the plaintiff holding no enforceable cause of action vis-à-vis the defendants standing ordered to be struck, whereupon evidence remaining yet un-adduced hence rendered the apposite application to warrant rejection. The impugned order pronounced by the learned trial Court does not suffer from any apparent illegality or impropriety conspicuously when the defendants at the stage whereat they initially received copy of the summons from the learned trial Court they abandoned besides waived their statutory right qua theirs thereat promptly availing the relevant grounds embodied in Order 7 Rule 11 CPC, for thereupon theirs seeking an apposite relief, relief whereof rather subsequent thereto stood constituted in the application at hand, also imperatively when availment thereof thereat constituted the apposite stage for theirs availing them contrarily when rather they procrastinated their availment even up to the stage whereat they in their written statement raised an apposite contention in consonance therewith bespeaks of the principle of thereupon theirs standing estopped to subsequent thereto unveil a ground in tandem thereof whereby they hence stand baulked in making their relevant espousal qua the plaintiffs extantly holding no subsisting cause of action vis-à-vis them. Moreso, when the factum aforesaid is construed along with the factum qua an apposite issue standing struck thereon by the learned trial Court whereon evidence remains yet un-adduced whereupon an inference is engendered qua prima facie hence this Court standing not constrained to pronounce qua the suit of the plaintiff warranting dismissal especially when the aforesaid pronouncement would be a premature closure besides termination of the suit even when the relevant issues are open for trial. Also with the relevant constitution of the "Society"/"Association" holding a mandate therein qua its authorized Secretary holding an authorization to enjoy the apposite term for a period of three years, period whereof may stand completed by the Secretary whose election stands challenged by Sanjay Singh Chauhan, may also obviously be a relevant factor before the Court below to make its relevant pronouncement thereon. In face thereof, when the suit of the plaintiff may prima facie ultimately suffer the fate of dismissal whereupon any adverse pronouncement qua the plaintiffs by this Court at this stage may ultimately forestall the learned trial Court to record an apposite verdict thereupon rather would present it with a *fait accompli*. For obviating any occurrence of the aforesaid casualty, this Court does not deem it fit and proper to interfere with the impugned order of the learned Court below.

5. The learned counsel appearing for the defendants has submitted before this Court that even the term of the defendants who stand elected in various capacities in the "society"/"Association" has ended whereupon she contends of the suit warranting dismissal. However, the aforesaid submission is open to be addressed before the learned trial Judge, who on adduction of germane evidence in substantiation thereof may record an apposite verdict thereon.

6. Be that as it may, the learned counsel appearing for the defendants has contended qua Sanjay Singh Chauhan mis-reflecting himself to be the Secretary of the Society significantly when he stands substituted by a newly elected Secretary besides she contends of the suit being bad for non-joinder of the "Society"/"Association" in the array of defendants whereas its joinder in the array of co-defendants was imperative. However, all the aforesaid defects in the frame of the suit or in the constitution of the litigating parties may be curable by an appropriate application standing preferred by the plaintiff before the learned Court below whereon it is open for the learned trial Court to record an appropriate decision thereon.

7. The factum of the suit being barred by statutory provisions engrafted in the relevant statute besides its thereupon being not maintainable may also not warrant this Court to record a pronouncement thereupon significantly when an apposite issue qua the facet aforesaid

stands struck by the learned trial Court whereon the parties may adduce the relevant evidence for facilitating the learned trial Court to record a clinching finding thereon.

8. For all the reasons, which stand assigned herein-above, the reasoning afforded by the learned Court below in dismissing the application of the defendants is free from any fault. In sequel, there is no merit in the instant petition, the same is dismissed. However, it is made clear that any observation made herein-above will have no bearing on the merits of the case and the learned trial Court shall decide the suit uninfluenced by any observation made hereinabove. All pending application(s) shall also stand disposed of.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

LPA No.210 of 2015, CR Nos.159 of 2003, 26 of 2005, 115 of 2012 & 134 of 2015, RFAs No.343 of 2008, 265 of 2011, CMPMO Nos.213, 284 and 285 of 2012

Reserved on : 27.10.2016

Pronounced on: November 16, 2016.

1. LPA No.210 of 2015

Mumtaz Ahmed ... Appellant.

Versus

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

2. CR No.159 of 2003

Harjinder Singh ... Petitioner.

Versus

Himachal Wakf Board and others ... Respondents.

3. CR No.26 of 2005

Punjab Wakf Board ... Petitioner.

Versus

Harjinder Singh and others ... Respondents.

4. CR No.115 of 2012

Nanhe Khan ... Petitioner.

Versus

H.P. Wakf Board and another ... Respondents.

5. CR No.134 of 2015

H.P. Waqf Board ... Petitioner.

Versus

Khwaja Khallilula and another ... Respondents.

6. RFA No.343 of 2008

Kamla Mohini ... Appellant.

Versus

Himachal Pradesh Wakf Board and another ... Respondents.

7. RFA No.265 of 2011

Maulana Abdul Subhan Khan ... Appellant.

Versus

Himachal Pradesh Wakf Board ... Respondent.

8. CMPMO No.213 of 2012

His Holiness The Dalai Lama & another ... Petitioners.

Versus

H.P. Wakf Board ... Respondent.

9. CMPMO No.284 of 2012

Noor Mohammad & another	Petitioners.
Versus	
H.P. Wakf Board	Respondent.
10. CMPMO No.285 of 2012	
Nayab and others	Petitioners.
Versus	
H.P. Wakf Board	Respondent.

Constitution of India, 1950- Article 226- Petitioner was appointed as Imam -he submitted his resignation reserving his right to continue as voluntary Imam and to keep the residential accommodation allotted to him -his resignation was accepted on 31.7.2003 -it was resolved to discontinue voluntary Imamat of the writ petitioner and all the facilities -a civil suit was filed for the recovery of possession and use and occupation charges, which was decreed -regular first appeal was filed, which was dismissed - a writ petition was filed for quashing the resolution - various other Civil revisions and Civil Miscellaneous Petitions (CMPMO) were also filed against various orders passed by Wakf Tribunal - all these petitions were taken for decision together-it was held, that Section 6 and 7 of the Wakf Act, 1995 provide for determination of certain disputes regarding wakf property only by Wakf Tribunal -sub Section 9 of Section 83 of the Act provides that no appeal shall lie against any decision or order whether interim or otherwise, passed by the Tribunal established under the Act - still the RFA and Writ Petitions are being filed and entertained by the Court -remedy of revision has been provided by the Act - since revision lies against the order; therefore, writ petition is not maintainable - it was further held that sections 6 and 7 of the Act do not cover the dispute of eviction relating to the immovable property, which is admittedly a Wakf property - such disputes are triable by the Civil Courts - writ petitions and RFAs dismissed as not maintainable - direction issued to treat CMPMO as civil revision.

(Para-26 to 44)

Cases referred:

Mohd. Abdul Kareem And Anr. vs. Andhra Pradesh State Wakf Board, 2004(2) ALD 345,
Faseela M. vs. Munnerul Islam Madrasa Committee and another, 2014 AIR SCW 2503

LPA No. 210 of 2015

For the appellant:	Ms. Seema K. Guleria, Advocate, vice Ms. Anjana Khan, Advocate.
For the respondents:	Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 1.
	Ms. Jyotsna Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate, for respondents No. 2 and 3.

CR No.159 of 2003

For the petitioner:	Mr. Bhupender Gupta, Sr. Advocate with Mr. Himanshu Sharma, Advocate.
For the Respondents:	Mr. B.C. Negi, Senior Advocate, with Mr. Pranay Pratap Singh, Advocate, for respondent No. 1.
	Mr. Ajit Jaswal, Advocate, for respondents No. 3 and 4.
	Nemo for other respondents.

CR No.26 of 2005

For the Petitioner:	Ms.Jyotsna Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate.
For the respondents:	Mr. Bhupender Gupta, Sr. Advocate with Mr. Himanshu Sharma, Advocate, for respondent No.1.
	Nemo for other respondents

CR No.115 of 2012

For the Petitioner:	Mr. Bhupender Gupta, Sr. Advocate with Mr. Himanshu Sharma, Advocate.
For the respondents:	Ms. Seema Guleria, Advocate, vice Ms. Anjana Khan, Advocate.

CR No.134 of 2015

For the Petitioner:	Mr. B.C. Negi, Senior Advocate, with Mr. Pranay Pratap Singh, Advocate.
For the respondents:	Mr. Arvind Sharma, Advocate.

RFA No.343 of 2008

For the appellant:	Ms. Seema Guleria, Advocate, vice Ms. Anjana Khan, Advocate.
For the respondents:	Ms. Jyotsna Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate, for respondent No.1. Respondent No. 2 already ex parte.

RFA No.265 of 2011

For the appellant:	Ms. Seema Guleria, Advocate, vice Ms. Anjana Khan, Advocate.
For the respondents:	Mr. B.C. Negi, Sr. Advocate with Mr. Pranay Partap Singh, Advocate.

CMPMO No.213 of 2012

For the petitioner:	Ms. Nishi Goel, Advocate.
For the respondent:	Mr. B.C. Negi, Sr. Advocate with Mr. Pranay Partap Singh, Advocate.

CMPMO Nos.284 & 285 of 2012

For the petitioners:	Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.
For the respondents:	Mr. B.C. Negi, Sr. Advocate with Mr. Pranay Partap Singh, Advocate

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Common question – Whether the instant cases are maintainable in the present form - is involved in all these cases, therefore, the same were clubbed and are taken up together.

2. Before the above question is determined, let us have a brief glance of the facts of the each case as under.

LPA No.210 of 2015

3. This appeal is directed against the judgment, dated 27th October, 2015, passed by a learned Single Judge of this Court, in CWP No.3635 of 2015, titled Mumtaz Ahmad vs. State of H.P. and others, whereby the writ petition filed by the petitioner (appellant herein) came to be dismissed, (for short the impugned judgment).

4. The writ petitioner was appointed as Immam of Boileauganj Mosque, submitted his resignation on 22.7.2003 reserving his right to continue as voluntary Immam and to keep residential accommodation allotted to him, resignation was accepted on 31st July, 2003.

5. Vide Annexure P-3 (resolution dated 5th February, 2007), it was resolved by the writ respondents to discontinue the voluntary immamt of the writ petitioner and all facilities. The writ petition filed representations, but of no avail.

6. Thereafter, on 22.6.2007, writ respondents filed a civil suit before the Wakf Tribunal, Shimla for possession of the accommodation provided to the writ petitioner as well as for occupation and recovery of use and occupation charges against the petitioner, which was decreed. Writ petitioner filed Regular First Appeal, being RFA No.484 of 2011, before this Court, which was dismissed on 25th August, 2014.

7. The writ petitioner filed the writ petition for quashing Annexure P-3 i.e. resolution and for declaring entire proceedings initiated on the basis of Annexure P-3 as null and void. The writ petitioner also prayed that the respondents be directed to allow the petitioner to continue with honorary Immamt with all facilities provided to him.

8. The writ petition came to be dismissed vide the impugned judgment, hence the instant appeal.

CR No.159 of 2003

9. This Civil Revision Petition has been filed by the petitioner under Section 83 of Wakf Act, 1995 against the judgment and decree passed by Wakf Tribunal, Kangra, Hamirpur, Kullu, Una, Lahaul and Spiti, and Chamba at Dharamshala in Civil Suit No.2-D/1/2002/(1994), dated 25.3.2003, whereby the suit of the plaintiff/respondent herein was decreed.

10. Plaintiff-Punjab Wakf Board, (now Himachal Wakf Board), filed a suit for possession and for demolition of the structure, being owner of the suit property the description of which has been given in the plaint. The Tribunal decreed the suit of the plaintiff (respondent No.1 herein), sale deed dated 14.2.1984 and 23.1.1984 executed in favour of defendant No.1 (appellant herein) by the mother of defendant No.2 were declared to be null and void and illegal. Accordingly, defendant No.1 was restrained from changing the nature of the suit land. Hence the instant revision petition.

CR No.26 of 2005

11. This petition has been filed by the plaintiff under Section 83(9) of Wakf Act, 1995 against the judgment and decree passed by Wakf Tribunal in Civil Suit No.2-D/1/2002/(1994), dated 25.3.2003, (also subject matter of CR No.159 of 2003 supra), whereby the plaintiff has challenged the impugned judgment on the sole ground that the Tribunal has not granted the relief of possession by demolishing the structure standing on the suit land.

CR No.115 of 2012

12. This Civil Revision Petition under Section 83(a) of Wakf Act, 1995 is the outcome of the judgment and decree, dated 20.7.2012, passed by the Wakf Tribunal, Shimla in Civil Suit No.6-S/1 of 2008, whereby the suit of the plaintiff/petitioner herein was dismissed, (for short, the impugned judgment).

13. It was averred by the Plaintiff in the plaint that he had been statutory tenant in possession of top floor alongwith attic in Kutub Mosque Subzi Mandi, Shimla under defendant No.1 i.e. H.P. Wakf Board, on rent and paying rent to the Wakf Board. Defendant No.1/H.P. Wakf Board initiated eviction proceedings under Section 54 of the Wakf Act, 1955 against the plaintiff. It was further averred that the order dated 28.12.2007 passed by defendant No.1 was wrong, illegal, void and not biding on the plaintiff. Thus, the suit filed by the plaintiff (petitioner herein) for permanent injunction.

14. The Tribunal, vide the impugned judgment, dismissed the suit of the plaintiff and held that the plaintiff was rank trespasser and liable to be evicted.

CR No.134 of 2015

15. This Civil Revision Petition under Section 83(9) of Wakf Act, 1995 is directed against the judgment and decree passed by Wakf Tribunal, Shimla in Civil Suit No.19-S/1 of 2008, dated 19.3.2015, whereby the suit of the plaintiff-H.P. Wakf Board has been dismissed, (for short the impugned judgment).

16. The plaintiff-H.P. Wakf Board filed a suit for declaration to the effect that plaintiff-Board was owner of shops in Middle Bazar Shimla, the description of which has been given in the plaint itself, and also prayed that the revenue entries showing defendants/respondents herein to be in possession of the suit property be declared as null, void, illegal and inoperative.

17. The Tribunal, vide the impugned judgment, dismissed the suit of the plaintiff, hence the present petition.

RFA No.343 of 2008

18. The instant Regular First Appeal has been preferred under Section 96 of the Code of Civil Procedure (for shot, CPC) by defendant No.1 against the judgment and decree, dated 30th August, 2008, passed by Wakf Tribunal, Kangra at Dharamshala, whereby suit of the plaintiff-Wakf Board was decreed, (for short, the impugned judgment).

19. Plaintiff-Board filed a suit for permanent injunction against the defendants, being the owner of the suit property as the same was the property of the mosque. It was averred that the entries reflecting defendant No.1 as owner in possession of the suit land were wrong and illegal.

20. The suit was decreed by the Tribunal, vide the impugned judgment, and the defendants were restrained from raising construction over the suit land or changing nature thereof, hence the present appeal.

RFA No.265 of 2011

21. This appeal under Section 96 of the CPC arises out of the judgment and decree, dated 31st May, 2011, passed by the Wakf Tribunal, Shimla, whereby the suit of the plaintiff-Wakf Board, for possession and recovery, was decreed, the defendant was ordered to be dispossessed from the suit property and the plaintiff-Board was also held entitled for Rs.1,09,400/- as use and occupation charges, (for short, the impugned judgment). Feeling aggrieved, the defendant has filed the instant appeal.

CMPMO No.213 of 2012

22. This petition has been filed under Article 227 of the Constitution of India read with Section 83(9) of the Wakf Act, 1995, against judgment and decree dated 31.12.2011, passed by the Wakf Tribunal, Kangra at Dharamshala, vide which the suit of the plaintiff/respondent herein was partly decreed inasmuch as the decree for possession was granted, while relief of mandatory injunction by way of demolition was declined.

CMPMO No.284 of 2012

23. This petition has been filed under Section 83(9) of the Wakf Act, 1995, read with Article 227 of the Constitution of India, against the judgment and decree, dated 4.6.2012, passed by Wakf Tribunal, Shimla, whereby petition under Section 7 read with 83(2) of the Wakf Act, 1995, was dismissed, hence, the present petition by the petitioners.

CMPMO No.285 of 2012

24. The present petition has been filed under Section 83(9) of the Wakf Act, 1995, read with Article 227 of the Constitution of India, against the order 4.6.2012, passed by Wakf Tribunal, Shimla, whereby petition under Section 7 read with 83(2) of the Wakf Act, 1995, was dismissed, (for short, the impugned judgment).

25. Thus, the question to be determined in the present cases is – Whether Regular First Appeal or Civil Revision or petition under Article 227 of the Constitution of India would lie against the order passed by the Wakf Tribunal.

To answer the question framed hereinabove, relevant provisions of the Wakf Act, 1995, (for shot, the Act), are to be noticed.

26. In order to settle the disputes qua the Wakf properties, the Act provides for establishment of Wakf Tribunals which have to determine the disputes, as detailed in Sections 6 of the Act. It is apt to reproduce Section 6 of the Act hereunder:

> *"6.* ***Disputes regarding wakfs*** *:- (1) If any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final :Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of wakfs.*
>
> *(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.*
>
> *(3) The Survey Commissioner shall not be made a party to any suit under sub- section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.*
>
> *(4) The list of wakfs shall, unless it is modified in pursuance of a decision or the Tribunal under sub-section (1), be final and conclusive.*
>
> *(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a court in that State in relation to any question referred to in sub-section (1)."*

27. Section 7 of the Act, reproduced below, deals with the powers of the Wakf Tribunal:

> *"7. Power of Tribunal to determine disputes regarding wakfs :- (1) If, after the commencement of this Act, any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board or the mutawalli of the wakf, or any person interested therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final; Provided that -(a) in the case of the list of wakfs relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of wakfs; and*
>
> *(b) in the case of the list of wakfs relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement :Provided further that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not re-open such question.*
>
> *(2) Except where the Tribunal has no jurisdiction by reason of the provisions of sub-section (5), no proceeding under this section in respect of any wakf shall be stayed by any court, tribunal or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.*
>
> *(3) The Chief Executive Officer shall not be made a party to any application under sub-section (1).*
>
> *(4) The list of wakfs and where any such list is modified in pursuance of a decision of the Tribunal under sub-section (1), the list as so modified, shall be final.*
>
> *(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a civil court under sub-section (1) of section 6 , before the commencement of this Act or which is the subject-matter of any*

appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be."

28. Thus, Sections 6 and 7 of the Act provides for determination of certain disputes regarding wakf properties only by the Wakf Tribunal. But the question arises that after determining the dispute by the Tribunal, what remedy is available to the aggrieved party.

29. Before the establishment of the Wakf Tribunal, District Judge was hearing the cases and determining the disputes under the Act. After amendment in the Act, under Section 83 of the Act, Tribunals are constituted having three members i.e. District Judge as Chairman, one person from the State Civil Services of the rank of Additional District Magistrate and one person having knowledge of Muslim Law and jurisprudence, as members. It is apt to reproduce Section 83 of the Act hereunder

"**83. Constitution of Tribunals, etc :-** (1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals.

(2) Any rnutawalli person interested in a wakf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the wakf.

(3) Where any application made under sub-section (1) relates to any wakf property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the rnutawalli or any one of the mutawallis of the wakf actually and voluntarily resides, carries on business or personally works for gain, and, where any such application is made to the Tribunal aforesaid, the other Tribunal or Tribunals having jurisdiction shall not entertain any applica- tion for the determination of such dispute, question or other matter :Provided that the State Government may, if it is of opinion that it is expedient in the interest of the wakf or any other person interested in the wakf or the wakf property to transfer such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such wakf or wakf property, transfer such application to any other Tribunal having jurisdiction, and, on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage which was reached before the Tribunal from which the application has been so transferred, except where the Tribunal is of opinion that it is necessary in the interests of justice to deal with the application afresh.

(4) Every Tribunal shall consist of –

(a) one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, who shall be the Chairman;

(b) one person, who shall be an officer from the State Civil Services equivalent in rank to that of the Additional District Magistrate, Member;

(c) one person having knowledge of Muslim law and jurisprudence, Member,

and the appointment of every such person may be made either by name or by designation."

(5) The Tribunal shall be deemed to be a civil court and shall have the same powers as may be exercised by a civil court under Code of Civil Procedure, 1908 , while trying a suit, or executing a decree or order.

(6) Notwithstanding anything contained in Code of Civil Procedure, 1908 , the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a civil court.

(8) The execution of any decision of the Tribunal shall be made by the civil court to which such decision is sent for execution in accordance with the provisions of Code of Civil Procedure, 1908 .

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit."

30. Sub Section 9 of Section 83 of the Act provides that no appeal shall lie against any decision or order whether interim or otherwise, passed by the Tribunal established under the Act. Still, it is astonishing that Writ Petitions and Regular First Appeals are being preferred by the aggrieved parties before this Court challenging the decisions rendered by the Tribunals constituted under the Act. It is also not understandable how such appeals or writ petitions are being entertained once there is specific bar in terms of Section 83(9) of the Act that no appeal will lie against the order of the Tribunal. We were told that it is a practice in this Court and the decisions have been made and such decisions have attained finality.

31. We may make it clear that we are not giving findings viz. a viz. those judgments which have attained finality. It is also made clear that this judgment is prospective in nature and will not, in any way, have retrospective effect.

32. In terms of proviso to Sub Section (9) of Section 83 of the Act, any person aggrieved by the orders of the Tribunals can invoke the revisional jurisdiction of the High Court. Thus, remedy is provided to the aggrieved person by way of filing revision petition and not by the medium of appeal.

The Act contains the mechanism for filing revision petition, thus, providing efficacious alternative remedy to the aggrieved party, rendering the writ petition not maintainable against the orders passed by the Tribunal. This view has been taken by this Court in case titled as **M/s Indian Technomac Company Ltd. versus State of H.P. & others, being CWP No.4779 of 2014, decided on 4th August, 2014**, and restated in plethora of judgments.

In a similar case, the High Court of Andhra Pradesh in case titled as **Mohd. Abdul Kareem And Anr. vs. Andhra Pradesh State Wakf Board, 2004(2) ALD 345,** held that the jurisdiction of the High Court in disputes pertaining to Wakfs can be invoked by way of filing revision petition and not by the medium of a writ petition. It is apt to reproduce paragraph 13 of the said decision hereunder:

> *"13. As seen from the above, the jurisdiction of the High Court in disputes relating to Wakfs can be invoked only when an aggrieved party files a revision petition under Sub-section (9) of Section 83 of the Act and a writ. petition would not be maintainable. In view of the binding precedents, this Court is not inclined to go into the merits of the contentions on other two questions raised by the learned Counsel for respective parties. These are left open to be decided at an appropriate stage in appropriate proceedings."*

33. In view of the above discussion, the question supra is answered accordingly.

34. Next question, which arises for determination is whether a suit for eviction and recovery of use and occupation charges against a person, who, admittedly, is a tenant, will lie before the Wakf Tribunal or before the Civil Court.

35. This point was neither raised before us by any of the parties nor arguments were addressed. However, we may observe that Sections 6 and 7 of the Act, reproduced above, nowhere encompasses the disputes relating to eviction of a tenant occupying the wakf property.

Therefore, such disputes are triable by the civil court and not by the Tribunal established under the Act.

36. Our this view is fortified by the judgment rendered by the Apex Court in **Faseela M. vs. Munnerul Islam Madrasa Committee and another, 2014 AIR SCW 2503,** wherein it was held by their Lordships that suit for eviction from wakf property is triable by a civil court and not by the Wakf Tribunal since the Act does not provide determination of dispute of eviction by the Tribunal. It is apt to reproduce paragraphs 12 to 17 of the said judgment hereunder:

> "12. The Court in para 35, page 738 held as follows:
>
> > "35. In the cases at hand the Act does not provide for any proceedings before the Tribunal for determination of a dispute concerning the eviction of a tenant in occupation of a wakf property or the rights and obligations of the lessor and the lessees of such property. A suit seeking eviction of the tenants from what is admittedly wakf property could, therefore, be filed only before the civil court and not before the Tribunal."
>
> 13. Mr. Renjith Marar, learned Counsel for Respondent No. 1, submits that in a subsequent decision in Bhanwar Lal and Anr. v. Rajasthan Board of Muslim Wakf and Ors., 2013 11 SCALE 210, this Court has taken a different view. According to him, Section 85 of the Act leaves no manner of doubt that the Waqf Tribunal has jurisdiction to decide the suit for eviction. It is so because one of the questions for determination is whether the suit property is waqf property or not.
>
> 14. The Court in Bhanwar Lal & Anr V/S Rajasthan Board Of Muslim Wakf & Ors, 2013 11 SCALE 210 considered the decision in at quite some length. Besides Ramesh Gobindram (Dead) Through LRs V/S Sugra Humayun Mirza Wakf, 2010 8 SCC 726, the Court in Bhanwar Lal & Anr V/S Rajasthan Board Of Muslim Wakf & Ors, 2013 11 SCALE 210 also considered two other decisions, one, Board of Wakf, West Bengal and Anr. v. Anis Fatma Begum and Anr., 2010 14 SCC 588 and two, Sardar Khan and Ors. v. Syed Najmul Hasan (Seth) and Ors., 2007 10 SCC 727. In Anis Board of Wakf, West Bengal and Anr. v. Anis Fatma Begum and Anr., 2010 14 SCC 588, this Court had held that the Waqf Tribunal constituted Under Section 83 of the Act will have exclusive jurisdiction to deal with the questions relating to demarcation of the waqf property.
>
> 15. Pertinently, the Court in Bhanwar Lal & Anr V/S Rajasthan Board Of Muslim Wakf & Ors, 2013 11 SCALE 210 held that the suit for cancellation of sale deed was triable by the civil court.
>
> 16. Bhanwar Lal & Anr V/S Rajasthan Board Of Muslim Wakf & Ors, 2013 11 SCALE 210 follows the line of reasoning in Ramesh Gobindram (Dead) Through LRs V/S Sugra Humayun Mirza Wakf, 2010 8 SCC 726, The decision of this Court in BHANWAR LAL & ANR V/S RAJASTHAN BOARD OF MUSLIM WAKF & ORS, 2013 11 SCALE 210 is not in any manner inconsistent or contrary to the view taken by this Court in Ramesh Gobindram (Dead) Through Lrs V/S Sugra Humayun Mirza Wakf, 2010 8 SCC 726, . We fully concur with the view of this Court in Ramesh Gobindram : (2010) 8 SCC 726, particularly with regard to construction put by it upon Sections 83 and 85 of the Act. In Ramesh Gobindram (Dead) Through LRs V/S Sugra Humayun Mirza Wakf, 2010 8 SCC 726, the Court said:
>
> > "32. There is, in our view, nothing in Section 83 to suggest that it pushes the exclusion of the jurisdiction of the civil courts extends (sic) beyond what has been provided for in Section 6(5), Section 7 and Section 85 of the Act. It simply empowers the Government to constitute a Tribunal or Tribunals for determination of any dispute, question of other matter relating to a wakf or wakf property which does not ipso facto mean that the jurisdiction of the civil courts stands completely excluded by reasons of such establishment.

33. It is noteworthy that the expression "for the determination of any dispute, question or other matter relating to a wakf or wakf property" appearing in Section 83(1) also appears in Section 85 of the Act. Section 85 does not, however, exclude the jurisdiction of the civil courts in respect of any or every question or disputes only because the same relates to a wakf or a wakf property. Section 85 in terms provides that the jurisdiction of the civil court shall stand excluded in relation to only such matters as are required by or under this Act to be determined by the Tribunal."

34. The crucial question that shall have to be answered in every case where a plea regarding exclusion of the jurisdiction of the civil court is raised is whether the Tribunal is under the Act or the Rules required to deal with the matter sought to be brought before a civil court. If it is not, the jurisdiction of the civil court is not excluded. But if the Tribunal is required to decide the matter the jurisdiction of the Civil Court would stand excluded."

17. The matter before us is wholly and squarely covered by Ramesh Gobindram (Dead) Through LRs V/S Sugra Humayun Mirza Wakf, 2010 8 SCC 726, . The suit for eviction against the tenant relating to a waqf property is exclusive triable by the civil court as such suit is not covered by the disputes specified in Sections 6 and 7 of the Act."

37. Thus, it is held that the suit for eviction against the tenant in regard to wakf property is triable by the Civil Court.

38. In view of the above findings, let us take the instant cases one by one and settle whether they are maintainable in the present form or not.

RFA Nos.343 of 2008 & 265 of 2011

39. These regular first appeals have been filed by the appellants against the impugned judgments passed by the Wakf Tribunal. Since we have held above that no appeal against the orders of the Wakf Tribunal will lie, therefore, these appeals merit to be dismissed and the same are dismissed accordingly. However, the aggrieved party may seek appropriate remedy, if any, available in terms of the Act. It is made clear that in case any party resort to appropriate proceedings, the time spent in pursuing these appeals is to be excluded while computing the period of limitation.

LPA No.210 of 2015:

40. This appeal has been filed by the appellant/writ petitioner against the impugned judgment passed by the learned Single Judge, whereby the writ petition filed by the petitioner came to be dismissed. It is worthwhile to record herein that earlier the Wakf Board had filed a civil suit, which came to be decreed. Feeling aggrieved, the writ petitioner filed RFA No.484 of 2011, which was dismissed by this court vide judgment dated 10th September, 2014. Thereafter, the writ petitioner filed the writ petition giving rise to the instant appeal. In fact, the writ petition was filed for the same relief, which already stands determined by the Wakf Tribunal and upheld by this Court in regular first appeal supra. As we have held above, though regular first appeal against the order of the Tribunal was not maintainable, however, since the judgment rendered by this Court has attained finality, therefore, we are not going into the said question.

41. Thus, the writ petition on the same cause of action was not maintainable and therefore, the learned Single Judge has rightly held that the writ petition was not maintainable. It is apt to reproduce paragraphs No.13 and 16 of the impugned judgment hereunder:

"13. Be that as it may, the power of this Court to exercise extraordinary jurisdiction under Article 226 of the Constitution is to ensure that rule of law prevails and not to issue directions or writ to perpetuate illegality or to act in disregard to the settled decisions, statutory provisions, regulations and policy decisions etc. and in such situation, this Court can only sympathize with the plight of such students who for no fault of their own are being dislodged. Here, it shall be apt to reproduce the following

passage from the judgment delivered by the Hon'ble Supreme Court in K.S. Bhoir vs. State of Maharashtra and others, AIR 2002 SC 444 wherein it was held as under:

> "11 ……… In such a situation one can sympathise with the plight of such students who for no fault of their own were to be dislodged. However, the compassion and sympathy has no role to play where a rule of law is required to be enforced….."

14. …………….. ………………… ………….

15. ……………….. ………………. …………….

16. Even this argument is not available with the petitioner for the simple reason that the findings in this regard on the aforesaid issues have already been returned against him in RFA No. 484 of 2011 as is evident from the perusal of para 14 of the judgment (quoted supra) and the same have admittedly attained finality."

42. Having said so, the instant appeal merits dismissal and the same is dismissed as such.

CMPMOs No.213, 284 and 285 of 2012

43. These petitions have been filed by the petitioner(s) under Section 83(9) of the Act. The Registry has wrongly treated these petitions as having been filed under Article 227 of the Constitution of India and has wrongly diarized them as CMPMO, rather they should have been diarized as Civil Revisions. The Registry is directed to diarize these petitions as Civil Revisions.

CR Nos.159 of 2003, 26 of 2005, 115 of 2012 and 134 of 2015

44. Keeping in view the discussion made hereinabove, these revision petitions and the revision petitions, after diarizing the CMPMOs supra as Civil Revisions, be listed for hearing before the Division Bench on 01.12.2016.

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

Roop Singh (since dead) through LRs & Ors. …Appellants.

Versus

Prabha Ram & Ors. …Respondents.

RSA No.351 of 2008.
Reserved on: 24.10.2016.
Decided on: November 16, 2016.

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit pleading that the possession of plaintiffs over the suit land is open, peaceful, hostile continuous without interruption to the knowledge of the defendants from January, 1960 and has matured into title- plaintiffs have become the owners by way of adverse possession – defendants No.1 and 2 had obtained a collusive judgment from Assistant Collector, Sarakaghat which does not affect the right of the plaintiffs- the suit was decreed by the Trial Court- an appeal was preferred, which was partly allowed- held in second appeal that proceedings were initiated by Assistant Collector for evicting the deceased defendant – the bartandarans were not impleaded and the suit was decreed in their absence- this shows that the judgment was passed by A.C. 1st Grade collusively and without following the principle of natural justice- the Courts below had passed the judgments rightly – appeal dismissed.(Para-9 to 13)

Case referred:

State of Himachal Pradesh versus Bagshi Ram, 2001 (2) Current Civil Law Journal 520

For the Appellants: Mr.R.L.Chaudhary, Advocate.

For the Respondents: Mr.Vijay Verma, Advocate for respondents No.1 to 7.
Mr.Vivek Singh Attri, Dy.A.G., for respondent No.8.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The learned trial Court had rendered a decree holding a pronouncement therein qua the judgment recorded by the learned Assistant Collector 1st Grade, Sarkaghat on 24.12.1992 being non-est. Also it pronounced a decree qua the plaintiffs becoming owners of the suit land by way of adverse possession. The defendants standing aggrieved by the rendition of the learned trial Court preferred an appeal therefrom before the learned District Judge who while affirming the verdict recorded by the learned trial Court qua the judgment recorded by the Assistant Collector 1st Grade, Sarkaghat on 24.12.1992 being non-est yet proceeded to rescind the decree of the learned trial Court whereby the plaintiffs were declared to become owners of the suit land by way of adverse possession. The defendants standing aggrieved by the findings recorded by the learned District Judge, for reversal whereof they institute the instant appeal here-before.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiffs filed a suit for declaration with consequential relief of permanent prohibitory injunction and averred that land comprised in Khewat No.57 min Khatauni No.141 Min Khasra No.1075 measuring 0-62-10 hectare is situated at village Kailag, illaqua Anatpur, Tehsil Sarkaghat, District Mandi, H.P. (for short 'the suit land') and there is house of defendant No.1 with verandah double storeyed over Khasra No.1075/1 measuring 0-01-40 hectares and cow shed consisting of three rooms with its courtyard over Khasra No.1075/2 measuring 0-04-42 hectares. The possession of the plaintiff No.1 over the suit land is open, peaceful hostile, continuous, without interruption and to the knowledge of the defendants from January 1960 and has now matured into title. Thus, the plaintiffs have become owners by way of adverse possession and the same is reflected in red ink in the spot map. The land comprised in Khasra No.1075/4 measuring 0-15-17 hectare is also in adverse possession of the plaintiffs No.2 to 7 as their possession is peaceful, continuous and hostile since the time of their father and the same has matured into title. It is averred that the defendant No.1 in collusion with the defendant No.2 has obtained fraudulently a collusive judgment on 24.12.1992 of the suit land from Assistant Collector 1st Grade, Sarkaghat exercising the powers of Civil Court on the basis of adverse possession which judgment is result of fraud and the same is liable to be set aside. Thereafter, mutation was also got sanctioned on the basis of the above judgment in favour of defendant No.1 and the same is void and not operative qua the rights of the plaintiff. The defendants for the first time on 24.12.1992 disclosed that he has obtained judgment of the suit land in his favour and has also got the mutation attested in his favour. All the above acts have been done by the defendant No.1 in collusion with the Patwari Halqua as well as Assistant Collector 1st Grade, Sarkaghat whereby an ejectment file was prepared against the defendant No.1 of the suit land and false reports were also got prepared. The plaintiff requested defendant No.1 to get the judgment of 24.12.1992 set aside as the same has been obtained by him with fraud and in collusion with defendant No.2 but of no use, hence the suit.

3. The suit of the plaintiff was resisted and defendant No.1 filed separate written statement taking preliminary objection inter alia of cause of action, maintainability, jurisdiction, valuation and the plaintiff having no locus standi to file the present suit. The description of the suit land given in para No.1 of the plaint was admitted. However, the defendant denied that the plaintiff is in adverse possession of the suit land. The defendant No.1 also alleged that the plaintiff should have filed appeal against the judgment of the Assistant Grade 1st Grade. It is also denied that there are different types of trees over the suit land. The defendant denied other averments made in the plaint.

4. Defendant No.2 filed separate written statement and took preliminary objection of jurisdiction, want of notice under Section 80, cause of action, valuation and limitation. It was denied that the plaintiff No.1 has his house with verandah over Khasra No.1075/1. It is also alleged that defendant No.1 Roop Singh filed application for adverse possession before the Assistant Collector 1st Grade, SArkaghat in respect of Khasra No.1075 measuring 0-62-10 and the judgment was passed in his favour on 24.12.1992. Mutation has also been attested in favour of the said defendant. It was also submitted that the suit land is in exclusive possession of State of H.P. and the entries made in the revenue record are on the basis of judgment of the Assistant Collector 1st Grade exercising the powers of Civil Court, the same is legally binding and is in accordance with law. The defendant denied other averments made in the plaint.

5. In the replication filed on behalf of the plaintiff the averments as contained in the plaint were reiterated and those of the written statements contrary to the plaint were refuted.

6. On the pleadings of the parties, the trial Court struck following issues inter-se the parties in contest:-

(i) Whether the plaintiffs have perfected their title to suit land by way of adverse possession? OPP.

(ii) Whether the defendants are interfering in the ownership and possession of the plaintiffs, as alleged? OPP

(iii) Whether the judgment dated 24.12.1992, passed by AC 1st Grade Shri J.P.Sharma, is the result of fraud and same is liable to be set aside? OPP.

(iv) Whether the plaintiffs have no cause of action to file the suit? OPD.

(v) Whether the suit is not maintainable? OPD

(vi) Whether this Court has no jurisdiction to try this suit? OPD

(vii) Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction? OPD

(viii) Whether the plaintiffs have no locus standi to file the present suit? OPD

(ix) Whether the defendant No.1 has become owner of the suit land by virtue of judgment by the competent authority? OPD-1

(x) Relief.

7. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs whereas the learned First Appellate Court had partly allowed the appeal preferred before it by the defendant/appellant.

8. Now the appellant/defendant has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court, in, its impugned judgment and decree. When the appeal came up for admission on 13.07.2009, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

1. Whether both the Courts below have mis-read and mis-construed oral as well as documentary evidence on record and arrived at a wrong conclusion?

2. Whether both the Courts below have wrongly decided Issue No.5 in respect of maintainability of the suit in view of the fact that judgment was passed on 24.12.1992 by the AC 1st Grade, Sarkaghat while exercising the power of Civil Judge under the proceedings under Section 163 of the HP Land Revenue Act and the respondents/plaintiffs have not preferred any appeal from the said judgment to the District Judge and the judgment has attained finality?

3. Whether bothe the Courts below have wrongly decided the matter wherein proprietary rights were vested in favour of the appellant/defendant

on 24.12.1992 and as per the law laid down by this Hon'ble Court in Chunia Versus Jindu, Sim. Law Cases (1991) Full Bench, whereby Civil Court having no jurisdiction to interpret in respect of proprietary rights?

4. Whether both the Courts below are wrong in holding that the judgment dated 24.12.1992 is a result of fraud in view of the fact that ingredients of fraud were neither pleaded nor proved in accordance with Order 6 Rule 4 of CPC?

5. Whether both the Courts below were wrong while decreeing the suit in favour of the respondents/plaintiffs on ground of adverse possession in view of the admission of appellant/defendant, wherein possession of respondents/plaintiffs has been admitted from 1990 but against the State, possession should be more than 30 years?

Substantial questions of law:

9. The judgment of learned Assistant Collector 1st Grade, Sarkaghat stood pronounced on 24.12.1992. It stands embedded in Ext.PW-4/A whereupon the defendant No.1/appellant herein stood declared to become owner(s) of the suit land by way of adverse possession. The aforesaid judgment recorded by the Assistant Collector 1st Grade stood preceded by the Patwari concerned making a report qua the suit land, described in the relevant records to be holding a classification of "Makbuja Malik Tabe Hakuk Bartandaran Mutabik Bartan", whereon the entire village body holds customary rights qua its user in consonance with the apposite reflections in the apposite record, standing subjected to encroachment in sequel whereto appropriate proceedings under Section 163 of the H.P. Land Revenue Act stood initiated against the purported encroachers. A perusal of Ext.PW-4/A omits to make a disclosure therein qua any representation standing caused therebefore on behalf of the State of Himachal Pradesh whereas it had initiated proceedings therebefore against the deceased defendant for seeking his eviction therefrom. It appears qua hence the Assistant Collector 1st Grade, Sarkaghat, proceeding to make his pronouncement even when the State of Himachal Pradesh stood unrepresented therebefore. Also a perusal of the relevant records emanating from the office of Assistant Collector 1st Grade, Sarkaghat make a disclosure therein qua his ordering for the State of Himachal Pradesh which had instituted before him apposite proceedings for eviction of the deceased defendant from the suit land being ordered to be proceeded against ex-parte. Consequently, the State of Himachal Pradesh did not hold the defendants' witnesses to cross examination while they therebefore propagated in their respective statements qua theirs by prescription ensuing from completion of the statutorily mandated period of time hence perfecting their title qua the suit land. Also when as afore-stated, with the suit land standing recorded in the apposite revenue record to hold the classification "Makbuja Malik Tabe Hakuk Bartandaran Mutabik Bartan", whereon the entire village body holds customary rights qua its user in consonance with the apposite reflections held in the apposite revenue record whereupon the individuals whose names occur in the list of "Bartandarans" stood enjoined to in the apposite lis to stand therein arrayed in the apposite array of litigants also when hence theirs being heard therebefore was imperative significantly when their rights thereon would stand substantially affected by an adverse decision recorded qua them. However, even without their impleadment, the Assistant Collector 1st Grade, Sarkaghat proceeded to record an order declaring the deceased defendant to become owner of the suit land by way of adverse possession. All the aforesaid facts are magnificatory qua the rendition comprised in PW-4/A standing stained with a vice of complicity besides collusion occurring inter se the Assistant Collector concerned vis-à-vis the defendants. Also it stands vitiated with a vice of its infracting the principle of *audi alteram partem.* The aforesaid inference stands aggravatedly accentuated by the pronouncements made by PW-9 qua their existing no person named as Kanu Ram son of Sadhu Ram who however stood examined before the Assistant Collector 1st Grade for succoring the claim of the defendants qua the suit land. The aforesaid deposition of PW-9 qua the aforesaid fact stands corroborated by PW-13. In aftermath, reliance, if any, placed upon the deposition of Kanu Ram son of Sadhu Ram who purportedly corroborated the testification of the deceased defendant recorded before the

Assistant Collector 1st Grade qua his acquiring title to the suit land by way of adverse possession, hence holds visible bespeakings of the deceased defendant by practicing fraud upon the Assistant Collector 1st Grade, Sarkaghat, his obtaining from him the pronouncement occurring in Ext.PW-4/A. Even otherwise the factum of the house of the defendants existing on the suit land stands falsified by an admission made in his written statement by the deceased defendant conveying qua contrarily the house of the plaintiff existing thereupon, whereupon hence it was imperative for the Assistant Collector concerned to on a motion standing made therebefore by the deceased defendant cause their impleadment in the apposite array of defendants whereas the deceased defendant despite holding knowledge qua the plaintiffs raising a house on the suit land his omitting to beget their impleadment in the apposite array of defendants, is an open proclamation qua his contriving behind the back of the plaintiffs also his by practicing fraud upon the Assistant Collector his obtaining therefrom the apposite pronouncement of 24.12.1992, whereupon necessarily it hence stands ingrained with a pervasive stain of vitiation, spurred by the factum qua the entrenched interests of the plaintiffs upon the suit land standing throttled besides by theirs coming to be condemned unheard. Also for reasons as assigned hereinabove the pronouncement occurring in Ext.PW-4/A visibly emanates on collusion occurring inter se the deceased defendant vis-à-vis the Assistant Collector 1st Grade, Sarkaghat.

10. Be that as it may, with an entrenched stain of nullity for reasons aforesaid gripping Ext.PW-4/A, thereupon the rigour of the mandate of the relevant provisions of the H.P. Land Revenue Act whereupon a civil Court is barred to exercise jurisdiction qua verdicts recorded in proceedings embarked under Section 163 of the HP Land Revenue Act stands benumbed also the statutory bar constituted in the relevant statutory provisions engrafted in the H.P. Land Revenue Act against a Civil Court trying a lis arising from proceedings launched under the provisions of 163 of the H.P. Land Revenue Act, lis whereof is statutorily exclusively triable by a Revenue Officer(s), remains unattracted hereat significantly when the plaintiffs herebefore were not a party in the hitherto lis whereupon the verdict pronounced stands evidently stained with an infirmity qua its infracting the principle of *audi alteram partem* whereupon reiteratedly the rigor of the relevant statutory bar against a civil Court trying a civil suit arising from verdict(s) recorded by Revenue Officer(s) in proceedings drawn under Section 163 of the H.P. Land Revenue Act, gets benumbed besides gets relaxed. Also for lack of occurrence of the names of the plaintiffs in the apposite array of litigants in the rendition pronounced by the Assistant Collector 1st Grade, Sarkaghat comprised in PW-4/A whereas for reasons afore-stated their impleadment therebefore was imperative also does not attract qua the extant suit the principle of res-judicata obviously when the pronouncement comprised in Ext.PW-4/A was not qua similar parties/combatants hereat.

11. The learned counsel appearing for the plaintiffs has contended on anvil of a judgment of the Himachal Pradesh High Court reported in **State of Himachal Pradesh** versus **Bagshi Ram**, 2001 (2) Current Civil Law Journal 520, relevant paragraph-11 stands extracted hereinafter:-

> "11. It is not even the contention of the learned counsel for the respondent that an appeal lies before the District Judge against the order passed by the Collector in exercise of the power under Section 14 of the Act. The Scheme of the Act is that if the Assistant Collector exercises jurisdiction under sub-section (3) and (4) of Section 163 of the Act "as if a Civil Court", that an appeal would lie to the District Judge. In the instant case, the order passed by the Assistant Collector was confirmed by the Collector under Section 14 of the Act. Hence, the District Judge could not have entertained the appeal and hence the judgment and decree are liable to be quashed and set aside."

wherein it is propounded qua the Assistant Collector while exercising jurisdiction under sub-section (3) and (4) of Section 163 of the HP Land Revenue Act his exercising the apposite jurisdiction of a Civil Court wherefrom preferment of an appeal therefrom before the learned District Judge constituting the appropriate statutory remedy wherefrom he canvasses qua the

rendition recorded on the civil suit by the learned trial Court besides the verdict recorded by the learned District Judge in an appeal preferred therefrom before him, both acquiring a taint of theirs being jurisdictionally void. However, the aforesaid submission holds no vigour in the face of the aforestated discussion holding upsurgences qua the impugned rendition of the Assistant Collector 1st Grade, Sarkaghat emanating on fraud standing practiced upon it by the deceased defendant also its infracting the principle of *audi alteram partem* whereupon hence with a visible contradistinctivity occurring hereat vis-à-vis the factual matrix prevailing in the citation propounding the aforestated principle wherefrom hence it is to be aptly concluded qua the apposite remedy available for availment by the plaintiffs standing comprised in theirs instituting a civil suit, as tenably done by them. Also for unmasking the stains of nullity on aforestated grounds embodying the impugned rendition warranted striking of apposite issues in consonance therewith besides adduction of germane evidence thereon whereas availment by the plaintiffs of the prescribed statutory remedy would for want of apposite pleadings hence preclude them to constrain the learned District Judge to strike an apposite issue on facet aforesaid conspicuously when they were not parties in the earlier lis. Also they would stand interdicted to adduce germane evidence thereon whereas when the aforesaid facilitations would accrue to the plaintiffs only on theirs instituting a civil suit before a civil Court renders hence the remedy as availed by them to not attract the jurisdictional bar expostulated in the judgment afore-stated.

12. Reiteratedly, with the plaintiffs pleading in the suit qua the rendition of the learned Assistant Collector 1st Grade, Sarkaghat standing stained with a vice of fraud and collusion, in sequel thereto with the plaintiffs also casting an apposite averment in their suit vis-à-vis the defendants is also a sufficient factum qua thereupon theirs making a tenable onslaught qua hence the frailty of the rendition afore-stated. Substantial questions of law are answered in favour of the plaintiffs/respondents and against the appellants/defendants.

13. Accordingly, there is no merit in the instant appeal and the same is dismissed. All pending application(s) shall also stand disposed of. No costs. The records be sent back forthwith.

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

Soma Devi …Appellant/Plaintiff.

Versus

Mast Ram ..Respondent/Defendant.

R.S.A. No. 243 of 2013
Judgment reserved on: 09.11.2016
Date of decision: 16 . 11. 2016.

Indian Succession Act, 1925- Section 63- Plaintiff claimed that she is legally wedded wife of P who died without executing any Will- the Will set up by the defendant is forged and fictitious document - the defendant pleaded that the plaintiff had taken divorce from the deceased and had contracted second marriage- he had executed a Will on being satisfied by the services rendered by the defendant – the suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held in second appeal that plaintiff has not disputed the execution of the Will but has pleaded the same to be the result of fraud and undue influence – no specific particular of fraud or undue influence were given and a general plea is not sufficient to amount to a plea of fraud- the pleas of fraud, undue influence, coercion etc. are to be proved by the person taking the plea – once a doubt is created regarding the free will of the deceased, the burden shifts upon the propounder to dispel the doubt - the Will is registered one and there is presumption of its valid execution- the court should not start with the presumption that Will is not genuine or that it is fraudulent – the conduct of the person who raises the ground for suspicion is also to be looked at in order to judge the credibility of the ground of suspicion- it was proved that plaintiff was

married to P, when she was 10 years of age and had not resided with P thereafter - in these circumstances, it was possible for P to execute a Will disinheriting the plaintiff - the suit was rightly dismissed by the Courts- appeal dismissed.(Para-10 to 35)

Cases referred:

Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib and others AIR 1967 SC 878
Afsar Shaikh and another v. Soleman Bibi and others AIR 1976 Supreme Court, 163
Upasna and others vs. Omi Devi, 2001 (2) Current Law Journal (H.P.) 278
H. Venkatachala Iyengar vs. B.N. Thimmajamma and others AIR 1959 SC 443
Shashi Kumar Banerjee and others vs. Subodh Kumar Banerjee and others AIR 1964 SC 529
Jaswant Kaur vs. Smt. Amrit Kaur and others (1977) 1 SCC 369
Ningawwa vs. Byrappa Shiddappa Hireknrabar AIR 1968, SC 956
Prem Singh vs. Birbal (2006) 5 SCC 353
Indu Bala vs. Mahindra Chandra 1982 SC 133
Janki Narayan Bhoir vs. Narayan Namdeo Kadam 2003 AIR SC 761
Joseph Antony Lazarus vs. A.J. Francis (2006) 9 SCC 515
Sham Singh vs. Smt. Rano Devi, 2007 Latest HLJ, 352
Bal Krishan and another vs. Shangri Devi, 2008 (2) Latest HLJ 799
Ashok Bansal vs. Anju Goel, (2011) 3 SLC 52

For the Appellant : Ms. Ritta Goswami, Advocate.
For the Respondent : Mr. Tara Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

<u>Tarlok Singh Chauhan, Judge</u>

The plaintiff is the appellant, who has lost in both the Courts below and has filed the second appeal praying therein for setting aside the judgments and decrees so passed by the Courts below.

2. The plaintiff/appellant (hereinafter referred to as the 'plaintiff') sought a declaration to the effect that the alleged Will dated 14.6.2000 allegedly executed by Paras Ram in favour of the respondent/defendant (hereinafter referred to as the 'defendant'), was fictitious and is the result of undue influence and, therefore, he be restrained by way of permanent prohibitory injunction from interfering in the suit land comprised in Khewat No. 213, Khatauni No. 240, Khasra Nos. 701, 713, Kita-2, measuring 3-16-17 situated in Muhal Dehar/75, Tehsil Sundernagar, District Mandi, H.P.

3. The plaintiff claimed herself to be the legally wedded wife of Paras Ram, who expired on 19.5.2001, that too, after suffering long ailment. It was claimed that the plaintiff was the sole surviving legal heir of Paras Ram, who was owner in possession of the suit land and had expired without leaving behind any Will regarding the suit land. It was further averred that she came to know about the forged and fictitious Will when the same was presented before the Assistant Collector 2nd Grade, Sundernagar. It was also contended that Paras Ram was not in a sound disposing mind due to long ailment and had therefore not executed the Will, which is the result of undue influence. Hence the suit.

4. The defendant contested the suit of the plaintiff by filing written statement wherein preliminary objection regarding locus standi was raised. On merits, it was claimed that the plaintiff was the divorced wife of Paras Ram and, therefore, she has no right, title and interest over the suit land in any manner whatsoever. It was pleaded that after getting divorce from Paras Ram, the plaintiff had contracted second marriage and was therefore, not entitled to the property left behind by him. It was further pleaded that Paras Ram had executed a Will on

account of the services rendered by the defendant and the same was registered on 14.6.2000 and it was by virtue of this Will that the defendant had now become owner in possession of the suit land. It was lastly contended that the Will was genuine and valid and accordingly dismissal of the suit alongwith costs was prayed for.

5. In her replication, the plaintiff reiterated the contents of the plaint in totality and refuted the averments as contained in the written statement.

6. On 17.5.2003, the learned trial Court framed the following issues:

1. Whether the plaintiff is legally wedded wife of Paras Ram and she inherited his property as alleged? OPP
2. Whether the plaintiff is owner in possession of the suit land? OPP
3. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction as prayed? OPP
4. Whether Paras Ram executed a due and valid Will in favour of the defendant on 14.6.2000 as alleged? OPD
5. Whether the plaintiff has no locus-standi to file the suit? OPD
6. Whether the Will dated 14.6.2000 executed by Paras Ram in favour of the defendant is a result of undue influence as alleged? If so, to what effect? OPD
7. Relief.

7. After recording the evidence and evaluating the same, the learned trial Court dismissed the suit and the appeal preferred against such judgment and decree was also dismissed by learned Additional District Judge, Mandi vide its judgment and decree dated 21.12.2012.

8. Aggrieved by the judgment and decree passed by the learned lower Appellate Court, the appellant has filed the instant appeal which has been admitted by this Court on 10.6.2013 on the following substantial question of law:

> *"1. Whether the Courts below have misread and mis-appreciated the evidence on record to come to the conclusion that the Will (Exhibited DW-2/A) is a genuine document?"*

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

10. At the outset, it may be noticed that the plaintiff had not disputed the execution of the Will but has only claimed the same to be an outcome of fraud and is a result of undue influence. Therefore, the first question that arises for consideration is as to whether the plaintiff has failed to raise these pleas as contemplated under Order 6 Rule 4 CPC which reads as follows:

> *"**4. Particulars to be given where necessary**.- In all cases in which the party pleadings relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."*

11. The answer to this question is definitely in the negative for the simple reason that apart from using the words like fraud, undue influence, not genuine, there is no specific particulars having set-forth and it is more than settled that a vague of general plea can never serve this purpose and 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.

12. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib and others AIR 1967 SC 878*** wherein it was held as under:

> *"10. Before, however a court is called upon to examine whether undue influence was exercised or not, it must scrutinize the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6 Rule 4 of the Code of Civil Procedure. This aspect of the pleading was also given great stress in the case of Ladli Prasad Jaiswal (1964) 1 SCR 270: (AIR 1963 SC 1279) above referred to. In that case it was observed (at p. 295 of SCR): (at p. 1288 of AIR):*
>
> > *"A vague of 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."*
>
> *"25. There was practically no evidence about the domination of Balaram over Prasanna at the time of the execution of the deed of gift or even thereafter. Prasanna, according to the evidence, seems to have been a person who was taking an active interest in the management of the property even shortly before his death. The circumstances obtaining in the family in the year 1944 do not show tht the impugned transaction was of such a nature as to shock one's conscience. The plaintiff had no son. For a good many years before 1944 he had been making a living elsewhere. According to his own admission in cross-examination, he owned a jungle in his own right (the area being given by the defendant as 80 bighas) and was therefore possessed of separate property in which his brother or nephew had no interest. There were other joint properties in the village of Parbatipur which were not the subject matter of the deed of gift. It may be that they were not as valuable as the Lokepur properties. The circumstances that a grandfather made a gift of a portion of his properties to his only grandson a few years before his death is not on the face of it an unconscionable transaction. Moreover, we cannot lose sight of the fact that if Balaram was exercising undue influence over his father he did not go to the length of having the deed of gift in his own name. In this he was certainly acting very unwisely because it was not out of the range of possibility that Subhas after attaining majority might have nothing to do with his father."*

13. It shall be apt to make reference to the judgment of the Hon'ble Supreme Court in ***Afsar Shaikh and another v. Soleman Bibi and others AIR 1976 Supreme Court, 163,*** wherein the Hon'ble Supreme Court has held as under:

> *"While it is true that 'undue influence', 'fraud', 'misrepresentation' are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are in view of Order 6, Rule 4, read with Order 6, Rule 2 of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the trial court, or, in the first round, even before the first appellate court."*

14. Yet again on the subject, reference to a judgment rendered by this Court in ***Upasna and others vs. Omi Devi, 2001 (2) Current Law Journal (H.P.) 278*** is also essential as the law on the subject was lucidly dealt and it was held as under:

> *"...........The allegation of fraud, coercion and undue influence could not be proved by the plaintiffs and as such both the courts below have rightly held that the plaintiffs have failed to prove that the gift deed was as a result of fraud, coercion*

and undue influence. The possession of the land in dispute was given to the defendant and the mutation of entry in the revenue record in her name was made by the Patwari in the presence of Beli Ram during his life time. The execution of the gift deed was the personal right of the donor and since Beli Ram had not assailed the gift made by him in favour of the defendant during his life time, the plaintiffs have failed to establish that the donee had not rendered any service to the donor during his life time. The gift has been validly made by the donor in favour of the donee voluntarily and with his free will and accepted by the donee it cannot be said that the gift was induced by undue influence under Section 16 (2) & (3) of the Indian Contract Act, 1872 and was as a result of fraud as defined under Section 1 of the Act. The ratio of the judgment in Ladli Parshad Jaiswal v. The Karnal Distillery Co., Ltd. Karnal & Ors., AIR 1963 Supreme Court 1279 strongly relied on by the learned counsel for the plaintiffs in my view does not advance the case of the plaintiffs that the gift in question was as a result of undue influence under S. 16 (2) & (3) of the Contract Act, 1872. In Subhas Chandra Das Mushib v. Ganga Prasad Das Mushib & Ors., AIR 1967 Supreme Court 878, it has been observed that law under Section 122 of the Transfer of Property Act, 1882 as to undue influence is the same in case of a gift inter vivos as in case of a contract. It has further been held that the court trying a case of undue influence under Section 16 of the Contract Act, 1872 must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor, and (2) has the donee used that position to obtain an unfair advantage over the donor? Upon the determination of these issues a third point emerges, which is that or the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. The judgment further proceeded to observe that merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. In this view of the matter, as noticed hereinabove, the plaintiffs have miserably failed to establish that the gift deed was executed by donor in favour of the donee under undue influence or fraud……"

15. It is surprising that though the plaintiff had herself raised the plea of fraud and undue influence but strangely enough, learned trial Court did not even bother to frame an issue and straightway placed the onus upon the propounder of the Will to dispel the so called suspicious circumstances.

16. It is high time the Courts clearly understand the legal position and desist from placing the onus directly upon the propounder of the Will irrespective of the case set up by the opposite party. The correct legal position in matters of Will was laid down by the three Hon'ble Judges of the Hon'ble Supreme Court in ***H. Venkatachala Iyengar vs. B.N. Thimmajamma and others AIR 1959 SC 443*** and thereafter approved by the Hon'ble Constitution Bench of the Hon'ble Supreme Court in ***Shashi Kumar Banerjee and others vs. Subodh Kumar Banerjee and others AIR 1964 SC 529*** and thereafter reiterated in a number of cases including three Judges of the Hon'ble Supreme Court in ***Smt. Jaswant Kaur vs. Smt. Amrit Kaur and others (1977) 1 SCC 369***, wherein the legal position was succinctly summed up in the following manner:

"10. *"There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in R. Venkatachala Iyengar v.B.N. Thirnmajamma & Others.(AIR 1959 SC 443). The Court, speaking through Gajendragadkar J., laid down in that case the following propositions :*

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent

mind in such matters. As in the ease of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by section 63 of the Evidence Act, one attesting witness at least has .been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death o[the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surround- ed by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he re- ceives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution' of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

17. Thus, it is absolutely clear from the aforesaid exposition of law that if a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the Will, such pleas have to be proved by him and only where the circumstances surrounding the execution of the Will may raise a doubt as to whether the testator was acting of his own free Will, then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

18. Adverting to the facts of the case, it would be noticed that as regards the oral evidence, the plaintiff has examined another witness besides herself. She appeared as PW-1 and

stated that she was married with Paras Ram about 40 years back, but no legal heir was born out from the wedlock. Her husband had expired on 19.5.2001 and therefore, she became the owner of the land in question. She performed his last rites and prior to his death, he was not in a position to understand about his good and bad and had in fact at one time killed an ox. The Will was claimed to be false one. However, when it got down to cross-examination, she candidly admitted that right from the date of her birth, she had been residing at the house of her parents. Though, she denied the suggestion that divorce had taken place with Paras Ram. She also denied Paras Ram was being looked after by the family of his brother and further denied that the defendant was looking after Paras Ram and in lieu of his services had executed a Will in his favour.

19. PW-2 Kali Dass is the brother of Paras Ram, who claimed that Paras Ram was of unsound mind from his childhood and he had killed an ox. He further stated that Paras Ram was not able to understand about his good and bad and in his cross-examination, stated that it is known that Paras Ram had executed a Will in favour of Mast Ram as Mast Ram had been looking after him.

20. As against this evidence, Mast Ram, defendant, appeared as DW-1 and deposed that he was looking after Paras Ram and due to that reasons he had executed a Will in his favour on 14.6.2000 which was registered with the Sub Registrar, Sundernagar and mutation on this basis had also been attested. He further stated that the plaintiff was divorced 20-25 years ago and it was Hari Mohan son of brother of Paras Ram, who had performed his last rites. He further stated that Will was executed by Paras Ram in a sound disposing state of mind. In cross-examination, the witness admitted that the Will was scribed in his presence and further stated that Chaman Lal's house is 5 KM away from Alsu and the house of witness was 26-27 kilometers away from village Alsu. The witnesses signed the Will in his presence. However denied that the Will was executed by him by exercising undue influence over Paras Ram. He admitted that Paras Ram was alone and helpless and claimed that he looked after him.

21. DW-2 Onkar Singh is the Document Writer, who proved the Will Ex.DW-2/A, which is scribed by him on 14.6.2000 at the instance of Paras Ram. He stated that at the time of execution of the Will, Paras Ram was in sound disposing state of mind. After scribing the Will, he had read over and explained the contents of the Will to Paras Ram and the witnesses also and after admitting the contents to be correct by all of them, the same was signed by Paras Ram and thereafter the witnesses had put their signatures on it. The Will was thereafter taken to Tehsil office where the same was attested by the Tehsildar. The signature of Paras Ram was in red circle. In cross-examination, the witness stated that Paras Ram was not personally known to him. He stated that he was identified by Sh. D. K. Abrol, Advocate, but denied the suggestion that the Will had drafted at the instance of Sh. Abrol. He denied the suggestion that Paras Ram while executing the Will was not in sound disposing mind. Lastly, he denied the suggestion that neither Paras Ram nor witnesses signed the Will in his presence.

22. DW-3 Chaman Lal deposed that Paras Ram got executed a Will in favour of defendant which was scribed by DW-2 at his instance. He alongwith Paras Ram son of Hiru Ram had witnessed the Will which had been read over by the scribe to Paras Ram, who after understanding the same as correct, put his signature on the Will and thereafter he alongwith another witnesses had put their signatures on the Will. He categorically stated that Paras Ram had signed the Will in his presence and Ext.DW-2/A is the same Will. He further deposed that after signing the Will, he went to the Tehsil office where Tehsildar asked Paras Ram about the Will and it is only after satisfying him regarding the execution of the Will that the same had been registered. In cross-examination the witness stated that his house was 3 KM away from Alsu and he admitted that there were other houses at Alsu. He could not tell about the other relatives of Paras Ram and the details of other family members. He stated that the Will was prepared of about 4 bighas of land and denied the suggestion that the Executant Paras Ram was not in sound disposing mind or that he had not executed the Will.

23. DW-4 Hem Raj deposed that the Will Ex.DW-2/A was registered with Sub Registrar Office, Sundernagar at serial No. 133 dated 14.6.2000. DW-5 D.K.Abrol, Advocate,

deposed that he had been practicing as an Advocate since 1967 and late Paras Ram was known to him. He stated that on 14.6.2000 Paras Ram had executed a Will in favour of Mast Ram and he had identified Paras Ram before Sub Registrar, Sundernagar. He proved the Will Ex.DW-2/A by identifying his signatures in circle red. He further stated that Sub Registrar read over and explained the contents of the Will to Paras Ram and had also made an inquiry and only thereafter the Will had been registered. In cross-examination, the witness stated that he put his signatures on the Will only as an identifier and denied the suggestion that the testator Paras Ram was not in sound disposing mind or that the Will had been prepared fraudulently.

This is the entire oral evidence led by the parties.

24. At this stage, it may be stated that the Will in question is a registered one and, therefore, there is a presumption to its being validly executed and onus of proof will be on the other party, who wants to set off the above presumption.

25. It is settled law that it is for the propounder of the Will to repel all the suspicious circumstances surrounding the Will and to prove the genuineness of the Will. Besides this, the propounder would also to satisfy the following points qua the due execution of the Will.

(i) *the Will was signed by the testator;*

(ii) *at the relevant time, testator was in sound disposing state of mind;*

(iii) *testator had understood the nature and effect of depositions and had put his signature on the document of his own free volition and will.*

26. In ***Ningawwa*** vs. ***Byrappa Shiddappa Hireknrabar AIR 1968, SC 956,*** the Hon'ble Supreme Court held as under:

> *"27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima-facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption."*

27. In ***Prem Singh*** vs**. *Birbal (2006) 5 SCC 353***, it was held as under:

> *"27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima-facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, respondent No.1 has not been able to rebut the said presumption."*

28. It however, needs to be clarified that though it is always for the propounder of the Will to repel all the suspicious circumstances surrounding the Will and to prove its genuineness, the testamentary Court is a Court of conscience and not a Court of suspicion. It is not the law that, whenever a Will is sought to be proved in the Court, the Court should start with the presumption that the Will is not genuine or that it is fraudulent or that the person who chooses to establish the Will must remove all such suspicions even when they are unreal.

29. The object of the Court proceedings is not to render the testamentary document ineffective but to make it effective and render the terms of that Will operative. In doing so, the Court has to bear in mind and has to take note of the fact that the testator is not available before the Court to state as to whether the document in fact was his or her last Will or as to whether he or she had signed the same and whether the attestors had signed receiving an acknowledgment from him about the execution of the Will. It is for that reason that the Courts should be cautious while dealing with the evidence placed before it in relation to the execution and attestation of the Will as also the disposing state of mind of the testator. This need for caution cannot be exploited by unscrupulous caveators who choose to cull out imaginary suspicious with a view to prevent the legatees under the Will from claiming the benefit thereunder and to render the Will of the

deceased wholly ineffective. In this context, the conduct of the persons who raise the alleged ground for suspicion is also to be looked at in order to judge as to how credible are the grounds for suspicion as sought to be raised by such person.

30. Adverting to the facts of the case, it would be noticed that the defendant has been able to prove the Will by removing all the so called suspicious circumstances to the judicial conscious of this Court. It has come on record that the appellant, who claimed herself to be the wife of deceased Paras Ram had apparently got married to him when she was hardly 10 years and had never stayed in his house and had been residing at the house of her parents. That apart, what strikes the judicial conscious of this Court is the fact that if the plaintiff was really so called wife of Paras Ram, then would she have left him simply to die because while appearing as PW-1 she herself claims that Paras Ram was not in sound disposing mind, whereas PW-2 goes to the extent of stating that Paras Ram was of unsound mind.

31. The word 'wife' is not simply a word. In relationship of husband and wife, there are certain obligations and duties which both the spouse have to discharge and that would not only mean the obligation in matter of leading conjugal life but would include the obligation to take care of husband when he is ill, infirm or sick. Even if these obligations are not taken to be legal, these can definitely be considered as moral obligations.

32. Ms. Ritta Goswami, learned counsel for the plaintiff would vehemently argue that even if the plaintiff has failed to prove the so called fraud or undue influence, even then the onus to dispel the Will from all the aforesaid rests upon the propounder of the Will and would rely upon the following judgments: ***Indu Bala vs. Mahindra Chandra 1982 SC 133, Janki Narayan Bhoir vs. Narayan Namdeo Kadam 2003 AIR SC 761***, ***Joseph Antony Lazarus vs. A.J. Francis (2006) 9 SCC 515, Sham Singh vs. Smt. Rano Devi, 2007 Latest HLJ, 352.***. There cannot be any quarrel with the proposition of law as laid down in the aforesaid judgments and this question has already been dealt with by me in the earlier part of the judgment.

33. It is next contended by learned counsel for the plaintiff that the testator has given no reasons in the Will to exclude the natural heir and would rely upon the judgment rendered by this Court in ***Bal Krishan and another vs. Shangri Devi, 2008 (2) Latest HLJ 799*** and ***Ashok Bansal vs. Anju Goel, (2011) 3 SLC 52.***

34. As regards the recording of reasons in the Will, once it has come on record that the appellant never resided with the deceased, then obviously Paras Ram never considered her to be his legally wedded wife, the same need not necessarily be disclosed in the Will and it was always open to the propounder of the Will to establish that she carried out her matrimonial obligation by taking care of Paras Ram, which unfortunately she neither alleged or proved.

The substantial question of law is accordingly answered against the appellant.

35. In view of aforesaid detailed discussion, I find no merit in this appeal and the same is accordingly dismissed, so also the pending application(s) if any, leaving the parties to bear their own costs.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

The Himachal Pradesh State Cooperative Milk Producers Federation Limited
………Petitioner

Versus

Surinder Kumar and others ……….Respondents

CWP No. 1636 of 2016
Reserved on: November 3, 2016
Decided on: November 16, 2016

Constitution of India, 1950- Article 226- Respondents 1 to 12 sought a direction to promote them to the post of technical superintendent – the claim was opposed on the ground that diploma obtained by the respondents is through distance learning and for one year - degree in dairy technology/dairy husbandry or diploma in dairy technology/dairy husbandry is required under Rules – the Tribunal allowed the application - held, that respondents possess essential qualification of five years regular service on the post- they had obtained diploma in dairy technology from IGNOU – once diploma has been awarded by IGNOU, it is not open for the federation to say that the same is not equivalent to the diploma of two years awarded by other institutions – the genuineness of the diploma has not been disputed by any authority- the petition is without any merit and the same is dismissed. (Para- 8 to 18)

Case referred:

Annamalai University v. Secy. to Govt. (2009)4 SCC 590

For the petitioner	Ms.Ranjana Parmar, Senior Advocate with Mr. M.R. Verma, Advocate.
For the respondents:	Mr. Satyen Vaidya, Senior Advocate with Mr. Surinder Saklani, Advocate, for respondents No.1 to 12.
	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondent No.13.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

Present petition has been filed by the petitioner-H.P. State Cooperative Milk Producers Federation Limited (hereinafter referred to as 'Federation'), against order dated 11.4.2016 passed by the Himachal Pradesh Administrative Tribunal in TA No. 5397/2015 and OA No. 3261/2015, whereby the learned Tribunal, while accepting the claim of the respondents No.1 to 12 directed the Federation to consider the cases of all the respondents for promotion to the post of Technical Superintendents within three months from the date of production of a certified copy of the order.

2. Briefly stated facts as emerge from the record are that respondents No. 1 to 12, who are In-charge Chilling Centres owned by the Federation, filed a writ petition before this Court for the redressal of their grievances but the same was transferred to the Himachal Pradesh Administrative Tribunal and was registered as TA No. 5397/2015, praying therein for a direction to the Federation to promote them to the post of Technical Superintendents in the Federation, after declaring them as qualified and eligible to be promoted to the said post from the date of their having completed five years of service as In-charge Chilling Centres, with all consequential benefits. Aforesaid claim of the respondents was opposed by the Federation on three grounds, viz. 1. the diploma acquired by the respondents from Indira Gandhi National Open University ('IGNOU', for short) is only of one year duration, 2. aforesaid diploma is through distance learning and as such respondents have no practical experience, and 3. Service Rules occupying the field were framed in the year 1994, whereas diploma was started in the year 2005. As per Federation, respondents can not be promoted to the post of Technical Superintendents, in terms of service Rules, wherein, vide Rule-13, post of Technical Superintendents (Production/Store/Marketing/MIS/P&I), is required to be filled up by way of promotion on seniority-cum-merit basis from amongst the In-charge Chilling Centres, having five years regular service on the post, provided that the eligible candidates possess Degree in Dairy Technology/Dairy Husbandry or Diploma in Dairy Technology/Dairy Husbandry. If eligible candidates are not available in the feeder cadre, then posts of Technical Superintendents are to be filled up by way of direct recruitment.

3. In the instant case, main contention of the Federation before the Tribunal was that the diploma obtained by the respondents in Dairy Technology/Dairy Husbandry from IGNOU is only of one year duration and that too through distance learning, and, as such, they can not be given promotion on the basis of same. Learned Tribunal, on the basis of pleadings as well as record made available to it, allowed the Original Application as well as TA from the due date alongwith consequential benefits, in accordance with service rules.

4. Being aggrieved and dissatisfied with aforesaid directions issued by the learned Tribunal, Federation has approached this Court, praying therein for the following main relief:

> "i) That the order dated 11.4.2016 (Annexure P-2) passed by the Ld. Administrative Tribunal in TA No. 5397/2015 titled as Surinder Kumar & others Vs. H.P. State Cooperative Milk Producers Federation Ltd., may kindly be quashed and set aside."

5. Ms. Ranjana Parmar, learned Senior Advocate duly assisted by Mr. M.R.Verma, Advocate, vehemently argued that the impugned order passed by the learned Tribunal below is not sustainable as the same is not based on correct appreciation of the Service Rules, wherein it has been specifically provided that In-charge Chilling Centre must posses five years service and a degree or diploma in Dairy Technology/Dairy Husbandry, as such, same deserves to be set aside. She further contended that though the respondents fulfill the criteria of minimum 5 years' service as provided under Rule-13, but they do not fulfill criteria of educational qualification because Diploma in Dairy Technology possessed by them has been awarded by IGNOU on the basis of training imparted for a few days i.e. 90 days by the officials of the Federation, who were not professionally qualified. She further stated that training was imparted by the Federation and tuition fee was paid to IGNOU by it and participating candidates were given TA/DA as and when they attended the classes and they were treated on duty at that time. She further stated that representation preferred by the respondents to treat the Diploma in Dairy Technology awarded by IGNOU at par with the diploma issued by the other Institutions after regular course, was considered by the Board of Directors and it was decided that the short term Diploma in Dairy Technology can not be equated with two years regular course provided by Agriculture University. She further stated that in addition to above, reference was made to the Director General, National Dairy Research Institute ('NDRI', in short), Education Division, New Delhi, who replied to the reference and informed that Diploma in Dairy Technology is offered by IGNOU of one year duration without practical training and it can not be considered equal to two years Diploma in Dairy Technology with regular practical and theory course offered by NDRI.

6. Mr. Satyen Vaidya, learned Senior Advocate duly assisted by Mr. Surinder Saklani, Advocate, supported the order passed by the learned Tribunal below stating that there is no scope of interference, whatsoever, by this Court, in the order aforesaid, as the same is based on correction appreciation of Service Rule-13.

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

8. It is undisputed that the respondent are In-charge, Chilling Centres owned and controlled by the Federation and they possess essential qualification of 5 years regular services on the post. Before adverting to the merits of the submissions having been made by the learned counsel for the parties, it would be apt to reproduce the Rule 13 of the Service Rules, as under:

> "13. TECHNICAL SUPERINTENDENTS (PRODUCTION /STORE/ MARKETING/ MIS/P&I):
>
> i) By promotion on seniority-cum-merit basis from amongst Incharge Chilling Centres having atleast 5 years regular service on the post, provided that eligible candidates should either be a Graduate in Dairy Technology/Dairy Husbandry or a Diploma Holder in Dairy Technology/Dairy Husbandry.
>
> Or

ii) By Direct Recruitment in case eligible candidates are not available in the feeder category."

9. Perusal of Rule 13 clearly suggests that there are two ladder of promotion to the post of Technical Superintendents (Production/Store/Marketing/MIS/P&I). Since, respondents are in-service candidates, they are to be governed by Rule 13(i), which provides that the candidate should possess 5 years regular service and he should be either be a Graduate in Dairy Technology/Dairy Husbandry or a Diploma Holder in Dairy Technology/Dairy Husbandry.

10. Since there is no dispute regarding condition contained in Rule 13 with regard to possessing 5 years service, this Court only needs to examine the aspect with regard to educational qualification.

11. Careful perusal of Rule-13, as reproduced herein above, clearly suggests that the candidate should either possess a degree or a diploma in Dairy Technology/Dairy Husbandry. Perusal of certificates placed on record by the respondents clearly suggest that Diploma in Dairy Technology was awarded by IGNOU on 1.3.2010 (available at page 200 of the paper-book). Close scrutiny of certificate suggests that respondents have been awarded Diploma in Dairy Technology, after having undergone above prescribed course of study in the examination. Once there is specific provision in the Rules that the incumbent should possess Diploma in Dairy Technology/Dairy Husbandry, it is not open for the Federation to take stand that diploma offered by IGNOU is only of one year duration and same can not be equated with diploma of two years offered by other institutions. Rules specifically provide for Diploma in Dairy Technology/Dairy Husbandry and it nowhere talks about duration, be it of one year or two years. It is not the case of the Federation that the diploma awarded by IGNOU is not recognized by University Grants Commission (in short, 'UGC') and as such same can not be considered in light of Rule 13 aforesaid. Even the Indian Council of Agricultural Research (in short 'ICAR') Education Division, while answering the reference made by the Federation, has nowhere disputed the correctness and genuineness of the diploma, admittedly offered by the IGNOU, rather they have stated that the diploma offered by IGNOU can not be equated with two years Diploma in Dairy Technology offered by NDRI.

12. At the cost of repetition, it may be again stated that this is not a condition precedent under rule 13 (i). Rule 13 (i) specifically talks about Diploma in Dairy Technology/Dairy Husbandry and there is no condition that diploma should be from NDRI. Record reveals that the Diploma in Dairy Technology was imparted to the respondents by IGNOU at the instance of the Federation, which itself sent the respondents to undergo the course/training, rather, entire expenses on account of course fee were borne by the Federation. Perusal of letter dated 15.10.2008, (available at page 311 of the paper-book) itself suggests that the Federation itself sponsored the respondents for Diploma in Dairy Technology through IGNOU, New Delhi, meaning thereby the Federation was fully aware that the respondents sent for course referred to herein above, would be awarded Diploma in Dairy Technology through IGNOU. Leaving everything aside, this Court, after perusing Rule-13, is fully convinced that the respondents, who had passed Diploma in Dairy Technology from IGNOU, had all the essential qualification as required for promotion to the post of Technical Superintendents.

13. Rule-13 of the Service Rules, framed by Federation clearly suggest that appointment to the post of Technical Superintendents, in the first instance, is by way of promotion from amongst the In-charge Chilling Centres having five years service (after amendment, now three years) having a degree or diploma in Dairy Technology/Dairy Husbandry, or, in the alternative, by way of direct recruitment, in case eligible candidates are not available in the feeder cadre. There is no ambiguity in the rule which can persuade this Court to take a different view than the one taken by the learned Tribunal below.

14. Further arguments having been advanced by Ms. Parmar that the candidates should have two years Diploma in Dairy Technology/Dairy Husbandry also needs to be rejected because there is no mention, if any, with regard to duration of course in Service Rule-13, as such

we are not inclined to accept the unreasonable distinction being portrayed by Ms. Parmar. Opinion, if any, expressed by the ICAR, which has been heavily relied upon by the Federation while opposing claim of the respondents, definitely can not override the specific provision of Service Rules, until and unless same are amended suitably. But as of today, this Court sees no ambiguity in Rule 13 and there is no illegality or infirmity in the order passed by Himachal Pradesh Administrative Tribunal, as such, same deserves to be upheld.

15. Otherwise also, IGNOU is a recognized University and courses offered by it are by and large recognized /authorized by UGC, which is the apex body to recognize courses/Universities. Since there is no challenge to the validity of the course/diploma offered by IGNOU, this Court sees no force in the contentions raised on behalf of the Federation that the diploma offered by IGNOU can not be taken into consideration in terms of Rule-13.

16. This Court is not competent to decide the validity/ equivalence of a degree/diploma for appointment/promotion, awarded by an open university and it is not in the domain of the Court to decide issue of equivalence of degree/diploma obtained through open universities and regular universities. Issue with regard to equivalence of diploma obtained by the respondents from IGNOU vis-à-vis diploma offered by NDRI as a valid qualification for promotion to the post of Technical Superintendents, can be decided only by UGC. Federation is bound to approach UGC for getting clarification whether diploma obtained by respondents from IGNOU i.e. Diploma in Dairy Technology is a valid qualification equivalent to diploma obtained by students attending regular course. Hon'ble Apex Court in **Annamalai University v. Secy. to Govt**. reported in (2009)4 SCC 590, while considering conflict of UGC Act, 1956 and IGNOU Act, 1985 held that merely because the Distance Education Council of IGNOU, which is an authority under Statute 28 of IGNOU Act, has granted its approval, will not validate the degree awarded by the open university. Hon'ble Apex Court further held that UGC Act will prevail over IGNOU Act, as UGC Act will bind all universities, whether conventional or open. Regulations framed by it in terms of clauses (e), (f) (g) and (h) of sub-section (1) of Section 26 are of wide amplitude. They apply equally to Open Universities and also to formal Conventional Universities. In the matter of higher education, it is necessary to maintain minimum standard of instructions and such minimum standards are required to be defined by UGC, meaning thereby that issue, if any, with regard to equivalence of degree/diploma obtained through open university and regular universities can only be decided by UGC, which is competent authority to do so. Their lordships of the Hon'ble Supreme Court have held as under:

> "40. UGC Act was enacted by the Parliament in exercise of its power under Entry 66 of List I of the Seventh Schedule to the Constitution of India whereas Open University Act was enacted by the Parliament in exercise of its power under Entry 25 of List III thereof. The question of repugnancy of the provisions of the said two Acts, therefore, does not arise. It is true that the statement of objects and reasons of Open University Act shows that the formal system of education had not been able to provide an effective means to equalize educational opportunities. The system is rigid inter alia in respect of attendance in classrooms. Combinations of subjects are also inflexible.
>
> 41. Was the alternative system envisaged under the Open University Act was in substitution of the formal system is the question. In our opinion, in the matter of ensuring the standard of education, it is not. The distinction between a formal system and informal system is in the mode and manner in which education is imparted. UGC Act was enacted for effectuating co- ordination and determination of standards in Universities. The purport and object for which it was enacted must be given full effect.
>
> 42. The provisions of the UGC Act are binding on all Universities whether conventional or open. Its powers are very broad. Regulations framed by it in terms of clauses (e), (f), (g) and (h) of sub-Section (1) of Section 26 are of wide amplitude. They apply equally to Open Universities as also to formal conventional universities. In the matter of higher education, it is necessary to maintain minimum standards of instructions. Such minimum standards of instructions are required to be defined by

UGC. The standards and the co- ordination of work or facilities in universities must be maintained and for that purpose required to be regulated.

43. The powers of UGC under Sections 26(1)(f) and 26(1)(g) are very broad in nature. Subordinate legislation as is well known when validly made becomes part of the Act. We have noticed hereinbefore that the functions of the UGC are all pervasive in respect of the matters specified in clause (d) of sub-section (1) of Section 12A and clauses (a) and (c) of sub- section (2) thereof. Indisputably, as has been contended by the learned counsel for the appellant as also the learned Solicitor General that Open University Act was enacted to achieve a specific object. It opens new vistas for imparting education in a novel manner. Students do not have to attend classes regularly. They have wide options with regard to the choice of subjects but the same, in our opinion, would not mean that despite a Parliamentary Act having been enacted to give effect to the constitutional mandate contained in Entry 66 of List I of the Seventh Schedule to the Constitution of India, activities and functions of the private universities and open universities would be wholly unregulated.

44. It has not been denied or disputed before us that in the matter of laying down qualification of the teachers, running of the University and the matters provided for under the UGC Act are applicable and binding on all concerned. Regulations framed, as noticed hereinbefore, clearly aimed at the Open Universities. When the Regulations are part of the statute, it is difficult to comprehend as to how the same which operate in a different field would be ultra vires the Parliamentary Act. IGNOU has not made any regulation; it has not made any ordinance. It is guided by the Regulations framed by the UGC. The validity of the provisions of the Regulations has not been questioned either by IGNOU or by the appellant - University. From a letter dated 5.5.2004 issued by Mr. H.P. Dikshit, who was not only the Vice-Chancellor but also the Chairman of the DEC of IGNOU it is evident that the appellant - University has violated the mandatory provisions of the Regulations."

17. In the present case, as has been observed above, there is nothing in Service Rule-13 framed by the Federation-petitioner, which suggests that department had specifically provided duration, if any, of Diploma in Dairy Technology, as such it does not lie in the mouth of Federation at this stage to refute the claim of the respondents on the ground that they have not acquired two years diploma as recognized by NDRI. Since the Federation failed to place on record any document suggestive of the fact that diploma awarded by IGNOU i.e. Diploma in Dairy Technology is not recognized by University Grants Commission, this Court, sees no reason to conclude that respondents were not having requisite qualification in terms of Service Rule-13 aforesaid.

18. Consequently, there is no merit in the present petition and the same is dismissed. Pending applications, if any, are also disposed of.

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

Cr. Revision No.: 288 of 2014 a/w Cr. Revision No.: 292 of 2014
Reserved on: 09.11.2016
Date of Decision: 17.11.2016

Cr. Revision No.: 288 of 2014

Amar Dev ....Petitioner.

Vs.

State of Himachal Pradesh ....Respondent.

Cr. Revision No.: 292 of 2014

Nand Lal ….Petitioner.

Vs.

State of Himachal Pradesh ….Respondent.

Indian Penal Code, 1860- Section 279, 337 and 338- Accused N was the conductor of the bus while accused A was the driver of the bus – the conductor did not take precaution to close the door of the bus and the driver drove the bus in a high speed – the driver applied the brakes abruptly- L, who was standing near the door was thrown out of the bus and fell down – the accused were tried and convicted by the trial Court- separate appeals were preferred, which were dismissed- held in revision that eye witnesses had consistently deposed that accident had taken place due to sudden application of brakes and not due to the closing of the door of the bus – the defence version that L was repeatedly opening the door of the bus despite requests not to do so was not established – the prosecution case was proved beyond reasonable doubt in these circumstances and the accused were rightly convicted – the High Court cannot interfere with the findings of facts in exercise of revisional jurisdiction unless, there is an error on point of law – no such error was shown – however, considering the time elapsed since the incident, sentence modified. (Para-8 to 21)

Cases referred:

Shlok Bhardwaj Vs. Runika Bhardwaj and others (2015) 2 Supreme Court Cases 721

Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke and others (2015) 3 Supreme Court Cases 123

For the petitioner(s): Mr. Gaurav Sharma, Advocate.

For the respondent(s): Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

These two revision petitions are being decided by a common judgment as both the petitions arise out of a common judgment passed by the Court of learned Additional Sessions Judge–(II), Shimla in Criminal Appeal No. 105-S/10 of 2014/2012 and Criminal Appeal No. 106-S/10 of 2014/2012 dated 01.09.2014, vide which learned appellate Court while dismissing the appeals so filed by both the present petitioners, upheld the judgment of conviction passed against the petitioners/accused by the Court of learned Chief Judicial Magistrate, Shimla in Criminal Case No. 30/2 of 2010/2007 dated 03.04.2012, whereby the learned trial Court convicted accused Nand Lal for commission of offences punishable under Sections 279, 337 and 338 of the Indian Penal Code and accused Amar Dev for commission of offences punishable under Sections 337 and 338 of the Indian Penal Code and sentenced Nand Lal to undergo simple imprisonment for three months and to pay a fine of Rs. 1,000/- under Section 279 of the Indian Penal Code, to undergo simple imprisonment for three months and to pay a fine of Rs. 500/- under Section 337 of the Indian Penal Code and to undergo simple imprisonment for one year and to pay a fine of Rs. 1,000/- under Section 338 of the Indian Penal Code and sentenced Amar Dev to undergo simple imprisonment for three months and to pay a fine of Rs. 500/-under Section 337 of the Indian Penal Code and to undergo simple imprisonment for six months and to pay a fine of Rs. 1,000/- under Section 338 of the Indian Penal Code.

2. The case of the prosecution in brief was that on 17.09.2007, Lal Singh, who at the relevant time was a school-going student boarded a bus bearing registration No. HP-51-4777, which was being driven by accused Nand Lal and conductor of which bus was accused Amar Dev. Lal Singh boarded the said bus from BCS, Shimla and the bus was on its way towards Shimla Bus Stand. This bus was full of passengers which also included school students. When the said

bus left BCS Bus Stand, accused Amar Dev, conductor of the Bus did not take precaution to close the doors of the same. Accused driver drove the bus in high speed and when the bus reached near Jai Mata Truck Union, New Shimla at around 9:30 a.m., the driver of the bus abruptly and forcefully applied breaks which resulted in a jerk and as a result of the same, Lal Singh, who was standing near the door was thrown out from the bus and he fell on the road, as a result of which, he sustained multiple injuries on his person. After the accident, the injured was taken to Ayurvedic Hospital Chhota Shimla, from where he was referred to IGMC, Shimla. Police at Police Post, New Shimla was informed about the said accident by the Health Authorities of Ayurvedic Hospital, Chotta Shimla and from there HC Budhi Singh was deputed to inquire into the matter. He went to IGMC, Shimla, but the injured was not found fit to give any statement and under these circumstances, one of the passengers who was travelling in the said bus, namely, Kamal Sood gave a statement under Section 154 of the Code of Criminal Procedure to HC Budhi Singh, on the basis of which, FIR was registered against the accused. Site plan etc. was prepared and the MLC and other reports of the injured were taken into possession by the police. The bus was also got mechanically examined and necessary mechanical report of the same was also obtained by the police.

3. After completion of investigation, challan was filed in the Court and as a prima facie case was found against the accused, accordingly accused driver was charged for commission of offences punishable under Sections 279, 337 and 338 of the Indian Penal Code, whereas accused Conductor was charged for commission of offences punishable under Sections 337 and 338 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. On the basis of evidence produced on record by the prosecution both ocular as well as documentary, learned trial Court held that the prosecution was able to prove that accused No. 1, i.e. the driver of the bus was driving the bus in high speed and that he abruptly applied forceful brake without any reasonable cause, which resulted in a jerk, as result of which, Lal Singh was hurled out of the door of the vehicle and fell on the road and sustained injuries. Learned trial Court further held that accused conductor had not taken precaution to ensure that doors of the vehicle were closed before its movement, which had resulted in simple as well as grievous injuries on the person of Lal Singh. On these bases, learned trial Court convicted the accused driver for commission of offences punishable under Sections 279, 337 and 338 of the Indian Penal Code, whereas accused No. 2 was convicted for commission of offences punishable under Sections 337 and 338 of the Indian Penal Code.

5. In appeal, learned appellate Court while dismissing the appeals filed both by the accused driver and accused conductor, affirmed the findings of conviction returned against them by the learned trial Court. It was held by the learned appellate Court that the factum of the injured travelling in the bus was not in dispute and this was proved by eye witnesses Kamal Sood (PW-1) and Chaman Lal (PW-3). Learned appellate Court further held that it was also proved fact that injured fell down from the bus and was rushed to IGMC, Shimla. It further held that the only line of defence raised by the accused was that the injured was opening the window time and again and he was asked by the conductor not to do so. The injured and his companions were about to beat the conductor and driver and further the bus which was being driven in the second gear was not in speed. Learned appellate Court while disbelieving the said version of the accused held that there was enough evidence to show that accused persons had acted in a rash and negligent manner while driving the vehicle and not closing the door from inside at the time of accident and that accident was proved with all necessary details by the eye witnesses, therefore, there was no error committed by the learned trial Court in appreciating the evidence. On these basis, learned appellate Court while upholding the judgment of conviction passed by the learned trial Court dismissed the appeals filed by the driver as well as the conductor.

6. Feeling aggrieved by the said judgments passed by both the learned Courts below, the accused driver and the accused conductor have filed these revision petitions.

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

8. The factum of the accident having been caused on account of rash and negligent driving on the part of accused driver and omission on the part of the accused driver in closing the doors of the bus from inside has been held against the accused by both the learned Courts below. The finding so arrived at by the learned trial Court is based on the appreciation of prosecution evidence, which includes the statements of PW-1 Kamal Sood, i.e. the complainant, PW-2 Lal Singh, the injured person and PW-3 Chaman Lal, who was also one of the passengers travelling at the relevant time in the bus.

9. Dr. Abhinay Sharma, who entered the witness box as PW-7 deposed that on 17.09.2007 at about 11:30 a.m., he examined Lal Chand, who was brought by Police with alleged injuries which he had sustained by falling down from a private bus. He also proved the MLC Ex. PW7/A. The final opinion of the doctor as it finds mention in Ex. PW7/A is as under:

> *"Final opinion:*
>
> *Injuries 1,2,3,4 and 5 were simple. As per case summary from Surgery, the injury was dangerous to life."*

10. Mechanical report of the bus is Ex. PW9/A and the same has been duly proved by HC Gian Chand PW-9, who was serving as a Motor Mechanic in the Police Department and who had mechanically examined the bus in issue. It is evident from a perusal of his statement as well as his report that there was no mechanical defect in the vehicle.

11. In these circumstances, what has to be examined by this Court while exercising its revisional jurisdiction is whether the finding of conviction returned against both the accused by the learned trial Court and upheld by the learned appellate Court is perverse finding or the same is borne out from the records of the case.

12. As I have already mentioned above, PW-1 Kamal Sood and PW-3 Chaman Lal are eye witnesses. PW-1 Kamal Sood has clearly and categorically stated that the accident took place on account of rash and negligent driving of the driver of the bus, who all of a sudden applied the breaks of the same without any obvious reason and further on account of the negligence of the conductor, who had not properly closed the doors of the bus. Though this witness was subjected to lengthy cross-examination by the defence, however, nothing could be elucidated from him by the defence to cast suspicion on his deposition.

13. Similarly, PW-3 Chaman Lal who is also an eye witness and was travelling in the bus has also clearly deposed that the accident took place as a result of rash and negligent driving of the driver of the bus who abruptly applied the breaks and further on account of the negligence on the part of the conductor of the bus who had not properly closed the doors of the same. The credibility of this witness also could not be impinged in his cross-examination by the defence.

14. Besides these two witnesses, the complainant entered into the witness box as PW-2 and he also duly proved the case of the prosecution and his credibility also could not be impinged in his cross-examination by the defence.

15. The Investigating Officer HC Budhi Singh, who entered the witness box as PW-10 also duly corroborated the case of the prosecution and though he was also subjected to lengthy cross-examination, however, his credibility could also not be impinged by the defence.

16. On the other hand, the defence could not probablise and establish its case that injured Lal Singh was opening the door of the bus again and again and he was not listening to the conductor and the boys who were alongwith him were on the verge of physically abusing the conductor and the driver.

17. Therefore, in this view of the matter, on the basis of the evidence, which was produced on record by the prosecution both ocular as well as documentary, it cannot be said that the finding of conviction returned against the accused by the learned trial Court and affirmed by the learned appellate Court is perverse or not borne out from the records of the case. Even during

the course of arguments, learned counsel for the petitioner could not point out that what was the perversity with the findings so returned by both the learned Courts below against the petitioners viz-a-viz evidence on record.

18. It is well settled law that the jurisdiction of High Court in revision is severely restricted and it cannot embark upon re-appreciation of evidence. The High Court in revision cannot in the absence of error on a point of law, re-appreciate evidence and reverse a finding of law. It has been further held by the Hon'ble Supreme Court that the object of the revisional jurisdiction was to confer upon superior criminal Courts a kind of paternal or supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has resulted in undeserved hardship to individuals.

19. It has been reiterated by the Hon'ble Supreme Court in **Shlok Bhardwaj** Vs. **Runika Bhardwaj and others** (2015) 2 Supreme Court Cases 721 that the scope of revisional jurisdiction of the High Court does not extend to re-appreciation of evidence.

20. It has been further reiterated by the Hon'ble Supreme Court in **Sanjaysinh Ramrao Chavan** Vs. **Dattatray Gulabrao Phalke and others** (2015) 3 Supreme Court Cases 123:

> *"14. In the case before us, the learned Magistrate went through the entire records of the case, not limiting to the report filed by the police and has passed a reasoned order holding that it is not a fit case to take cognizance for the purpose of issuing process to the appellant. Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non- consideration of any relevant material or there is palpable misreading of records, the revisional court is not justified in setting aside the order, merely because another view is possible. The revisional court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. Revisional power of the court under Sections 397 to 401 of Cr.PC is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction.*

21. However, taking into consideration the alternative argument made by the learned counsel for the petitioners that this Court may sympathetically consider the reduction of the sentences imposed upon the petitioners in view of the fact that the petitioners have been undergoing the ordeal of trial since 2007, in my considered view, the interest of justice will be served in case the sentence imposed upon accused Nand Lal by the learned trial Court under Section 338 of the Indian Penal Code is modified from one year to three months and similarly the sentence imposed upon accused Amar Dev under Section 338 of the Indian Penal Code is reduced from six months to three months. Ordered accordingly. However, it is made clear that fine imposed by the learned trial Court against both the petitioners for being convicted under Section 338 of the Indian Penal Code is upheld and is not modified. Similarly, the sentence and fine imposed against petitioner Nand Lal under Sections 279 and 337 of the Indian Penal Code is upheld and not modified and sentence and fine imposed against petitioner Amar Dev under Section 337 of the Indian Penal Code is upheld and not modified.

The revision petitions are disposed of in above terms.

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

Shri Banshi Ram Chauhan …..Petitioner.
Vs.
State of Himachal Pradesh and others …..Respondents.

CWP No.: 2072 of 2011
Date of Decision: 17.11.2016

Himachal Pradesh Panchayati Raj (Election) Rules, 1994- Rule 96- An election petition was filed by respondent No.3 against the election of respondent No.4 and 5 – the same was listed for announcement of the order when it was withdrawn without issuing notice to any person – held, that the election petition could have been withdrawn by following the procedure laid down in the rules – notice should have been given to the parties after fixing the date of hearing, which is mandatory – there was no application of mind while permitting the withdrawal of the election petition- however, considering the fact that the term of the person whose election was challenged has expired, no order of restoration passed. (Para-7 to 9)

For the petitioner: Mr. B.C. Negi, Senior Advocate, with Mr. Narender Thakur, Advocate.
For the respondents: Mr. Vikram Thakur & Ms. Parul Negi, Deputy Advocate Generals, for respondents No. 1 and 2.
Mr. Debender Sharma, Advocate, vice Mr. C.N. Singh, Advocate, for respondents No. 3 to 5.
None for respondents No. 6 to 9.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this writ petition, the petitioner has challenged order dated 14.03.2011 (Annexure P-5) passed by respondent No. 2 {Sub-Divisional Officer (Civil), Poanta Sahib, District Sirmour}, vide which the said respondent permitted an Election Petition filed by Shri Mohar Singh (respondent No. 3 in the present petition) to be withdrawn without following the provisions of Rule-96 of Himachal Pradesh Panchayati Raj (Election) Rules, 1994.

2. Facts as are borne out from the file are that an Election Petition was filed by respondent No. 3 Mohar Singh against the election of respondents No. 4 and 5 as Chairman and Vice-Chairman, respectively of Panchayat Samiti, Shillai, which elections were conducted in the year 2010. Petitioner before this Court was also an elected Member of the Panchayat Samiti, Shillai and was impleaded as a party respondent in the Election Petition, though he was impleaded only as a proforma respondent as his election was not under challenge. The Election Petition was heard by respondent No. 2 on 10.03.2011, on which date, after hearing the arguments, the case was fixed for 14.03.2011 for announcement of the order. However, on 14.03.2011 itself, Mohar Singh moved an application for withdrawal of the Election Petition so filed by him which was allowed by respondent No. 2 on 14.03.2011 itself without issuance of any notice to the respondents in the Election Petition including the present petitioner and without fixing a date of hearing of the application as per the provisions of Rule-96(2) of Himachal Pradesh Panchayati Raj (Election) Rules, 1994.

3. Feeling aggrieved by the same, the petitioner has filed this petition.

4. According to Mr. B.C. Negi, learned Senior Counsel appearing for the petitioner, Rule-96 of Himachal Pradesh Panchayati Raj (Election) Rules, 1994 lays down the procedure as to how an Election Petition filed under the Panchayati Raj Act can be withdrawn. Mr. Negi has submitted that an Election Petition so filed under the Panchayati Raj Act can be withdrawn only

after the permission of the Authorized Officer to whom the petition has been presented and when an application for withdrawal is in fact made, a notice thereof fixing a date for hearing of the application is mandatorily required to be given to all the parties to the petition. According to Mr. Negi, the present petitioner, who was one of the respondents in the Election Petition which was filed by Shri Mohar Singh, was never served upon any notice for withdrawal of the petition which was filed by Mohar Singh and the appropriate authority, i.e. respondent No. 2 ordered the petition to be withdrawn without following the provisions contemplated in Rule-96 (supra), which order thus passed by respondent No. 2 was not sustainable in law and was liable to be quashed.

5. In counter to the arguments made on behalf of the petitioner, learned counsel for the respondents have submitted that no prejudice has been caused to the petitioner by the withdrawal of the Election Petition as neither the election of the petitioner was under challenge in the Election Petition and therein also he was only impleaded as a formal party/proforma respondent. It was further urged by learned counsel for respondents that with the efflux of time, the petition has been rendered as infructuous.

6. I have heard the learned counsel for the parties and also perused the pleadings of the parties.

7. Keeping in view the fact that the elections which were assailed by Mohar Singh by way of Election Petition were held in December, 2010 and the term of the Members so selected in the said elections is since over and thereafter fresh Panchayat elections have also been conducted in the entire State, no fruitful purpose shall be served by granting the prayers which have been prayed for by the petitioner in the present writ petition. However, this Court can also not ignore the fact that there is merit in the contention of the learned Senior Counsel for the petitioner that respondent No. 2 permitted the Election Petition to be withdrawn in utter violation of the provisions of Rule 96 (2) of Himachal Pradesh Panchayati Raj (Election) Rules, 1994. This Court is not even remotely suggesting that respondent No. 2 was not having authority to permit Shri Mohar Singh to withdraw the Election Petition, however, the said withdrawal should have been permitted by following the procedure laid down in Rule-96 of Himachal Pradesh Panchayati Raj (Election) Rules, 1994.

8. After receiving the application for withdrawal of the Election Petition, a notice thereof should have been given to all other parties to the petition by respondent No. 2 after fixing a date for hearing the application. It is pertinent to take note of the fact that word used in Sub-rule (2) of Rule 96 is “shall”, meaning thereby that after receiving the application for withdrawal of Election Petition, it is not the discretion of the Authorized Officer whether or not to issue notice of the same to all other parties to the petition, rather it is mandatory for the Authorized Officer to issue notice thereof after fixing a date for hearing of the application to all other parties to the petition.

9. Coming to the facts of the present case, the hot haste manner in which respondent No. 2 has acted in the matter is evident from the fact that not only the application for withdrawal of the Election Petition was filed by Mohar Singh on 14.03.2011, after taking the same on record, respondent No. 2 passed orders on the same at 10:15 a.m. itself. Respondent No. 2 has not even appreciated that before permitting the Election Petition to be withdrawn, there has to be an application of mind made by the Authorized Officer to the effect that as to whether the application so filed for withdrawal of the Election Petition was induced by bargain or consideration or not. This Court deprecates the manner in which the Election Petition was permitted to be withdrawn by respondent No. 2. However, as I have already mentioned above, keeping in view the fact that term of the Members whose election was under challenge has expired and new incumbents have come in their place, this Court is not interfering with the order passed by respondent No. 2, however, respondent No. 1 is directed to ensure that all Authorized Officers contemplated under Rule- 96 of Himachal Pradesh Panchayati Raj (Election) Rules, 1994 are issued instructions that in future while dealing with application for withdrawal of Election Petition, the procedure prescribed under Rule-96 (supra) shall be strictly adheared to.

With the said directions, the present writ petition is disposed of. No order as to costs.

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BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.

Smt. Lajja Devi wife of Sh Bhagat Ram ....Revisionist/Decree Holder.
Vs.
Sh. Kanshi Ram son of Sh Gurbax and others. ...Non-revisionists/Judgment Debtors.

Civil Revision No. 133 of 2004.
Order reserved on:23.9.2016.
Date of Order: November 17, 2016.

Code of Civil Procedure, 1908- Order 21 Rule 32- An execution petition was filed, which was dismissed by the Executing Court – held in revision that witnesses of decree holder had deposed that no construction was raised after passing of decree- J.D. No.7 had died and cause of action came to an end on his death- High Court cannot reverse the finding of facts unless the same is perverse- no illegality was committed by the trial Court- revision dismissed. (Para-9 to 14)

Cases referred:
Masjid Kacha Tank Nahan Vs. Tuffail Mohammed, AIR 1991 SC 455
Indore Municipality Vs. K.N.Palsikar, AIR 1969 SC 580
P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao, AIR 1995 SC 1357
Gurdial Singh Vs. Raj Kumar Aneja, AIR 2002 SC 1004

For revisionist: Mr.G.C.Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For Non-revisionists. Mr.G.D.Verma, Sr. Advocate with Mr. B.C.Verma Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present revision petition is filed under section 115 of code of civil procedure 1908 against order dated 12.5.2004 passed by learned Civil Judge Junior Division Karsog District Mandi H.P. in Execution Petition No. 17-X of 2001 title Smt. Lajja Devi Vs. Kanshi and others.

BRIEF FACTS OF CASE:

2. Decree holders instituted civil suit for partition and separate possession against judgment debtors. Decree holders also sought relief of perpetual injunction restraining judgment debtors from raising any type of construction upon suit land comprised in khasra Nos. 1450, 1451, 1452, 1447, 1448 and 1449 situated in mauja Churag Tehsil Karsog District Mandi HP. Learned Trial Court dismissed civil suit filed by decree holders.

3. Feeling aggrieved against the judgment and decree passed by learned Trial Court decree holders filed civil appeal No. 61 of 1993 title Yog Raj and others Vs. Kanshi Ram and others which was disposed of by learned Appellate court on 12.3.1999. Learned Appellate court allowed appeal filed by appellants. Learned Appellate court set aside judgment and decree passed by learned Trial Court. Learned Appellate court passed preliminary decree for partition of suit property comprised in khasra Nos. 1450, 1451 and 1452 situated in mauja Churag District Mandi H.P Learned Appellate court further directed that suit property comprised in khasra Nos. 1447, 1448 and 1449 situated in mauja Churag District Mandi H.P. would be partitioned through revenue courts. Learned Appellate court also passed decree of perpetual injunction against

judgment debtors restraining judgment debtors not to raise any construction in suit property till partition of suit land.

4. Decree holder Smt. Lajja Devi filed Execution Petition No. 17-X of 2001 title Smt. Lajja Devi Vs. Kanshi Ram and others. Learned Executing Court on the basis of pleadings of parties framed following issues in execution petition on dated 5.7.2002.

1. Whether as per judgment and decree passed by learned Additional District Judge dated 12.3.1999 judgment debtors were ordered not to raise any construction on khasra Nos. 1450, 1451, 1452, 1447, 1448 and 1449 situated at mauja Churag Tehsil Karsog District Mandi HP? ..OPDH

2.Whether judgment debtors during the pendency of execution have started raising construction?. ..OPDH

3.In case issues No. 1 and 2 are proved in affirmative whether judgment debtors should be detained in civil prison or their property should be attached and should be sold in auction?. …OPDH.

4. Whether judgment debtors are not raising any construction over suit land?. …OPJDs 1 to 6.

5 Relief.

Learned Executing court decided issues No. 1 to 3 in negative. Learned Executing Court decided issue No.4 in affirmative. Learned Executive court dismissed execution petition filed by decree holder Smt. Lajja Devi.

5. Feeling aggrieved against order of learned Executing Court Smt. Lajja Devi has filed present revision petition.

6. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionists and also perused entire record carefully.

7. Following points arise for determination in present revision petition:

1. Whether revision petition filed under Section 115 of code of civil procedure 1908 by revisionist is liable to be accepted as mentioned in memorandum of grounds of revision petition?.

2. Relief.

8.Findings upon point No.1 with reasons:

8.1. DHW1 Smt. Lajja Devi has stated that decree holders have filed civil suit against judgment debtors. She has stated that appeal was also filed against judgment and decree passed by learned Trial Court. She has also stated that learned Appellate court has directed judgment debtors not to raise any type of construction over suit land till partition. She has stated that copy of jamabandi is Ext PA and copy of decree is Ext PB. She has stated that Keshav Ram judgment debtor has raised construction over vacant portion of suit land. She has stated that Keshav Ram judgment debtor be directed to demolish construction raised over vacant portion of suit land prior to partition. In cross-examination she has stated that judgment debtors No.1 to 6 namely Kanshi Ram, Chaman Lal, Joginder Pal, Harish Chander, Smt. Champa Devi and Smt. Padma Devi did not raise construction over vacant portion of suit land after judgment and decree passed by learned Appellate court.

8.2 DHW2 Chandermani has stated that parties are known to him and he has also seen suit land. He has stated that Keshav Ram started construction over vacant portion of suit land and also raised lintel over suit land. In cross-examination he has stated that judgment debtors No. 1 to 6 namely Kanshi Ram, Chaman Lal, Joginder Pal, Harish Chander, Smt. Champa Devi and Smt. Padma Devi did not raise construction over vacant suit land after passing of decree.

8.3 DHW3 Naru Ram has stated that parties are known to him. He has stated that Keshav Ram has started construction over vacant portion of suit land and started raising pillars. He has stated that Keshav Ram was requested not to raise construction over suit land in view of decree passed by Court but Keshav Ram did not stop construction work. In cross-examination he has stated that judgment debtors 1 to 6 namely Kanshi Ram, Chaman Lal, Joginder Pal, Harish Chander, Smt. Champa Devi and Smt. Padma Devi did not raise construction over vacant portion of suit land.

8.4 DHW4 Param Dev Naib Tehsildar Karsog has stated that he visited the spot as Local Commissioner as directed by court and submitted report Ext PW4/A. He has stated that field book is Ext PW4/B. He has stated that new constructions raised as mentioned in field book Ext PW4/B. He has stated that report and field map have been signed by him. He has stated that Smt. Lajja Devi has raised new construction over suit land comprised in khasra No. 1448/6, 1449/5 and 1450/4 kita 3 measuring 0-1-13 bighas. He has stated that Smt. Lajja Devi told that she is in possession of above stated khasra numbers. He has denied suggestion that he did not prepare field book Ext PW4/B as per factual position.

8.5 JDW1 Sh Kanshi Ram has stated that his house and land is situated in village Sanoti. He has stated that his old house was since time of his ancestral. He has stated that about 8/9 years ago he uprooted old house and raised new house. He has stated that thereafter he did not raise any new construction. In cross examination he has stated that in judgment and decree judgment debtors were directed not to raise any construction over vacant land. He has admitted that DHW4 Naib Tehsildar visited spot. He has denied suggestion that it was observed by Local Commissioner that constructions were raised over vacant portion of land.

8.6 JDW2 Keshav Ram has stated that they are five brothers and one sister. He has stated that suit land was joint earlier upon which his father had raised house. He has stated that his father had given constructed house to his three brothers and allotted vacant land to his two brothers and one sister. He has stated that vacant land was given to Gytri Devi, Bhagat Ram and Yog Raj. He has stated that Gytri Devi and Yog Raj have given their shares to Bhagat Ram. He has stated that Bhagat Ram is raising five stories building. He has stated that he did not raise any new construction. He has stated that he repaired his kitchen in the year 1999. He has denied suggestion that in the year 2001 and 2002 he has forcibly raised construction over vacant portion of decretal land.

8.7 JDW3 Mahesh Sharma has stated that parties are known to him and he has seen house of parties. He has stated that Bhagat Ram has raised three stories building. He has stated that Bhagat Ram has raised projection of his house upon the house of Keshav Ram. He has stated that Bhagat Ram has raised construction by way of RCC manner. He has stated that Keshav Ram did not raise any new construction. He has admitted that he is tenant of Keshav Ram. He has stated that he took shop on rent in the year 1995 from Keshav Ram. He has stated that he does not know that in the year 2001 and 2002 Keshav Ram has raised new construction over land mentioned in decree sheet. He has denied suggestion that projection of the house of Bhagat Ram is not upon the house of Keshav Ram.

9. Submission of learned Advocate appearing on behalf of revisionist that findings of Executing Court upon issue Nos 1,2,3 and 4 are contrary to law and contrary to prove facts is rejected being devoid of any force for reasons hereinafter mentioned. DHW1 namely Lajja Devi when she appeared in witness box has specifically stated in cross examination that judgment debtors Nos. 1 to 6 namely Kanshi Ram, Chaman Lal, Joginder Pal, Harish Chander, Smt. Champa Devi and Smt. Padma Devi did not raise any construction over vacant portion of suit land after passing of decree by learned Appellate court. It is well settled law that facts admitted need not to be proved under section 58 of Indian Evidence act 1872. Testimony of DHW1 is also corroborated by DHW2 Chandermani and DHW2 has specifically stated when he appeared in witness box that judgment debtors No. 1 to 6 did not raise any type of construction over vacant land after passing of decree by learned Appellate court. Similarly DHW3 Naru Ram has also stated in positive manner that judgment debtors No. 1 to 6 did not raise any construction over

vacant portion of suit land after passing of decree. DHW1 Lajja Devi, DHW2 Chandermani and DHW3 Naru Ram have exonerated judgment debtors No. 1 to 6. As per testimonies of DHW1 Lajja Devi, DHW2 Chandermani and DHW3 Naru Ram it is proved beyond reasonable doubt that judgment debtors No. 1 to 6 did not violate decree of learned Appellate court at any point of time intentionally and voluntarily.

10. Submission of learned Advocate appearing on behalf of revisionist that it is proved on record beyond reasonable doubt that Sh Keshav Ram judgment debtor has violated judgment and decree passed by learned Appellate court intentionally and voluntarily and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Revisionist Smt. Lajja Devi filed CMP No. 8659 of 2015 in present revision petition under order 1 rule 10 CPC and pleaded that Smt. Padma Devi widow of Sh Gurbax Singh expired and her legal representatives are already co-party as co-respondents No. 1 to 4 in revision petition. Revisionist further pleaded in CMP No. 8659 of 2015 that judgment debtor Keshav Ram also expired and pleaded that allegations against judgment debtor No. 7 Keshav Ram are personal in nature and upon his death cause of action comes to an end and sought permission of Court to delete the name of Keshav Ram judgment debtor from memo of parties in revision petition. Thereafter Hon'ble High Court vide order dated 18.8.2015 deleted names of Smt. Padma Devi and Sh Keshav Ram from memo of parties in revision petition. In view of the fact that revisionist has herself admitted that cause of action against non-revisionist Keshav Ram is personal in nature and comes to an end after his death court is of the opinion that no action is warranted against deceased Keshav Ram and his L.Rs in present revision petition.

11. It is well settled law that judicial proceedings under order 21 rule 32 CPC are punitive in nature. It is well settled law that positive, cogent and reliable evidence is required in judicial proceedings filed under order 21 rule 32 CPC. In view of the fact that DHW1 Lajja Devi, DHW2 Chandermani and DHW3 Naru Ram did not state anything about judgment debtors No. 1 to 6 in examination-in-chief and cross examination and in view of fact that revisionist has herself admitted that cause of action against Keshav Ram was personal in nature and comes to an end after his death court is of the opinion that it is not expedient in the ends of justice to interfere in the order of Executing Court.

12. Submission of learned Advocate appearing on behalf of revisionist that in view of report of Local Commissioner placed on record present revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. In view of the testimonies of DHW1 Lajja Devi, DHW2 Chandermani and DHW3 Naru Ram wherein they have specifically stated that judgment debtors No. 1 to 6 did not raise any type of new construction over vacant portion of suit land after passing of decree by learned Appellate court no action is warranted. Even DHW1 Lajja Devi, DHW2 Chandermani and DHW3 Naru Ram did not state in examination-in-chief and in cross-examination that judgment debtors No. 1 to 6 namely Kanshi Ram, Chaman Lal, Joginder Pal, Harish Chander, Smt. Champa Devi and Smt. Padma Devi have raised construction over suit land mentioned in decree sheet after passing of decree. DHW1 Lajja Devi and DHW2 Chandermani and DHW3 Naru Ram have stated that only Keshav Ram has raised construction over vacant land after passing of decree by learned Appellate court and in revision petition revisionist Smt. Lajja Devi has herself admitted in CMP No. 8659 of 2015 that cause of action against Keshav Ram judgment debtor has comes to end after his death. Smt. Lajja Devi has admitted in CMP No. 8659 of 2015 that cause of action against deceased Keshav Ram was personal in nature. Smt. Lajja Devi herself filed application under order 1 rule 10 CPC in revision petition and sought deletion of name of Keshav Ram from revision petition. Smt. Lajja Devi did not implead L.Rs of Keshav Ram as co-party in revision petition. It is well settled law that no order can be passed against any person who is not impleaded as co-party in judicial proceedings on the concept of audi alteram partem (No one should be condemned unheard).

13. It is well settled law that High Court cannot reverse findings of fact in revision petition unless findings of fact are perverse. See AIR 1991 SC 455 Masjid Kacha Tank Nahan Vs. Tuffail Mohammed. See AIR 1969 SC 580 Indore Municipality Vs. K.N.Palsikar. See AIR

1995 SC 1357 P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao. See AIR 2002 SC 1004 Gurdial Singh Vs. Raj Kumar Aneja. It is held that findings of learned executing court are not perverse nor illegal. It is held that learned executing court did not commit any material irregularity in execution. In view of the above stated facts and case law supra point No.1 is answered in negative.

Point No.2 (Relief).

14. In view of findings upon point No.1 revision petition is dismissed. Parties are left to bear their own costs. File of learned executing Court along with certify copy of order be sent back forthwith. Revision petition is disposed of. Pending application(s) if any also disposed of.

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

Pavinder Singh …Appellant
Versus
State of Himachal Pradesh …Respondent

Criminal Appeal No. 384 of 2012
Date of Decision : November 17, 2016

Indian Penal Code, 1860- Section 420- **Prevention of Corruption Act, 1988-** Section 13(d)(ii)- The land belonging to accused No. 4 and D (since deceased) relatives of accused No. 3 got washed away – they applied for grant of two biswas land – accused No. 3 was posted as patwari/nautor clerk and he got manipulated a false report from accused No. 1 and 2 – two Biswas of land was allotted in favour of accused No. 4 and D -subsequently order was reviewed and FIR was registered- the accused No. 4 was convicted while other accused were acquitted- held in appeal that accused No. 4 had not prepared any document or report – he was not a recommending authority – recommendations were made by the Competent Authority on the basis of reports prepared by accused No. 1 and 2- PW-13 had made an improvement in her statement- recommending authority was Tehsildar a Gazetted Officer who remains uninfluenced by the fact that accused No. 4 and D were close relatives of accused No. 3 – sanctioning authority was Deputy Commissioner who had applied his mind prior to the sanction of nautor – no person had deposed that accused No. 3 had influenced the sanctioning of the land – the Trial Court had wrongly convicted the accused- appeal allowed – judgment of the Trial Court set aside.

(Para-7 to 22)

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
Brathi alias Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519

For the appellant	:	Mr. N. S. Chandel, Advocate, for the appellant.
For the respondent	:	Mr. R. S. Verma and Mr. Ram Murti Bisht, Addl. Advocate Generals for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

Assailing the judgment dated 23.8.2012, passed by the learned Special Judge, Chamba Division, Chamba, H.P. in Corruption Case No. 3 of 2011, titled as *State of Himachal Pradesh vs. Sudhir Singh & others,* whereby present appellant Pavinder Singh (Accused No. 3) stands convicted for having committed offences punishable under the provisions of Section 420 Indian Penal Code read with Section 13(d)(ii) of the Prevention of Corruption Act, 1988

(hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of two years and pay fine of Rs.10,000/- and in default thereof, to further undergo simple imprisonment for two months for offence punishable under Section 420 IPC and rigorous imprisonment for a period of two years and pay fine of Rs.10,000/- and in default thereof to further undergo simple imprisonment for two months for offence punishable under Section 13(2) of the Act, he has filed the present appeal under the provisions of Section 374 of the Code of Criminal Procedure, 1973.

2. Facts leading to the filing of the present appeal are as under:

In the year 1995, as a result of a natural calamity (flash floods), land belonging to Chetna Devi (Accused No. 4) and Dhano Devi (since deceased), relative of Pavinder Singh (Accused No.3), got washed away. In consonance with the scheme so framed by the State for allotment of nautor land (grant), Chetna Devi and Dhano Devi applied for grant of two biswas (98 Sq. mts.) of land. Since Pavinder Singh was posted as a Patwari/Nautor Clerk, he manipulated in getting a false report prepared from Kanungo, Sudhir Singh (Accused No. 1) and Halka Patwari, Kamal Singh (Accused No. 2). On the basis of such report and the order scribed by Accused No. 3, two biswas of land came to be allotted in favour of applicants Chetna Devi and Dhano Devi. This was so done on 29.6.1998 (Ext. PW-7/D). Subsequent realization of the land having been allotted in violation of the Rules (Ext. PW-1/A) and Policy Decision (Ext. PW-1/B), led to the passing of order dated 17.5.1999 (Ext.PW-7/A-6), reviewing the sanction of grant.

3. But the matter did not rest here. Since Revenue Officials had connived with the private applicants, F.I.R. No. 4/2010, (Ext.PW-21/A), came to be registered on 26.3.2010 at Police Station SV & ACB, Chamba under the provisions of Sections 420/467/468/471/120B IPC and 13/132 of the Act. Investigation, prima facie, revealed complicity of all the accused in the alleged crime, which led to the filing of challan in the Court for trial.

4. All accused were charged for having committed offences punishable under the provisions of Sections 420, 467, 468, 471 and 120B of the Indian Penal Code. Additionally the Revenue Officials, including the present appellant, were also charged for having committed an offence punishable under the provisions of Section 13(2) of the Act, to which, they all did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 29 witnesses and statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded, in which they took plea of innocence and false implication. No evidence in defence was led by the accused.

6. In terms of the impugned judgment dated 23.8.2012, except for accused Pavinder Singh, all the accused stand acquitted on all counts. The said accused stands convicted for having committed an offence punishable only under the provisions of Section 420 IPC read with Section 13(d)(ii) of the Act and sentenced as aforesaid. Hence the present appeal.

7. Having heard learned counsel for the parties as also perused the record, I am of the considered view that the reasoning adopted by the trial Court is perverse and is not based on correct and complete appreciation of testimonies of the witnesses. Judgment in question insofar as it relates to the conviction of the appellant, is not based on correct and complete appreciation of evidence and the material placed on record, hence causing serious prejudice to the appellant, 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, the 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. It is a matter of record that no appeal against the judgment of acquittal of co-accused Sudhir Singh, Kamal Singh and Chetna Devi stands filed by the State. Also State has not preferred any appeal assailing the judgment of acquittal of the present appellant, in relation to the charges he stands acquitted for. Hence, this Court is called upon to examine the correctness of findings returned by the Court below.

12. It is a settled principle of law that when allegedly several persons commit an offence in furtherance of common intention and all except one are acquitted, it is open to the appellate court to find out, on reappraisal of evidence whether some of the accused persons stood wrongly acquitted, although it would not interfere with such acquittal in the absence of any appeal by the State Government. The effect of such finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality. (See: *Brathi alias Sukhdev Singh v. State of Punjab,* (1991) 1 SCC 519).

13. It is a matter of record that save and except for one document i.e. letter of recommendation (Ext. PW7/A-12), and that too so made by the concerned Tehsildar, the present appellant has himself neither prepared any report nor authored any document. Bare perusal of this recommendation only reveals the present appellant to a scribe and not the recommending authority. It is not the case of prosecution that he had colluded with the Tehsildar in making such recommendation. Significantly such recommendation came to be made by the competent authority on the basis of field reports so prepared by Sudhir Singh (Accused No. 1) and Kamal Singh (Accused No. 2), who already stood acquitted. This report has not been proved to have been prepared falsely.

14. To establish involvement of the accused in the alleged crime, prosecution case primarily hinges on the ocular version with which the Court shall deal herein subsequently.

15. Record reveals that both Dhano Devi and Chetna Devi made applications (Ext. PW 7/A and Ext. PW 7/A-2) for grant of nautor land. These applications were processed in the office, not by accused Pavinder Singh, but other authorized/competent revenue officials. After processing, they were forwarded to the concerned field staff, who prepared their reports (Ext. PW 7/A-8 and Ext. PW 7/A-9). Even at this point in time, the present appellant did not deal with these applications. The field staff is not directly reporting to him.

16. Prosecution wants the court to believe, through the testimony of Smt. Rekha Devi (PW-13), Patwari posted in the Tehsil Office at Chamba, that it was the appellant who was dealing with the Nautor files. She does state that at the time of preparation of report on the application (Ext. PW7/A), appellant was in the office and she did make it so on his behalf. But then such version of hers is totally uninspiring in confidence, for in the cross examination part of her testimony, she categorically admits such fact not to be there in her pervious statement, so recorded by the police. In fact, she goes on to add that "*It is correct that I am deposing for the first time that I had made the noting on the applications at the asking of accused Pavinder*". If only one were to believe her, she would be no less than an accomplice in the crime. Significantly with the preparation of her report, the matter did not come to an end. Also she was not the final authority in the preparation of the document, for recommendation of the case for grant. One must record

that the recommending authority is none else but the Tehsildar, a Gazetted Officer, who undoubtedly remained uninfluenced from the fact that the applicants were close relatives of the appellant. Crucially none of the prosecution witnesses have testified to the contrary.

17. At this juncture, it be only observed that the sole ground for cancellation of grant was infraction of Rule (Ext. PW-1/A), which, to some extent, prohibits grant of land, outside the mohal of normal residence of the applicants. Pertinently, the authority sanctioning grant was no less than a person of the level of the Deputy Commissioner, Chamba who presumably had applied his mind before allotting the land outside the mohal. Otherwise there is no bar in the authority exercising discretion in the allotment of land outside the mohal.

18. It was incumbent upon the prosecution to have established that the appellant got recommended allotment of nautor land of two biswas in favour of Dhano Devi and Chetna Devi in connivance with other accused, in violation of the Rules and instructions in this regard, so issued by the State Government and thereby dishonestly induced the State Government and also committed criminal misconduct by misusing his official position in the allotment of the said nautor land, by causing wrongful loss to the State and wrongful gain to himself.

19. Now if one were to peruse the testimonies of 26 prosecution witnesses, one finds that emphasis was more to prove the execution of the documents referred to herein earlier. But save and except, the testimony of Rekha Devi (PW-13), none has come forward to depose about the alleged involvement of the present appellant, in the preparation of the field reports or for that matter sanction of grant. Perusal of order, reviewing the sanction of grant (Ext PW 7/A-6), also does not indicate involvement of the present appellant in the alleged crime. Significantly it is not the case of prosecution that (i) the applicants were otherwise not entitled to the grant in accordance with the Rules and (ii) the land of the applicants had not washed away in a natural calamity.

20. Hence, from the material placed on record, prosecution has failed to establish that the appellant is guilty of having committed the offences, he stands charged for. The circumstances cannot be said to have been proven by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt.

21. Findings returned by the trial Court, convicting the appellant, 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 appellant. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as the appellant stands wrongly convicted.

22. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 23.8.2012, passed by the learned Special Judge, Chamba Division, Chamba, H.P. in Corruption Case No. 3 of 2011, titled as *State of Himachal Pradesh vs. Sudhir Singh & others,*, is set aside and the appellant is acquitted of the charged offences. Fine amount, if deposited, be refunded to the accused. Bail bonds furnished by the accused are discharged. Appeal stands disposed of, so also pending application(s), if any.

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

Sh. Ranjeet Singh …Appellant

Versus

Sh. Prithvi Singh & others …Respondents

FAO No. 406 of 2014

Date of Decision : November 17, 2016

Code of Civil Procedure, 1908- Order 41 Rule 25- Matter was remanded by the Appellate Court after framing issues – the order is challenged before the High Court- held, that the Court had not considered the provisions of Order 41 Rule 25 of C.P.C – the Court had erred in framing the issues – the case was pertaining to the execution of the Will and the burden is always on the propounder to establish the same – the order of the Appellate Court set aside and the matter remanded to the Appellate Court for a fresh decision. (Para-7 to 13)

Cases referred:

Nagar Mal and another v. Bimal Kumar and another, Latest HLJ 2005(HP) 679

Prem Kumar and others v. Parkash Chand and others, 2002(3) SLC 358

Jabbar Singh v. Shanti Swaroop, 2006 (3) SLC 58

H. Venkatachala Iyengar vs. B. N. Thimmajamma & others, AIR 1959 SC 443

Niranjan Umeshchandra Joshi vs. Mrudula Jyoti Rao & others, AIR 2007 SC 614:(2006) 13 SCC 433

For the appellant : Mr. B. N. Sharma, Advocate, for the appellant.
For the respondent : Mr. I. N. Mehta, Advocate, for respondents No. 1, 5, 6 and 7.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

Sunder Singh and Mehar Singh jointly owned certain properties. Sunder Singh had two wives namely Misru Devi (defendant No. 2) and Isru (defendant No. 9) who respectively gave birth to sons Ranjeet Singh (defendant No. 1) and Prithvi Singh (plaintiff). Dispute pertaining to the inheritance of estate of Sunder Singh resulted into the parties litigating amongst themselves. The dispute is primarily between Prithvi Singh and Ranjeet Singh. Resultantly Prithvi Singh (respondent No. 1 herein) filed a suit, *inter alia*, against Ranjeet Singh (appellant herein) seeking declaration of his right in the estate of Sunder Singh. In defence Ranjeet Singh claimed absolute ownership on the basis of Will dated 7.2.2009, allegedly executed by Sunder Singh, excluding Prithvi Singh from inheritance.

2. Based on the respective pleadings of the parties, trial Court framed the following issues:

1. Whether the will dated 07.02.2009 executed by Sunder Singh is declared to be null and void, as alleged? OPP
2. Whether mutation No. 19/09 dated 07.02.2009 on the basis of will is also declared to be null and void? OPP
3. Whether suit of the plaintiff is not maintainable in the present form? OPD
4. Whether suit is bad for non-joinder and misjoinder of necessary parties? OPD.
5. Whether suit of plaintiff is not properly valued for the purpose of court fee and jurisdiction? OPD
6. Relief.

3. Finding, the plaintiff not to have established its case, issues came to be decided in favour of the defendant and, as such, trial Court dismissed the suit in terms of judgment and decree dated 7.12.2013 passed in Civil Suit No. S.D./0300063/2009, titled as *Prithvi Singh vs. Ranjeet Singh & others*.

4. In the plaintiff's appeal, the lower Appellate Court, by framing the following two additional issues, remanded the matter back to the trial Court, for deciding all the issues on the strength of the evidence, which may be led by the parties:

5-A. Whether Sh. Sunder Singh has executed a valid and legal Will dated 7-2-2009 in favour of defendants, if so, its effect? OPD

5-B Whether there was a family partition between Sunder Singh and Mehar Singh upon which Sunder Singh became absolute owner in possession of the suit property? OPD

However while doing so, it set aside the judgment and decree passed by the trail Court.

5. It is this order dated 4.11.2014, passed by District Judge, Kinnaur Civil Division at Rampur Bushahr, Distt. Shimla in plaintiff's Civil Appeal No. 0000007/2014, titled as *Prithvi Singh vs. Ranjeet Singh & others*, which is subject matter of challenge in the present appeal filed by the defendant.

6. Having heard learned counsel for the parties as also perused the record, one finds that the lower appellate Court committed grave illegality and irregularity by totally setting aside the judgment and decree, in remanding the matter back to the trial Court. It amounts to a wholesale remand.

7. In somewhat similar circumstances, this Court in *Nagar Mal and another v. Bimal Kumar and another,* Latest HLJ 2005(HP) 679, deprecated the practice of wholesale remand of the case by the appellate Court, more so keeping in view the provisions of Order 41 of the Code of Civil Procedure.

8. A Division Bench of this Court in *Prem Kumar and others v. Parkash Chand and others,* 2002(3) SLC 358, while dealing with an identical issue, held that:-

> "6. Learned Counsel for the appellants contended that the directions issued by the learned Additional District Judge are not in accordance with the provisions of Rules 23, 23-A or 25 of Order 41, Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code'). He submitted that the appellate Court can make an order of remand either under Rule 23 or 23-A or Rule 25 of Order 41 of the Code.
>
> 7. So far as Rule 23 is concerned, the said provision obviously is not applicable to the case in hand in view of the fact that the trial Court had not disposed of the suit on a preliminary point. The question, therefore, is either the order is passed by the first appellate Court under Rule 23-A or Rule 25 of Order 41 of the Code. But, in either case, contended the learned Counsel, it was obligatory on the part of the first appellate Court to frame issue(s). If the first appellate Court was of the view that the decree passed by the trial Court was liable to be reversed which had been passed on merits, it was open to the appellate Court if it thought fit to remand the matter by directing what issue or issues should be framed in the case so remanded and by sending a copy of the judgment or order to the Court from whose decree the appeal was preferred, i.e., to the trial Court. But the said course has not been adopted by the first appellate Court. Similarly, Rule 25 has also not been invoked inasmuch as it was incumbent upon the first appellate Court to frame issue or issues and refer the same to the trial Court from whose decree the appeal is preferred by directing the said Court to take additional evidence if required, proceed to try such issue or issues and return the evidence to the appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the appellate Court. That is, however, not done. Hence, in either case, the order passed by the first appellate Court deserves to be quashed and set aside.
>
> 8. We find considerable force in the argument of the learned Counsel for the appellants. In our opinion, in either case, i.e. either under Rule 23-A or under Rule 25 of Order 41 of the Code, the first appellate Court ought to have framed additional issue(s) and ought to have issued necessary directions. In our considered opinion, the order passed by the first appellate Court is not in conformity with law. It is, therefore, liable to be quashed and set aside.

Accordingly, the appeal filed by the appellants stands allowed. The order passed by the Additional District Judge, Mandi, dated 30th June, 2001 is hereby quashed and set aside by directing the appellate Court to pass an appropriate order by framing necessary issue(s) and by making necessary directions to the trial Court. In the facts and circumstances of the case, no order as to costs."

(Emphasis supplied)

9. Lower appellate Court, rather than setting aside the judgment and decree, without adjudicating the issues on merit and remanding the matter for trial and consideration of all issues, ought to have resorted to the provisions of Order 41 Rule 25 of the Code of Civil Procedure as stands clarified by the Apex Court in *Jabbar Singh v. Shanti Swaroop,* 2006 (3) SLC 58.

10. The subject matter of suit, was only about inheritance to the estate of Sunder Singh. Whether it stood partitioned by metes and bounds or otherwise, with Mehar Singh or not, was neither an issue agitated by the parties, nor required to be considered in the *lis, inter se* them. As such, lower appellate Court exceeded its jurisdiction in framing issue No. 5-B.

11. Insofar as Issue No. 5-A is concerned, again the lower appellate Court erred in framing the same, entitling the parties to lead further evidence. Fact that the trial Court itself had framed an issue, pertaining to the validity of the Will (Issue No. 1), perhaps, escaped its attention, which erroneously led to the framing of additional issue No. 5-A.

12. It is a settled principle of law that regardless of the onus, which the parties are required to discharge, in a case of Will, it is always the propounder thereof, who has to establish its valid execution, in accordance with law. Hence it did not matter as to whether the trial Court placed the onus on the plaintiff or not, for what was required to be considered by the Court is as to whether the propounder was able to discharge its burden, so cast upon him under law, of proving the Will, to have been validly executed or not. The position is no longer *res integra* as stands settled by the apex Court in *H. Venkatachala Iyengar vs. B. N. Thimmajamma & others,* AIR 1959 SC 443 and *Niranjan Umeshchandra Joshi vs. Mrudula Jyoti Rao & others,* AIR 2007 SC 614: (2006) 13 SCC 433.

13. Thus, for the aforesaid reasons, appeal is allowed and the impugned judgment dated 4.11.2014, passed in Civil Appeal No. 0000007/2014, titled as *Prithvi Singh vs. Ranjeet Singh & others*, quashed and set aside.

14. Matter is remanded back to the lower appellate Court with a direction to consider and decide the appeal on the basis of material already on record. At the cost of repetition, it is reiterated that the onus of discharging the burden of proving the Will, shall always be upon the propounder.

15. Parties are directed to appear before the lower appellate Court on 9.12.2016. Hearing is expedited. Parties undertake to fully cooperate. Records of the Courts below be returned immediately.

Appeal stands disposed of, so also the pending application(s), if any.

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

State of H.P. ……Appellant.
Versus
Piar Chand & another ……Respondents.

Cr. Appeal No. 608 of 2008
Decided on : 17/11/2016

Indian Penal Code, 1860- Section 336 and 304-A- Accused were posted as linemen and junior engineer they were entrusted with a duty to maintain 33 KV Rohtang- Keylong electricity line – one wire of the line fell on the vehicle due to which two persons got electrocuted – the accused were tried and acquitted by the Trial Court- held in appeal that prosecution evidence does not establish that accused had failed to rectify the fault despite knowledge rather it is established that accused were maintaining the tower and line efficiently – maintenance register was also not produced before the Court and an adverse inference has to be drawn – the trial Court had rightly appreciated the evidence – appeal dismissed. (Para-9 to 12)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondents: Mr. K.S.Banyal, Sr. Advocate with Mr. Vijender Katoch, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 11.06.2008 by the learned Chief Judicial Magistrate, Lahaul-Spiti at Keylong, Himachal Pradesh, in Criminal Case No16-r of 2003, whereby he acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that in the year 2002 accused/respondents Ram Singh and Piar Chand were posted as Linemen and Junior Engineers, respectively in H.P.S.E.B. Section at Koksar in District Lahaul and Spiti. It is alleged that both these accused/respondents were entrusted with a duty to maintain 33 KV Electricity Rohtang-Keylong Line. It is further alleged that on 6.5.2002 around 8.00 a.m. Kama Lama (complainant) was traveling in Taxi No. HP-02-8378 including other persons, namely Ses Ram, Ashwani Kumar, K.R. Chaudhary and deceased Dal Bahadur and Vijay Kumar. While the aforesaid vehicle reached near Doharani Bye-Pass on Rohtang-Keylong Highway, one line wire of 33 KV Electricity Rohtang-Keylong Line had fallen on the vehicle and as a result of the same the driver, namely Vijay Kumar and Nepali youth, namely, Dal Bahadur, who were passengers in the said vehicle, got electrocuted and died on the spot. This mishap has resulted due to rash and negligent act of both the accused/respondents herein, since they were entrusted with the maintenance of aforesaid electricity line and which they failed to maintain. It is further alleged that the death of Vijay Kumar and Dal Bahadur not amounting to culpable homicide was caused due to rash or negligent act of both the accused/respondents. The matter was reported to the police and FIR was lodged at police Station, Keylong. During the course of investigation, the site plan of the place of occurrence, where both the deceased expired, was prepared. The Investigating Officer concerned took into possession broken burnt pieces of live wire and bag which was kept on the roof of the vehicle in question vide memo Ex. PD. The vehicle was impounded alongwith documents. Broken Electric parts, wall cleeves, I-Socket were also taken in possession by the police and sent to Forensic Science Laboratory, Bharari, Shimla. Postmortem examination of Vijay Kumar and Dal Bahadur was conducted. Inquest report of the cause of their death was prepared by the police. Photographs of the place of occurrence were taken. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for theirs committing offences punishable under Sections 336 and 304-A to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 14 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record by the learned trial Court 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. Vijay Kumar and Dal Bhadur, who at the relevant time stood borne on vehicle bearing No. HP-02-8378, suffered fatal electrocution on theirs coming in contact with high tension 33 KV line. The aforesaid had come to contact with high tension 33 KV lines given their concerting to remove it from the top of the aforesaid vehicle whereon it had fallen. Penal culpability for the aforesaid hence suffering demise would stand attracted vis.a.vis the accused respondents only when forthright potent evidence stood adduced before the learned trial Court wherefrom upsurgings occur qua despite their holding the enjoined responsibility to maintain it, theirs intentionally derelicting from performing their enjoined duty. However, in case evidence surgesforth qua the falling of 33 KV line onto the relevant vehicle being abrupt besides its fall thereon occurring without the accused respondents derelicting from their enjoined duty, the charge qua which the accused respondents stood subjected to would stand concluded to not stand proven.

10. The prosecution while concerting to nurse the charge whereupon the accused respondents stood subjected to trial, depended upon the testimony of 14 witnesses. Preponderantly the testimony of PW-7 unveils qua the falling of 33 KV line onto the relevant vehicle being abrupt. The aforesaid disclosure occurring in the testimony of PW-7, an occupant of the relevant vehicle inhibits this Court in underscoring an inference qua both the accused respondents despite theirs at the relevant time sighting the vehicle theirs omitting to take the relevant due care and caution while theirs purportedly proceeding to undertake the relevant maintenance work of 33 KV line. Contrarily, the testification of PW-7 foments a firm conclusion qua the falling of 33 KV line onto the relevant vehicle being abrupt also its fosters a derivative of both the accused respondents at the relevant time not holding its repair nor they at the relevant time standing positioned in close proximity to the relevant site of occurrence. Also the testimony of PW-7 obviously underscores qua thereupon this Court holding leverage to erect an inference of the accused respondents not derelicting in performing their enjoined duties in maintaining it. The testification of the relevant prosecution witness stands comprised in the deposition of PW-1 who in his deposition unveils qua the Ball Clive Eye Socket of the relevant tower wherefrom 33 KV line originated begetting a rupture. He in his cross-examination has accepted the suggestion put to him by the learned defence counsel while holding him to cross-examination qua the falling of the aforesaid line onto the relevant vehicle spurring from the aforesaid rupture occurring in the tower wherefrom the relevant 33 KV line originated not standing sequelled for lack of its proper maintenance by the accused/respondents. The aforesaid acquiescence of PW-1 to the apposite suggestion put to him by the learned counsel for the accused while holding him to cross-examination remains unshred of its efficacy comprised in the learned APP concerned subsequent thereto seeking to re-examine him whereupon it acquires immense credence qua the facet of his exculpating the guilt, if any, of the respondents/accused in the manner alleged against them. The aforesaid disclosure made by PW-1 qua the aforesaid cause sequelling the falling of 33 KV line onto the relevant vehicle also his communicating therein qua the relevant cause not being

attributable to the accused respondents derelicting in maintaining it, gains vigour from the testimony of PW-10. PW-10 in his testification has voiced qua the Guarding below the line standing broken. He communicates therein qua in case the relevant Guarding of the wire had not suffered any rupture thereupon the illfated mishap would not have occurred. Even though he in his testification articulates a cause for the relevant mishap contradictory to the one spelt out by PW-1 yet he alike the testimony of PW-1 has therein exculpated the negligence, if any, of the accused respondents in maintaining the relevant tower besides the 33 KV line, by his voicing therein qua on his inspecting the relevant maintenance register his not detecting qua the accused respondents derelicting in their enjoined duty to promptly maintain it. The aforesaid testimonies of the relevant prosecution witnesses do not unveil qua the accused respondents despite holding knowledge qua the relevant defect occurring respectively in the tower and in 33 KV line, theirs omitting to rectify it. Contrarily evidence stands adduced qua the accused respondents efficiently maintaining the tower besides the 33 KV line evidence whereof stands comprised in the relevant manifestations occurring in the maintenance register which stood inspected by PW-10 besides by PW-1.

11. The prosecution would succeed in falsifying the relevant entries echoed the relevant maintenance register when evidence of immense vigour stood adduced before the learned trial Court wherewithin apposite portrayals are held. However, the aforesaid relevant evidence stood omitted to be adduced by the prosecution before the learned trial Court. Omission of adduction by the prosecution before the learned trial Court of relevant cogent evidence for eroding the efficacy of relevant entries disclosed in the relevant maintenance register wherewithin unveilings occur qua the accused respondents not derelicting in maintaining both the tower and 33 KV line, forecloses an inference of no imputation of penal negligence being ascribable qua them.

12. Be that as it may, the prosecution would also succeed qua the accused respondents despite holding knowledge qua the relevant defect occurring in the tower besides in the 33 KV line, they yet omitting to promptly rectify them only when best evidence in consonance therewith stood adduced before the learned trial Court. The best evidence qua the aforesaid facet would stand comprised in the prosecution adducing before the learned trial Court evidence personifying qua the distance occurring inter se the control room manned by the respondents vis.a.vis the location of the tower besides the location of 33 KV line. In case the distance inter se both was minimal, the court would conclude qua theirs not promptly rectifying the relevant defects nor also the relevant reflections borne on the relevant register holding any tenacity. However, for omission of adduction of the aforesaid evidence it can be forthrightly concluded qua the distance inter se the control room/repair room which stood manned by the accused respondents vis.a.vis the relevant tower besides 33 KV line being immense wherefrom it is to be concluded qua the relevant defect which evidently occurred abruptly standing unnoticed by the accused respondents thereupon neither any relevant knowledge can stand imputed to the accused respondents nor their omission if any to promptly rectify the defects can constrain a conclusion of theirs being hence penally inculpable.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

United India Insurance Company .....Appellant.

Versus

Dhananjoy Dass and others .....Respondents.

FAO No.: 351 of 2014.
Date of Decision : 17/11/2016

Workmen Compensation Act, 1923- Section 4- Son of the claimant died in the course of performing his duties as a labourer – claimant filed a claim petition and a compensation of Rs. 4,45,000/- was awarded to the claimant – held in appeal that no objection regarding limitation was taken in the reply – Commissioner had power to condone the delay on sufficient cause being shown by the Claimant – monthly wages of the deceased could be quantified at Rs. 2,591.72/- - 50% of the amount is to be deducted in accordance with Section 4- therefore, the claimant is entitled to Rs. 222.71 x 1295.86= Rs. 2,88,600.98/- along with interest @ 12% per annum- penalty of Rs. 20,000/- also imposed upon respondents No. 2 and 3. (Para-3 and 4)

For the Appellant: Mr. Ashwani Kumar Sharma, Sr.Advocate with Mr. Ishan Thakur, Advocate.

For the respondents: Mr. Tek Chand Sharma and Mr. K.C.Sankhyan, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge (Oral)*

The instant appeal stands directed against the impugned award rendered by the learned Commissioner, Employees Compensation, Mandi, District Mandi, in Workmen Compensation Petition No. 40/2011 whereby on occurrence of demise of the son of the claimant during the course of his performing employment as a labourer under his employer respondents No. 2 and 3. he determined compensation vis.a.vis the claimant in the sum comprised therein.

2. This appeal was admitted on 7.12.2015 on the hereinfafter extracted substantial questions of law:-

> "1. Whether the claim petition filed beyond the prescribed limitation period of two years after death of deceased workman, Sh. Bapi Das on 27.09.2003, was time barred and thus, did not deserve to be entertained?
>
> 2. Whether amount of compensation to the tune of Rs.4,45,000/- awarded to the claimant is legal and justified as per provisions of the Employee's compensation Act or on the basis of proved income of deceased and his age the claimant is entitled only to an amount of Rs.2,85,124/- alongwith interest."

The learned counsel for the appellant has not concerted to repel the legality of the findings recorded by the learned Commissioner qua the demise of the deceased occurring during the course of his performing employment as a labourer under respondents No. 2 and 3. He also does not controvert the findings recorded by the learned Commissioner qua the claimant holding the capacity of a dependant of his deceased son.

3. Be that as it may, the substantial question of law occurring at Sr. No.1 stands enjoined to be adjudicated upon. The learned counsel appearing for the appellant has submitted qua with the demise of the son of the claimant occurring on 27.09.2003 whereas the apposite claim petition standing preferred on 29.10.2005 wherefrom he contends qua with the preferment of the apposite claim petition before the learned Commissioner occurring after more than two years elapsing since the demise of claimants' son renders attractable qua the claim petition the

mandate of the provisions engrafted in Section 10(1) of the Workmen's Compensation Act (hereinafter referred to as the Act), provisions whereof stand extracted hereinafter, significantly when hence it evidently stood preferred therebefore beyond the statutorily prescribed period of limitation:-

> "10. Notice and claim:- (1) No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within two years of the occurrence of the accident or in case of death, within two years from the date of death."

thereupon he canvasses qua the Commissioner standing statutorily barred to exercise jurisdiction upon the apposite claim petition reiteratedly when its preferment occurred after more than two years since the demise of a workman during the course of his performing employment under his employer. Apparently, the claim petition stood preferred by the claimant before the learned Commissioner with a minimal delay of one month occurring since elapse of the statutorily prescribed period of two years since the illfated demise of his son for thereupon rendering it to be maintainable. However, the rigour of the mandate of sub section (1) of Section 10 of the Act which stands extracted hereinabove stands relaxed by its proviso engrafted therein, which also stands extracted hereinafter

> "Provided that, where the accident is the contracting of a disease in respect of which the provisions of sub-section (2) of section 3 are applicable, the accident shall be deemed to have occurred on the first of the days during which the workman was continuously absent from work in consequence of the disablement caused by the disease:
>
> Provided further that in case of partial disablement due to the contracting of any such disease and which does not force the workman to absent himself from work, the period of two years shall be counted from the day the workman gives notice of the disablement to his employer: Provided further that if a workman who, having been employed in an employment for a continuous period, specified under sub-section (2) of section 3 in respect of that employment, ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected:
>
> Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim
>
> (a) if the claim is preferred in respect of the death of a workman resulting from an accident which occurred on the premises of the employer, or at any place where the workman at the time of the accident was working under the control of the employer or of any person employed by him, and the workman died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred, or
>
> (b) if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed had knowledge of the accident from any other Source at or about the time when it occurred:
>
> Provided further, that the Commissioner may [entertain] and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been [preferred], in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or [prefer] the claim, as the case may be, was due to sufficient cause."

relevant proviso whereof embodies therein a diktat qua the learned Commissioner even when the apposite claim petition stands preferred before him beyond a period of two years since the illfated demise of a workman during the course of his performing employment under his employer, his

yet holding jurisdiction to thereupon pronounce an adjudication on his demonstrably besides explicitly evincing satisfaction qua the sufficiency of cause which precluded the claimant to file it therebefore within the statutorily prescribed period of limitation engrafted in sub section (1) of Section 10 of the Act. He contends qua the mandate of the relevant proviso to sub section (1) of Section 10 of the Act for hence its standing attracted hereat for thereupon rendering maintainable a claim petition preferred beyond the statutorily prescribed period of limitation obviously does not empower the learned Commissioner to draw satisfaction qua the good and sufficient cause which precluded besides deterred the claimant to within time file his apposite claim petition before him unless an apposite motion in consonance with its mandate stands made therebefore by the claimant. He proceeds to argue qua with the relevant record omitting to make any disclosures qua the learned Commissioner within the ambit of the relevant proviso to sub section (1) of Section 10 of the Act explicitly drawing satisfaction qua the sufficiency of cause which deterred the claimant to file a claim petition before him, renders it to be unworkable vis.a.vis the claimant. He hence contends qua the pronouncement recorded by the learned Commissioner being jurisdictionally nonest. The aforesaid submission made by the learned counsel for the appellant has been made on a stricto sensu interpretation by him of the ambit besides the amplitude of the apposite proviso (1) of Section 10 of the Act. The learned counsel for the appellant has remained oblivious to the factum of a minimal delay of only one month occurring on elapsing of the statutorily mandated period of two years since the ill fated demise of the son of the claimant upto the stage whereat the apposite claim petition stood preferred before the learned Commissioner. He also remained unmindful qua the factum of the aforesaid contention standing not raised by the appellant herein while instituting a reply to the claim petition preferred by the claimant before the learned Commissioner. Consequently, no apposite issue struck thereon by the learned Commissioner also no evidence thereon stood adduced therebefore. Even though the objection raised herebefore by the learned counsel for the appellant stands anvilled upon evident infraction of statutory provisions also any omission(s) qua the facets aforesaid would not beget any inference of thereupon the award recorded by the learned Commissioner not suffering from any vice of jurisdictional statutory disempowerment. However, the effect of omissions aforesaid when coalesced with the learned Commissioner ultimately recording his pronouncement upon the claim petition does convey qua his impliedly drawing satisfaction qua the sufficiency of good cause which precluded the claimant to within the statutorily mandated period of time prefer the apposite claim petition before him. The play of the apposite proviso to sub section (1) of Section 10 of the Act is not enjoined to be inhibited by rigidly insisting upon the learned Commissioner to in terms thereof explicitly record the sufficiency of cause which deterred or precluded the claimant to within the statutorily mandated period of time prefer the apposite claim petition before him. Contrarily the workability of the proviso would remain alive given the factum of the impact of the aforesaid omissions construed in coagulation with his ultimately pronouncing an award upon it hence facilitating impetus to a deduction qua thereupon the learned Commissioner impliedly drawing satisfaction qua good and sufficient cause which deterred the claimant to within the statutorily prescribed time file his apposite claim petition before him. As aforesated hence it would be insagacious to insist upon the learned Commissioner to within the ambit of the relevant proviso explicitly make a pronouncement qua its provision standing attracted qua the claim significantly when hence it would denude the salutary purpose of the Act also would ultimately work hardship to the dependents of the deceased workman especially when he was performing employment under his employer as an unskilled labourer besides with the claimant likewise being a resident of Bengal situated at a location remotely distanced from the place of work whereat his deceased son was performing employment, also given the semi illiteracy of his deceased son besides of the claimant, any insistence with rigour upon him qua his remaining alive to the statutory mandate of sub section (1) of Section 10 of the Act would rather aggravate his hardship. For mitigating the aforesaid hardships besides for carrying forward the salutary purpose of the Act necessarily when the aforesaid discussion forecloses an inference qua the learned Commissioner hence impliedly drawing satisfaction qua the good and sufficient cause which deterred the claimant to within the statutorily prescribed period of time prefer his claim petition before him. Consequently, the submission made by the learned counsel for the appellant

qua the learned Commissioner standing jurisdictionally disempowered to record his award given the claim petition standing preferred before him beyond the period of limitation prescribed under sub section (1) of Section 10 is liable to be discountenanced. Accordingly, the substantial question of law No.1 is answered in favour of the claimant.

4. The learned counsel for the appellant has submitted with much vigour qua with the employer of the deceased workman making a disclosure in Mark-E6 qua the deceased workman from his relevant employment under him drawing per mensum wages quantified at Rs.2591.72, constituted the sum aforesaid to be construable to be the relevant per mensum quantum of monthly wages drawn by the deceased workman from his employment under his employer whereas the learned Commissioner anvilling his relevant findings merely on an affidavit sworn by the claimant holding therewithin reflections of his deceased son drawing per mensum wages quantified at Rs.5,000/- whereto he applied the relevant statutory principles, has thereupon committed an inherent error. Apparently Mark E6 submitted by the employer of the deceased son of the claimant holds reflections of the deceased from his relevant employment drawing per mensum wages quantified at Rs.2591.72. The disclosure aforesaid occurring therewithin constitutes formidable evidence qua the relevant facet significantly when the apposite disclosure occurring therein has emanated from the employer of the deceased workman who obviously held the best knowledge to pronounce qua the relevant fact. The relevant sole testimony of the claimant even if it holds any vigour its sinew stands benumbed by Ext.E6 also by the claimant in his cross-examination acquiescing to a suggestion put to him by the learned counsel for the appellant while holding him to cross-examination qua his holding no knowledge qua the wages per mensum drawn by his deceased son from his relevant employment under his employer. Consequently, the reliance placed qua the relevant fact by the learned Commissioner upon the sole testimony of PW-1 is grossly inapt it being wholly surmisal whereas he was enjoined to mete reverence to the apposite reflections occurring in Mark E6. The learned Commissioner has hence committed a gross illegality. The sequel of the above discussion is qua in the manner prescribed by the apposite provisions of the Workmen's Compensation Act embedded in Section 4(1)(a) provision whereof stands extracted hereinafter:

> "4. Amount of compensation.-
>
> (1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-- (a) where death results from the injury
>
> An amount equal to fifty percent of the monthly wages of the deceased workman multiplied by the relevant factor,"

After meteing 50% deduction to the sum of Rs.2591.72 i.e. Rs.1,295.86/- whereupon on application thereto of the relevant factor which stands correctly applied by the learned Commissioner, the amount of compensation which is to be determined to be payable to the claimant stands comprised in a sum Rs.222.71x1,295.86= 2,88,600.98/-.

Accordingly, the substantial question of law No.2 answered in favour of the appellant. The appeal is partly allowed. The award of the learned Commissioner is modified to the extant that the respondents/claimants 1 and 4 herein shall be entitled to compensation comprised in a sum of Rs. 2,88,600.98/-. alongwith interest @ 12 per cent per annum to be levied thereon since the elapsing of one month after the accident. Statutory penalty for omission of the employer to beget satiation of the mandate of Section 4-A is quantified at Rs.20,000/- liability whereof stands fastened upon the employers i.e. respondents No. 2 and 3 herein. The compensation amount shall be equally apportioned amongst the claimants/ respondents No. 1 and 4 herein.

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BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.

Sh. Ajit Singh son of Sh. Bidhi Chand. .....Revisionist/Co-defendant No.2..
Vs.
Sh. Mukhtiar Singh son of Sh. Bidhi Chand. .....Non-revisionist/Plaintiff.

Civil Revision No. 74 of 2015.
Order reserved on:23.9.2016.
Date of Order: November 18, 2016.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit pleading with the consequential relief of permanent prohibitory injunction- an application seeking interim relief was filed, which was dismissed by the trial Court- an appeal was filed, which was partly allowed and parties were directed to maintain status quo- held in revision that previous suit was dismissed in default and principle of res-judicata was not applicable- dismissal will not affect the present suit- the order of status quo is necessary to preserve the property during the pendency of the suit – revision dismissed. (Para- 7 to 11)

Cases referred:
Inacio Martins Vs. Narayan Hari Naik, AIR 1993 SC 1756
Lonakutty Vs. Thomman and another, AIR 1976 SC 1645
Satyadhyan Ghosal and others Vs. Smt. Deorajin Debi and another, AIR 1960 SC 941
Masjid Kacha Tank Nahan Vs. Tuffail Mohammed, AIR 1991 SC 455
Indore Municipality Vs. K.N.Palsikar, AIR 1969 SC 580
P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao, AIR 1995 SC 1357
Gurdial Singh Vs. Raj Kumar Aneja, AIR 2002 SC 1004

For revisionist: Mr.R.R.Rahi Advocate.
For Non-revisionist. Ms. Kiran Lata Sharma, Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present revision petition is filed under Section 115 of code of civil procedure 1908 against order of learned District Judge Hamirpur HP dated 19.2.2015 passed in civil miscellaneous appeal No. 23 of 2014 whereby learned District Judge Hamirpur set aside order of learned Trial Court dated 27.9.2014 and partly allowed appeal with direction to parties to maintain status quo with regard to nature and alienation of suit land till final disposal of main suit on merits.

BRIEF FACTS OF CASE:

2. Sh. Mukhtiar Singh plaintiff filed suit under section 77 of Registration Act 1908 for declaration to the effect that Will dated 15.1.2008 executed by late Sh. Bidhi Chand father of plaintiff Mukhtiar Singh and co-defendant No.2 Ajit Singh is valid Will and same is liable to be registered under Registration Act 1908. Consequential relief of permanent prohibitory injunction also sought restraining co-defendant No.2 Ajit Singh from dis-possessing plaintiff from suit land and alienating the land and changing the nature of land comprised khata No. 41 khatauni No. 52 khasra No. 49, 50, 67, 75, 1076/98, 144, 145, 150, 1097/273, 432 and 867 kitas 11 measuring 20 kanals 4 marlas situated in village Beer tappa Beer Baghera Tehsil Sujanpur District Hamirpur HP. Additional relief for mandatory injunction also sought directing Sub Registrar Sujanpur District Hamirpur HP to register Will dated 15.1.2008.

3. Per contra written statement filed on behalf of co-defendants No. 2 and 3 pleaded therein that plaintiff has got no cause of action and plaintiff has got no locus standi to file present suit. It is pleaded that plaintiff is estopped from filing suit by his own act and conduct. It is pleaded that suit is bad for want of necessary parties. It is pleaded that suit is not legally maintainable for declaration as the plaintiff is out of possession over suit land. It is pleaded that suit is not properly valued for the purpose of court fee and jurisdiction. It is pleaded that suit property is self acquired property of deceased Bidhi Chand son of Daulat Ram. It is pleaded that Bidhi Chand has not executed any Will on 15.1.2008. It is pleaded that suit is hit by principle of resjudicata under section 11 CPC and under order 2 rule 2 CPC. It is pleaded that defendants are entitled to special cost under section 35A CPC. It is pleaded that former civil suit No. 16 of 2008 titled Mukhtiar Singh Vs. Ajit Singh was filed by plaintiff before civil Court in which both Wills dated 15.1.2008 and 18.5.2007 were directly and substantially in dispute. It is pleaded that civil suit No. 16 of 2008 titled Mukhtiar Singh Vs. Ajit Singh was dismissed in default by learned Civil Judge (Junior Division) Court No. 3 Hamirpur HP on dated 23.1.2009. It is pleaded that interim application filed under order 39 rules 1 and 2 CPC was also dismissed. It is pleaded that CMA No. 47 of 2008 titled Mukhtiar Singh Vs. Ajit Singh was also filed before learned District Judge Hamirpur and same was also dismissed in default on 24.3.2009. It is pleaded that fresh present civil suit on the basis of Will dated 15.1.2008 is not maintainable.

4. During pendency of civil suit No. 119 of 2014 Mukhtiar Singh plaintiff filed application under order XXXIX rule 1 and 2 CPC for grant of ad-interim injunction. Learned Trial Court dismissed application filed under order XXXIX rule 1 and 2 CPC by plaintiff. Feeling aggrieved against order of learned Trial Court plaintiff Mukhtiar Singh filed appeal under order XLIII CPC. Learned Appellate court partly accepted appeal and set aside order of learned Trial Court dated 27.9.2014. Learned Appellate court directed parties to maintain status quo with regard to nature and alienation of suit land till final disposal of main suit on merits. Feeling aggrieved against order of learned Appellate court revisionist filed present revision petition.

5. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist and also perused entire record carefully.

6. Following points arise for determination in present revision petition:

1. Whether revision petition filed under section 115 of code of civil procedure 1908 by revisionist is liable to be accepted as mentioned in memorandum of grounds of revision petition?.

2. Relief.

Findings upon point No.1 with reasons:

7. Submission of learned Advocate appearing on behalf of revisionist that non-revisionist has earlier filed civil suit No. 16 of 2008 titled Mukhtiar Singh Vs. Ajit Singh which was dismissed in default on dated 23.1.2009 in which two Wills i.e. Will dated 18.5.2007 and 15.1.2008 were directly and substantially in issue and subsequent civil suit No. 119 of 2014 is barred on the concept of resjudicata under section 11 CPC and under order II rule 2 CPC is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that two Wills dated 18.5.2007 and dated 15.1.2008 were in dispute in civil suit No. 16 of 2008 titled Mukhtiar Singh Vs Ajit Singh. It is proved on record that Civil Judge did not dispose of civil suit No. 16 of 2008 on merits but civil suit No. 16 of 2008 was dismissed in default. It is also proved on record that learned District Judge did not dismiss civil appeal No. 47 of 2008 on merits but dismissed the appeal in default. It is held that when civil suit is dismissed in default then provision of resjudicata would not apply in subsequent civil suit when subsequent civil suit is filed upon different cause of action and title. See AIR 1993 SC 1756 Inacio Martins Vs. Narayan Hari Naik. See AIR 1976 SC 1645 Lonakutty Vs. Thomman and another. See AIR 1960 SC 941 Satyadhyan Ghosal and others Vs. Smt. Deorajin Debi and another.

8. Submission of learned Advocate appearing on behalf of revisionist that non-revisionist filed application for registration of Will dated 15.1.2008 before learned Sub Registrar

under Registration Act 1908 and application of non-revisionist was dismissed by learned Sub Registrar on dated 15.2.2011 and thereafter appeal was filed by non-revisionist before learned Registrar and same was also dismissed by learned Registrar on dated 23.7.2014 and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Registration Act 1908 is special Act. As per section 18 E of Registration Act 1908 registration of Will is optional. As per section 77 of Registration Act 1908 suit can be filed before civil court against order of refusal of registration by learned Registrar. Present civil suit No. 119 of 2014 is filed under section 77 of Registration Act 1908 upon different cause of action and upon different title.

9. As per section 59 of Indian Succession Act 1925 every person of sound mind not being a minor may dispose of his property by way of Will. It is well settled law that Will are of two types (1) Privileged Will as defined under section 65 of Indian Succession Act 1925 and un-privileged Will as defined under section 63 of Indian Succession Act 1925. It is well settled law that privileged Will is always executed by soldier being employed in an expedition or engaged in actual warfare.

10. Court is of the opinion that in order to avoid multiplicity judicial proceedings inter se parties it is expedient in the ends of justice to direct both parties to maintain status quo as of today qua nature and possession of suit property till disposal of civil suit No. 119 of 2014. It is well settled law that in revision proceedings High Court cannot reverse the order of subordinate court unless order of subordinate court is perverse. See AIR 1991 SC 455 Masjid Kacha Tank Nahan Vs. Tuffail Mohammed. See AIR 1969 SC 580 Indore Municipality Vs. K.N.Palsikar. See AIR 1995 SC 1357 P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao. See AIR 2002 SC 1004 Gurdial Singh Vs. Raj Kumar Aneja. In view above stated facts and case law cited supra it is held that order of learned District Judge Hamirpur HP dated 19.2.2015 announced in civil miscellaneous appeal No. 23 of 2014 is not perverse. Point No.1 is answered in negative.

Point No.2 (Relief).

11. In view of findings upon point No.1 revision petition is dismissed. Parties are left to bear their own costs. Observations will not effect merits of civil suit in any manner. File of learned Trial Court and learned Appellate Authority along with certify copy of order be sent back forthwith. Parties are directed to appear before learned Trial Court on 5.12.2016. Revision petition is disposed of. Pending application(s) if any also disposed of.

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

Braham Dev Sood … Appellant

Versus

Jugal Kishore … Respondent

RSA No. 586 of 2007
Reserved on: 03.11.2016
Date of decision: 18.11.2016

Transfer of Property Act, 1882- Section 106- Plaintiff pleaded that tenancy of the defendant was terminated by issuing a notice – the possession of the defendant was unlawful – hence, the mesne profit were sought along with the interest- the suit was decreed by the trial Court- an appeal was filed, which was dismissed – held in second appeal that mesne profit is to be determined on the basis of cogent and credible evidence like recent registered lease deeds of the locality – plaintiff had not brought on record lease deed or registered documents showing the rent of the similar premises – the findings recorded by the Court cannot be said to be perverse- appeal dismissed.(Para- 12 to 17)

For the appellant: Mr. K.S. Kanwar, Advocate.
For the respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, the appellant has challenged the judgment and decree passed by the Court of learned Additional District Judge, Fast Track Court, Solan, in Civil Appeal No. 27 FTC/13 of 2007 dated 16.08.2007, vide which, learned Appellate Court dismissed the appeal so filed by the present appellant against the judgment and decree passed by the Court of learned Civil Judge (Senior Division), Kandaghat, in Civil Suit No. 47-K/1 of 2001 dated 31.07.2006,_whereby learned trial Court had partly decreed the suit filed by the plaintiff for recovery.

2. Brief facts necessary for adjudication of the present case are that the appellant/plaintiff, hereinafter referred to as the plaintiff, filed a suit for recovery of Rs.28,696/- w.e.f. 01.07.1998 to 30.06.2001 @ Rs.700/- per mensem i.e. Rs.25,200/- as principal amount and Rs.3,496/- on account of interest @ 9% per annum, on the ground that the plaintiff was owner of a single storeyed house consisting of 2 rooms and 2 kitchen, situated below the Parkash Saw Mill on Kalka Shimla Road in Kandaghat Town, Tehsil Kandaghat, District Solan and the said accommodation was given to defendant on rent for residence purpose in the month of April, 1984 by the plaintiff @ Rs.300/- per mensem and besides this, the defendant was also required to pay Rs.15/- per mensem as water charges to the plaintiff. As per the plaintiff, he determined the tenancy of the defendant from 31.07.1996 by issuance of a notice under Section 106 of the Transfer of Property Act. Therefore, as per the plaintiff, the possession of the defendant since 01.08.1996 was unlawful and unauthorized. It was further pleaded by the plaintiff that had the defendant vacated the house on or before 31.07.1996, then the plaintiff could have gained more benefits from the said premises. The demised premises in the year 1996 could have had been rented out by the plaintiff @ Rs.800/- per mensem which was the rent prevalent in the vicinity. On these basis, the plaintiff claimed mesne profit w.e.f. 01.07.1998 upto 30.06.2001 @ Rs.700/- per annum alongwith interest.

3. The suit so filed by the plaintiff was contested by the defendant, inter aia, on the ground that the demised premises were not rented out to the defendant by the plaintiff at the rate of Rs.300/- P.M. but were in fact rented out at the rate of Rs.150/- P.M., as has been held by the Court of learned Additional District Judge in its judgment and decree dated 08.12.2003 passed in Civil Appeal No. 2-S/13 of 2003 in case titled Jugal Kishore Vs. Braham Dev Sood. It was further the case put up by the defendant that the alleged determination of the tenancy by way of alleged notice w.e.f. 31.07.1996 was totally wrong and illegal and the same stood set aside by learned Additional District Judge, Solan, in Civil Appeal No. 2-S/13 of 2003. It is further denied that premises in issue could have been rented out for an amount of Rs.800/- per mensem in the year 1996 and as per the defendant, there was no such rent prevalent in the vicinity for such like accommodation as alleged. Thus, the suit of the plaintiff was resisted by the defendant inter alia on the said grounds.

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

1. Whether the plaintiff is entitled for the recovery of Rs.28,696/- as prayed? … OPP
2. Whether the plaintiff is entitled for the payment of interest at the rate of Rs.9% per annum as alleged? … OPP
3. Relief.

5. On the basis of the evidence which was led by the respective parties before learned trial Court, the following findings were returned to the issues so framed by it:-

Issue No. 1:	Yes.
Issue No. 2:	Yes.
Relief	The suit filed by the plaintiff is decreed as per operative portion of this judgment.

6. Accordingly, the suit so filed by the plaintiff was decreed by learned trial Court for recovery of Rs.7344/- on account of rent and mesne profit from 01.07.1998 to 30.06.2001 and future interest @ 15% per annum till the realization of the amount alongwith cost of the suit throughout with special cost of Rs.3,000/-. It was held by learned trial Court that it stood proved on record that the plaintiff had filed suit for possession of demised premises in the year 1996 and due notice was issued to the defendant but legal position changed during the pendency of the trial. It was further held by learned trial Court that learned Appellate Court in Civil Appeal No. 2-S/13 of 2003 had set aside the prayer of the plaintiff for the possession of the shop and determined the rent at Rs.150/- P.M. Learned trial Court further held that it was also admitted fact that the appeal against the judgment and decree passed by the First Appellate Court was pending in the High Court. Learned trial Court further held that the plaintiff had already shown his intention to terminate the tenancy and he had no intention to keep the defendant as a tenant on the demised premises and as Urban Rent Control Act was not applicable to Kandaghat area at the relevant time then the occupation of the defendant cannot be treated to be that of a tenant but he was merely a trespasser who was using the property of the plaintiff without any authority. On these basis, it was held by learned trial Court that till the decision of High Court, the tenancy of the defendant cannot be terminated and possession cannot be given to the plaintiff but the plea of the defendant that he was not liable to pay any amount to the plaintiff as mesne profit, was not acceptable as the defendant could not use the property of the plaintiff without paying any rent. On these basis, it was held by learned trial Court that the plaintiff was entitled for the recovery of Rs.5,400/- as a principal amount on account of monthly rent @ Rs.150/-. Learned trial Court further held that as the defendant had not paid any rent from 1996 onwards, therefore, the plaintiff was also entitled for the interest @ Rs.12% per annum.

7. Feeling aggrieved by the judgment so passed by learned trial Court, the plaintiff filed an appeal on the ground that learned trial Court had erred in not granting mesne profit to the plaintiff as Rs.700/- P.M. as claimed by him, whereas cross-objections were preferred against the judgment and decree passed by learned trial Court by the defendant on the ground that the plaintiff was not entitled for the decree which was passed in his favour by learned trial Court qua interest.

8. Vide its judgment and decree dated 16.08.2007, learned Appellate Court while affirming the judgment and decree passed by learned trial Court dismissed the appeal filed by the plaintiff/appellant as well as cross-objections filed by the defendant. While arriving at the said conclusion it was held by learned Appellate Court that judgment passed by learned Additional District Judge, Solan, in Civil Appeal No. 2-S/13 of 2003, showed that the rent of the premises in dispute was held Rs.150/- P.M. and on these basis, it was held by learned Appellate Court (in the present case) that there was no irregularity or illegality in the findings returned by learned trial Court, vide which, the plaintiff was awarded rent of Rs.150/- P.M. It was further held by learned Appellate Court that contention of the defendant that learned trial Court had erred in granting interest more than what was claimed by the plaintiff had no legal force and as the Court has inherent powers to grant any relief to the party which it deems fit and proper in the facts and circumstances of the case. Learned Appellate Court held that the rent of the premises was very nominal i.e. Rs.150/- P.M. as held by learned trial Court but despite this defendant had neither paid any rent to the plaintiff nor deposited in the Court, which had forced the plaintiff to file the suit. It further held that keeping in view the conduct of the defendant, learned trial Court had not committed any error in awarding special cost of Rs.3000/- to the

plaintiff and interest @ 15% per annum. On these basis, learned Appellate Court dismissed the appeal as well as cross-objections.

9. The judgment and decree so passed by learned Appellate Court is under challenge in this appeal, which has been filed by the plaintiff. No appeal against the dismissal of cross-objections has been filed by the defendant.

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

> "Whether the learned Court below while fixing the mesne profits has rightly relied upon judgment dated 10.12.2003 passed by the learned Addl. District Judge, Solan, modifying judgment and decree in Civil Suit No. 85/1 of 1996 wherein rent has been fixed by virtue of application of H.P. Urban Rent Control Act, 1987 and which judgment is under challenge by way of Regular Second Appeal pending before this Hon'ble Court."

11. It is a matter of record that Regular Second Appeal which was filed against the judgment referred to in the substantial question of law stands disposed of by this Court on 26.02.2013 by passing the following order:

> "When both appeals were taken up for hearing, it was submitted by the learned counsel appearing for the parties that the suit premises have since been handed over to the landlord Sh. Braham Dev. In these circumstances, I hold that both appeals have become infructuous and disposed of as such. No finding is given on the merits of the points of law and facts of the case.
>
> 2. Submission is made on behalf of the learned counsel appearing for the appellant-Braham Dev that some amount of Rs. 6,000/-as arrear remains due and recoverable from the respondents. In the changed circumstances, I do not deem it necessary to go into this fact."

12. In this view of the matter, now the issue which has to be determined by this Court is as to whether the findings returned by learned trial Court to the effect that the plaintiff was entitled to mesne profit per mensem @ Rs.150/- is correct finding or whether the plaintiff was entitled for an amount of Rs.700/- P.M. for mesne profit.

13. Before proceeding further, it is pertinent to take note of the fact that it is settled law that determination of mesne profits is to be done on the basis of cogent and credible evidence like recent registered lease deeds of locality to show the amount of rent which is payable and inadmissible evidence is not to be taken into account for this purpose. The basic principle which is to be kept in mind is that tenant is under a bounden duty to pay the rent which is akin to the market rent.

14. A perusal of the records of the case demonstrates that to substantiate his claim that he was entitled for mesne profits @ Rs.700/- P.M. after the determination of the tenancy of the defendant, the plaintiff examined two witnesses including himself. PW-1 Umesh Kumar, owner of Uco Bank building in Kandaghat, stated that he had rented out house for residential purposes and in the year 1996 rent for premises having two rooms and two kitchens was Rs.1000/- P.M. He further stated that now-a-days the said premises could be rented out for Rs.1,500/- P.M. In his cross-examination, he stated that he could not state as to what should be the rent for the premises which were with the respondent.

15. Plaintiff entered the witness box as PW-2 and he reiterated his version that he was entitled for mesne profit @ Rs.700/- P.M. In his cross-examination, he denied that the premises were rented out to the defendant for an amount of Rs.150/- P.M. Besides this, the plaintiff produced on record a copy of judgment passed by the Court of learned Civil Judge (Junior Division), Kandaghat, in Civil Suit No. 46-K/1 of 2003 titled Rajeev Sharma & Ors. Vs. Brij Mohan.

16. A perusal of the evidence on record demonstrates that there was no cogent and convincing evidence led by plaintiff either by way of latest lease deed or by way of any other registered document from which it could be inferred that the rental rates of the premises akin to that of plaintiff which were with the defendant was around Rs.700/- P.M. The onus to prove as to what were the occupation charges to which he was entitled to was upon the plaintiff. In my considered view, the plaintiff on the basis of evidence which was led by him miserably failed to discharge the said onus. There was no cogent and reliable evidence placed on record from which it could be inferred that the premises of the plaintiff in possession of the defendant in fact demanded occupation charges @ Rs.700/- P.M. or more.

17. Therefore, in these circumstances, in my considered view, no error was committed by learned trial Court in granting mesne profits in favour of the plaintiff on the basis of the findings returned by learned Additional District Judge in Civil Appeal No. 1-S/13 of 2003 titled Jugal Kishore Vs. Braham Dev Sood, dated 10.12.2003, which judgment passed by learned Appellate Court otherwise has now attained finality. Reliance placed upon by learned trial Court on the judgment passed by learned Additional District Judge dated 10.12.2003 in Civil Appeal could have been faulted with, if there was any other material available with learned trial Court on the basis of which learned trial Court could have had inferred that the premises in dispute in fact commanded better occupation charges. The factum of pendency of Regular Second Appeal in this Court against the judgment passed by learned Appellate Court lost relevance with the passage of time as during the pendency of this litigation, it is an admitted position that the demised premises stand vacated by the defendant. Learned Appellate Court also rightly upheld the findings returned by learned trial Court by correctly appreciating the evidence on record as well as the judgment passed by learned trial Court. Further it cannot be said that the findings returned by both learned Courts below are either perverse or not borne out from the records of the case.

18. Therefore, in view of the above discussion, there is no merit in the present appeal and the same is dismissed. Substantial question of law is answered accordingly. Miscellaneous application(s) pending, if any, stand disposed of. Interim order, if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Desh Raj Sharma .....Appellant

Versus

Chitra Rai and others .....Respondents

FAO No.272 of 2012
CO No.57 of 2014
Reserved on : 11.11.2016.
Pronounced on : 18 .11.2016

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 50% disability, which is permanent in nature and is in regard to whole body- the claimant was an advocate by profession – the disability suffered by him has shattered his physical frame- he would not be in position to do the job of an advocate as he was doing prior to the accident- his income can be taken as Rs.10,000/- per month – considering the permanent disability, it can be safely held that the claimant had lost 20% earning capacity and loss of earning capacity will be Rs.2,000/- per month – the age of the claimant was 49 years and multiplier of 13 is applicable – thus, the claimant is entitled to Rs.2000 x12 x 13= Rs. 3,12,000/- under the head loss of earning capacity – the claimant remained admitted for over one month in the hospital and he would have taken some time in recuperation – hence, the loss of income can be assessed as Rs. 10,000 x 6= Rs. 60,000/- Rs. 50,000/- each awarded under heads painand suffering and loss of amenities of life

– the claimant would have spent Rs.100/- per day or Rs.3,000/- per month on account of special diet- hence, the claimant is held entitled to Rs.3000 x6= Rs.18,000/- under the head special diet – Rs.20,000/- awarded under the medical expenses and Rs.10,000/- awarded under the head future medical treatment – the attendant charges for six months come to Rs.18,000/-- the claimant is held entitled to Rs.3000/- under the head transportation charges- the claimant was occupant of the car and the insurance policy shows the sitting capacity as 1 + 3- no breach of terms and conditions was proved – hence, insurer directed to satisfy the award.(Para-11 to 36)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252
Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120.
S. Iyyapan versus United India Insurance Company Limited and another, (2013) 7 Supreme Court Cases 62

For the appellant: Mr.Jai Dev Thakur, Advocate, vice Mr.H.S. Rangra, Advocate.
For the respondents: Mr.G.R. Palsara, Adovcate, for respondents No.1 and 2.
Respondent No.3 deleted.
Mr.P.S. Chandel, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This appeal is directed against the award, dated 21st February, 2012, passed by the Motor Accident Claims Tribunal(II), Mandi, H.P., (for short, the Tribunal), in Claim Petition No.58 of 2004, titled Desh Raj Sharma vs. Ram Pyari and others, whereby compensation to the tune of Rs.2,44,000/, alongwith interest at the rate of 7.5% per annum, came to be awarded in favour of the claimant and the owner and the driver came to be saddled with the liability jointly and severally, (for short, the impugned award).

2. Feeling aggrieved, the claimant has questioned the impugned award by the medium of instant appeal on the ground that the amount awarded by the Tribunal is on the lower side. On the other hand, the legal representatives of the owner (respondents No.1 and 2 herein) have filed Cross Objections seeking exoneration and have prayed that the insurer be saddled with the liability.

3. The driver and the insurer have not challenged the impugned award on any ground, thus, the same has attained finality so far as it relates to them.

4. Facts of the case, in brief, are that on 28th October, 2003, at about 10 p.m., the claimant boarded Maruti Car bearing No.HP-22-5911, owned by respondent No.1 Ram Payari (since dead) and being driven by respondent No.2, from Karsog to Mandi. Further averred that when the said Car reached at Village Bagla, due to the rash and negligent driving of respondent No.2, the car hit with the rear portion of the truck going ahead, as a result of which the claimant sustained injuries, was taken to Zonal Hospital, Mandi, remained admitted there till 13th November, 2003, was referred to Indira Gandhi Medical College and Hospital, Shimla where the claimant was operated upon for neck injury and was discharged on 3rd December, 2003. Thus,

the claimant filed the claim petition for compensation to the tune of Rs.10.00 lacs, as per the break-ups given in the claim petition.

5. The owner and the driver filed joint reply and resisted the claim petition. The insurer also filed reply and contested the claim petition on the grounds taken in the memo of reply.

6. On the pleadings of the parties, the following issues were framed by the Tribunal on 24th August, 2015:

"1. Whether the petitioner had sustained injuries due to the rash and negligent driving of Maruti Car No.HP-22-5911 on 28.10.2003 at place Bagla, being driven by respondent No.2 as alleged? OPP

2. If issue No.1 is proved in affirmative to what amount of compensation the petitioners are entitled to and from whom? OPP

3. Whether respondent No.2 was not having a valid and effective driving license at the time of accident? OPR-3

4. Whether the offending vehicle was being driven in contravention of the terms and condition of the Insurance Policy? OPR-3.

5. Relief."

7. In support of his claim, the claimant examined Dr.Manoj Thakur as PW-1, ASI Joginder Pal as PW-2, Suresh Kumar from the office of S.P., Mandi, as PW-3, Dr.Renu Behal as PW-4, while he himself stepped into the witness box as PW-5. On the other hand, the insured/owner, the driver and the insurer have not led any evidence. Thus, the evidence led by the claimant has remained un-rebutted.

8. The Tribunal, after appreciating the pleadings and the evidence, allowed the claim petition, vide the impugned award and saddled the owner and the driver with the liability.

9. Feeling aggrieved, the claimant has questioned the impugned award on the ground of adequacy of compensation, while the owner has laid challenge to the impugned award by filing cross objections.

10. Thus, following points arise for determination in the instant lis:

i) Whether the amount awarded is inadequate?

ii) Whether the Tribunal has fallen into an error in discharging the insurer form the liability and directing the owner/insured to satisfy the same?

Point No.i)

11. The claimant has examined PW-4 Dr.Renu Behal, Zonal Hospital, Mandi, who stated that the claimant suffered five injuries and that the injury in the neck was grievous in nature. PW-4 has proved on record the MLC Ext.PW-4/A. The claimant also examined Dr.Manoj Thakur, Associate Professor, Department of Orthopedics, IGMC, Shimla, who stated that he was one of the members of the Medical Board, which issued the disability certificate. The disability certificate has been proved on record as Ext.P-I. A perusal of the disability certificate Ext.P-1 does disclose that the claimant suffered 30% disability, which is permanent in nature and is in regard to the whole body.

12. Thus, this being an injury case, the compensation is to be assessed keeping in view the disability suffered by the claimant i.e. 30%.

13. The Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771,** has clearly laid down the principles as to how

compensation has to be awarded in cases where the claimants have suffered permanent disability and how the assessment is to be made.

14. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his/her life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the whole life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
>
> *............ ....*
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

15. The claimant-injured was an Advocate by profession. The disability suffered by the claimant has shattered his physical frame and, in all probabilities, he would not be in a position to do the job of an Advocate, as he would have been doing prior to the accident.

16. It has been pleaded by the claimant in the Claim Petition that he, at the time of accident, was earning Rs.20,000/- per month. No evidence has been led by the claimant in support of his assertion that he was earning Rs.20,000/- by practicing as an Advocate. In the circumstances, the Tribunal has rightly assessed the income of the claimant at Rs.10,000/- per month. However, the Tribunal has fallen into an error in assessing the loss of earning capacity to the tune of only 10% in view of the fact that the claimant suffered 30% permanent disability in regard to whole body. Thus, it can safely be concluded that the claimant lost 20% earning capacity because of the disability suffered by him. Therefore, loss of earning capacity can roughly be said to be Rs.2,000/- per month.

17. The age of the claimant, at the time of accident, was 49 years. The Tribunal has rightly applied the multiplier of 13 in view of 2nd Schedule attached to the Motor Vehicles Act, 1988, (for short, the Act) and the dictum of the Apex Court in **Sarla Verma (Smt.) and others vs.**

Delhi Transport Corporation and another, (2009) 6 SCC 121, which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120.**

18. Having said so, the claimant is held entitled to Rs.2,000 x 12 x 13 = Rs.3,12,000/- under the head loss of future earning capacity.

19. The accident had taken place on 28th October, 2003, the claimant remained admitted till 13th November, 2003 in Zonal Hospital, Mandi, from where was referred to IGMC, Shimla, was operated upon for neck injury and discharged from the hospital on 3rd December, 2003. The discharge certificate has been proved on record as Ext.P-2. Thus, the claimant remained admitted for over one month in the hospital. For recuperation, the claimant would have also remained out of profession after discharge from the hospital. Thus, such period, during which the claimant would have remained out of profession, including the period of hospitalization, can be said to be six months.

20. The income of the claimant has been assessed at Rs.10,000/- per month. Thus, the claimant is held entitled to Rs.10,000/- x 6 = Rs.60,000/- under the head 'loss of earning during treatment'.

21. Discussion in the preceding paragraphs shows that the claimant has suffered a lot and because of the disability suffered by him, has to struggle throughout his life. In the given circumstances, read with the law laid down by the Apex Court, the claimant is held entitled to Rs.50,000/- under the head 'pain and sufferings'.

22. Owing to the disability suffered by the claimant, he is deprived of all comforts and amenities of life. Therefore, the claimant is held entitled to Rs.50,000/- under the head 'loss of amenities of life'.

23. The claimant would have also spent at least 100/- per day i.e. Rs.3,000/- per month on account of special diet during the period of treatment. Accordingly, the claimant is held entitled to Rs.3,000/- x 6 = Rs.18,000/- under the head 'special diet'.

24. In order to prove the expenses incurred by the claimant for purchasing medicines etc., the claimant has only placed on record the photocopies of the medical bills, which have not been proved on record as per law. Therefore, keeping in view the injury sustained by the claimant, hypothetically, it can be said that the claimant would have spent Rs.20,000/- on medicines. Accordingly, the claimant is held entitled to Rs.20,000/- under the head 'medical expenses incurred'.

25. Keeping in view the expert evidence, the claimant has to undergo medical check-ups/treatment, at intervals, throughout his life and I deem it proper to award Rs.10,000/- under the head 'future medical treatment'.

26. During the period of hospitalization and recovery i.e. six months, as has been discussed supra, the claimant would have needed special care and attendance, and would have hired attendant. The attendant charges at the rate of Rs.3,000/- per month, for six months, comes to Rs.18,000/- and the said amount is awarded in favour of the claimant under the head 'attendant charges'.

27. The Tribunal has rightly awarded Rs.3,000/- under the head 'transportation charges' and is maintained.

28. Having glance of the above discussion, the claimant is awarded Rs.5,41,000/- under different heads as given below:

Sl.No.	***Heads***	***Amount***
1	*Loss of earning during treatment*	*Rs.60,000/-*
2.	*Loss of future income*	*Rs.3,12,000/-*

3.	*Pain and sufferings*	*Rs.50,000/-*
4.	*Loss of amenities of life*	*Rs.50,000/-*
5.	*Attendant charges*	*Rs.18,000/-*
6.	*Special diet*	*Rs.18,000/-*
7.	*Future medical treatment*	*Rs.10,000/-*
8.	*Medical expenses incurred*	*Rs.20,000/-*
9.	*Transportation charges*	*Rs.3,000/-*
	Total	***Rs.5,41,000/-***

29. Point No.i) is answered accordingly and the compensation is enhanced.

Point No.ii)

30. Factum of insurance is admitted. The claimant was traveling in the Maruti Car, thus, was an occupant and was third party. As per Insurance Policy Ext.RX, the seating capacity of the Maruti Car was 1+3, meaning thereby, the risk of the claimant, being an occupant/third party, is covered.

31. The mandate of Sections 146, 147 and 149 of the Act is to protect the rights of third parties and that is why, compulsory duty has been imposed upon the owners to get the vehicles insured, so that, claim of third parties cannot be defeated.

32. The same question arose before the Apex Court in a case titled as **S. Iyyapan versus United India Insurance Company Limited and another,** reported in **(2013) 7 Supreme Court Cases 62.** It is apt to reproduce para 16 of the judgment herein:

> *"16. The heading "Insurance of Motor Vehicles against Third Party Risks" given in Chapter XI of the Motor Vehicles Act, 1988 (Chapter VIII of 1939 Act) itself shows the intention of the legislature to make third party insurance compulsory and to ensure that the victims of accident arising out of use of motor vehicles would be able to get compensation for the death or injuries suffered. The provision has been inserted in order to protect the persons travelling in vehicles or using the road from the risk attendant upon the user of the motor vehicles on the road. To overcome this ugly situation, the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force."*

33. The same principle has been laid down by this Court in a series of cases.

34. Onus to prove issues No.3 and 4 was on the claimant, has failed to discharge. Accordingly, the said issues were decided against the insurer by the Tribunal. The insurer has failed to prove that the owner has committed willful breach of the terms and conditions contained in the insurance policy. The said findings recorded by the Tribunal have not been challenged by the insurer by filing an appeal or cross objections, thus have attained finality.

35. It is not out of place to mention that the Tribunal on one hand has decided issue No.3 against the insurer and held that the insured has not committed any willful breach of the terms and conditions contained in the insurance policy, and on the other hand, has saddled the insured with the liability.

36. Having glance of the above discussion, the impugned award is modified, the appeal filed by the claimant and the cross objections filed by the owner are allowed, as indicated above, and the insurer is saddled with the liability. The insurer is directed to deposit the amount in the Registry of this Court, alongwith interest, as awarded by the Tribunal, within eight weeks from today and on deposit, the Registry is directed to release the amount in favour of the claimant, through his bank account. The statutory amount deposited by the owner is also

awarded as costs in favour of the claimant. The appeal and the cross objections stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Devinder Singh .....Appellant
Versus
Geetan Devi and others .....Respondents

FAO No.81 of 2012
Date of decision: 18.11.2016

Motor Vehicles Act, 1988- Section 166- Deceased was 59 years of age at the time of incident – deceased was earning Rs.25000/- per month by maintaining accounts of various firms- he was also earning Rs.5,000/- per month from agricultural activities- MACT had treated the income of the deceased as Rs.10,000/- per month or Rs.1,20,000/- per annum - after deducting 1/3rd the loss of dependency will be Rs.80,000/- per annum- multiplier of 8 was applied by the Tribunal, whereas multiplier of 6 is applicable- thus, claimants are entitled to Rs.80,000 x 6= Rs.4,80,000/- under the head loss of dependency – claimants are also entitled to Rs.10,000/- each under the head loss of love and affection, loss of estate, funeral expenses and loss of consortium- thus, claimants are entitled to Rs.4,80,000 +Rs. 40,000= Rs.5,20,000/-.

(Para-9 to 13)

Cases referred:

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellant: Mr.Neel Kamal Sharma, Advocate.
For the respondents: Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 28th November, 2011, passed by the Motor Accident Claims Tribunal, Hamirpur, H.P., (for short, "the Tribunal") in Claim Petition No.19 of 2009, titled Geetan Devi and others vs. Devinder Singh, whereby the claim petition was allowed and compensation to the tune of Rs.6,50,000/-, with interest at the rate of 7.5% per annum, came to be awarded in favour of the claimant and the owner/appellant was saddled with the liability, (for short the "impugned award").

2. The claimants have not questioned the impugned award on any ground, thus, the same has attained finality so far as it relates to them. Feeling aggrieved, the owner has challenged the impugned award on the grounds taken in the memo of appeal.

3. Facts of the case, in brief, are that on 7th July, 2009, at about 4.45 p.m., deceased Tilak Raj was crushed by the Motorcycle bearing No.JK-02AE-4687, near Bus Stand, Hamirpur, being driven by the original respondent (appellant herein) rashly and negligently, as a result of which the deceased sustained injuries and succumbed to the same lateron. Claimants filed the claim petition before the Tribunal claiming compensation to the tune of Rs.7.00 lacs, as per the break-ups given therein.

4. The claim petition was resisted by the respondent by filing reply and following issues came to be framed:

"1. Whether the death of Tilak Raj alias Uttam Chand was caused due to rash and negligent driving of Motorcycle No.JK-02AE-4687, by its owner-cum-driver, Devinder Singh, at the relevant time, as alleged?

2. If issue No.1 is proved in affirmative, whether the petitioners/claimants are entitled to compensation, if so, to what amount and from whom? OPP

3. Relief."

5. The claimants examined as many as eight witnesses. One of the claimants namely, Naresh Shama, stepped into the witness box as PW-7. On the other hand, respondent Devinder Singh appeared as RW-1 and also examined one Sunil Sharma as RW-2.

6. The Tribunal, after examining the pleadings and the evidence, allowed the claim petition and saddled the owner with the liability, as detailed above.

7. During the course of hearing, the learned counsel for the appellant-owner argued that the Tribunal has wrongly saddled him with the liability as the driver/owner had not caused the accident. Though FIR was lodged against the driver, but he now stands acquitted of the charge. Secondly, it was submitted that the amount awarded by the Tribunal is excessive.

8. Heard learned counsel for the parties and gone through the record.

9. In regard to the accident, FIR No.218, dated 7th July, 2009, was lodged at Police Station, Sadar, District Hamirpur, H.P. and the same has been proved on record as Ext.PW-1/A. The challan i.e. final report in terms of Section 173 of the Code of Criminal Procedure was presented before the court of competent jurisdiction. While answering issue No.1 in favour of the claimants and against the respondent/owner, the Tribunal has rightly made discussion in paragraphs 8 to 15, are borne out from the records and are accordingly upheld.

10. As far as issue No.2 is concerned, the same pertains to the quantum of compensation. The deceased was 59 years of age at the time accident. It was pleaded in the claim petition that the deceased was earning Rs.25,000/- per month by maintaining accounts of various persons/firms. Besides this, the deceased was also earning Rs.5,000/- per month from agricultural activities. However, the Tribunal after referring to the statements of witnesses examined by the claimants and the evidence brought on record, assessed the monthly income of the deceased at Rs.10,000/-. The Tribunal has discussed the evidence meticulously in paragraphs 16 to 25 and has rightly assessed the income of the deceased at Rs.1,20,000/- per annum. After deducting 1/3rd from the total income of the deceased, loss of source of dependency to the claimants, per annum, can be said to be Rs.80,000/-.

11. The deceased was 59 years of age. The Tribunal has fallen into an error in applying the multiplier of 8, instead, in view of the law expounded by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120** and the 2nd Schedule attached with the Motor Vehicles Act, 1988, multiplier of 6 was just and appropriate and is applied accordingly.

12. In view of the above discussion, the claimants are held entitled to compensation to the tune of Rs.80,000/- x 6 = Rs.4,80,000/- under the head loss of source of dependency. In addition, the claimants are also held entitled to Rs.10,000/- each i.e. Rs.40,000/- in all under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'.

13. Thus, the claimants are held entitled to Rs.4,80,000/- + Rs.40,000/- = Rs.5,20,000/-.

14. Having said so, the impugned award is modified, as indicated above. The appellant is directed to deposit the amount in the Registry of this Court within eight weeks from today, alongwith interest as awarded by the Tribunal, and on deposit, the Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award.

15. The appeal is disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

H.R.T.C. through its Managing Director and another …..Appellant

Versus

Sanjay Kumar and another …..Respondents.

FAO (MVA) No. 376 of 2012.
Date of decision: 18th November, 2016.

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injury in a motor vehicle accident- he was aged 27 years at the time of accident- he remained in hospital for a period of about 2 months- he was coming up for follow up after every 4-6 weeks – he is having difficulty in walking and speaking and he has lost all charms of life- he had spent Rs.1,94,428/- on his treatment- the Tribunal had rightly awarded the compensation- appeal dismissed.
(Para- 12 to 16)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

For the appellants: Mr. Vikrant Thakur and Mr. Purshotam Chaudhary, Advocates.
For the respondents: Mr.Pushpender Jaswal, Advocate, for respondent No.1
Mr. Onkar Jairath, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 3.3.2012, passed by the Motor Accident Claims Tribunal, Hamirpur, H.P. hereinafter referred to as "the Tribunal", for short, in MAC Petition No.03 of 2010, titled *Sanjay Kumar versus H.R. T.C. and others,* whereby compensation to the tune of Rs.5,45,000/- alongwith interest @ 7.5% per annum came to be awarded in favour of the claimant and HRTC was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimant has not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to him.

3. The H.R.T.C. has questioned the impugned award on the grounds taken in the memo of appeal.

4. Claimant being the victim of a vehicular accident, filed claim petition before the tribunal for the grant of compensation to the tune of Rs. 20 lacs, as per the break-ups given in the claim petition on account of the injuries suffered by him due to rash and negligent driving of HRTC Bus driver, namely, Sukh Dev, while driving HRTC Bus No. HP-36-A-7505 at Kaloor, was taken to hospital at Nadaun and thereafter shifted on the same day to Dayanand Medical College hospital Ludhiana where he remained admitted till 21.10.2009.

5. The claim petition was resisted by the respondents and following issues came to be framed.

1. *Whether the petitioner has suffered injuries due to use/rash and negligent driving of Bus No. HP-36-A-7505 by its driver-respondent No. 3 as alleged? OPP*
2. *If issue No. 1 is proved in affirmative, whether the petitioner/claimant is entitled to compensation, if so, to what amount and from which of the respondents? OPP*
3. *Whether the petition is not maintainable in the present form? OPRs.*
4. *Whether the petitioner is estopped from filing the present petition by his act and conduct? OPRs.*
5 *Relief.*

6. Claimants have examined the witnesses and the Tribunal, after scanning the evidence oral as well as documentary, held that the driver has driven the offending vehicle rashly and negligently and caused the accident. The driver has not questioned the said findings. Thus, the appellant cannot question the same. However, I have gone through the pleadings and evidence. FIR Ext. PW1/A does disclose that the driver had driven the offending vehicle rashly and negligently and caused the accident. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

7. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 and 4. It was for the appellant to lead evidence, has not led any evidence. Thus, failed to discharge the onus. The Tribunal has rightly made discussion in paras 17 and 18 of the impugned award and decided the issues against the appellant, needs no interference.

Issue No.2.

8. It is beaten law of land that the compensation is to be awarded in an injury case under pecuniary and non-pecuniary heads by making guess work.

9. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

10. This Court has also laid down the same principle in a series of cases.

11. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the entire life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the*

trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.

………… …………… ……………

18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."

12. The injured was 27 years of age at the time of accident, was admitted in the hospital from 23.8.2009 to 21.10.2009. The claimant examined PW3 Dr. R.K. Kaushal who is Head of neurosurgery department in DMC Hospital Ludhiana, who deposed that the injured was deeply comatosed. C.T. Scan of his head was done which showed fluid on left side of brain. He was operated twice. Bone flap was placed on the head on 29.9.2009 and after treatment he was discharged on 21.10.2009. He has further stated that the claimant was coming on for regular follow up after every 4-6 weeks. He is having difficulty in speaking and walking. Discharge summary Ext. PW3/A and other certificates Ext. PW3/B and Ext. PW3/C do disclose that the claimant has become permanently disabled and has lost charm of his life. The bill Ext. PW3/D do disclose that the claimant had spent Rs.1,94,428/- on his treatment in DMC Ludhiana. The tribunal has rightly made discussion in paras 10 to 15 of the impugned award and has given the details how the claimant is entitled to compensation.

13. It is apt to record herein that the learned counsel for the appellant was not in a position to indicate how the Tribunal has fallen in an error in making assessment. In fact he has not disputed the impugned award to that effect.

14. The entire evidence on the record do disclose that the claimant has to suffer forever life. The injuries have shattered his physical frame and he has lost amenities of life.

15. I have gone through the impugned award. The amount awarded is adequate needs no interference.

16. Accordingly, the impugned award is upheld and the appeal is dismissed.

17. The HRTC-appellant is directed to deposit the amount alongwith interest, as awarded by the Tribunal, within eight weeks from today in the Registry, if not deposited. The Registry, on deposit, is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in his bank account, after proper verification.

18. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs (MVA) No. 382 and 416 of 2012.
Date of decision: 18th November, 2016.

FAO No. 382 of 2012.

ICICI Lombard General Insurance Co. Ltd. …..Appellant
Versus
Sh. Ram Prakash and others ……Respondents.

FAO No. 416 of 2012.
Ram Parkash ……Appellant
Versus
Sh. Rajinder Singh and others ……Respondents.

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 50% permanent disability- he was treated as a skilled labourer earning Rs.5,000/- per month -at the relevant time labourer would have been earning Rs.4000/- per month by guess work – considering the disability, the loss of income can be taken as Rs.2000/- per month – the claimant was 25 years of age at the time of accident – claimant was entitled to Rs.2,000 x 12 x 15= Rs.3,60,000/- under the head loss of future income- the tribunal had rightly awarded Rs.75,000/- on account of cost of medical treatment past and prospective, Rs.5,000/- on account of travel expenses, Rs.20,000/- on account of attendant charges for six months, Rs.10,000/- on account of physical pain and shock and Rs.50,000/- for the loss of amenities of life - thus, total compensation of Rs.5,20,000/- awarded with interest @ 7.5% per annum. (Para- 9 to 17)

Cases referred:
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771.
Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

For the appellant(s): Mr. Jagdish Thakur, Advocate, for the appellant in FAO No. 382 of 2012 and Mr. Kanwar Bhupinder Singh, Advocate, for the appellant in FAO No. 416/2012.
For the respondent(s): Mr. Vishwa Bhushan, Advocate, for respondents No. 1 and 2 in FAO No. 416 of 2012 and for respondents No. 2 and 3 in FAO No. 382 of 2012.
Mr. Kanwar Bhupender Singh, Advocate, for respondent No.1 in FAO No. 382 of 2012 and Mr. Jagdish Thakur, Advocate, for respondents No. 3 in FAO No. 416 of 2012.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

Both these appeals are outcome of one award, hence are taken up together for disposal by this common judgment.

2. Both these appeals are directed against the judgment and award dated 19.6.2012, passed by the Motor Accident Claims Tribunal, Shimla, H.P. hereinafter referred to as “the Tribunal”, for short, in MAC Petition No.5-S/2 of 2010, titled *Sh. Ram Parkash versus Sh. Rajinder Singh and others,* whereby compensation to the tune of Rs.6,70,000/- alongwith costs assessed at Rs.5000/-, came to be awarded in favour of the claimant and insurer was saddled with the liability, with direction to deposit the amount within two months, in default had to satisfy the amount with simple interest @ 9% from the date of claim petition, on the grounds taken in the memo of appeals.

3. Claimants being the victims of a vehicular accident invoked the jurisdiction of the Tribunal for the grant of compensation as per the break-ups given in the claim petition, which was resisted by the respondents and following issues came to be framed.

1. *Whether petitioner suffered injuries on account of rash and negligent driving of vehicle by the respondent No.2.OPP.*
2. *If issue No. 1 is proved, to what amount of compensation and from whom is the petitioner entitled to? OPP*
3. *Whether the respondent No. 2 had not been in possession of a valid and effective driving licence, if so, with what effect? OPR-3.*
4. *Whether the petitioner was travelling as gratuitous passenger in the vehicle, if so, with what effect? OPR-3.*
5. *Relief.*

4. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant has proved that the respondent No. 2 before the Tribunal, namely, Mohan Lal has driven the offending vehicle rashly and negligently in which the claimant sustained the injuries and became permanently disabled to the extent of 40%. The findings on issue No. 1 are not in dispute are accordingly upheld.

5. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 and 4.

<u>Issues No. 3 and 4.</u>

6. It was for the appellant/insurer to plead and prove both the issues, has not led any evidence, thus failed to discharge the onus. It is also apt to record herein that the learned counsel for the insurer has not seriously contested issue No.4. There is nothing on the record to indicate that the injured was travelling in the offending vehicle as gratuitous passenger. The Tribunal has rightly made discussion from paras 26 to 28 of the impugned award, needs no interference. Accordingly, the findings returned on these issues by the Tribunal, are upheld.

<u>Issue No.2.</u>

7. Admittedly, the deceased was 25 years of age at the time of accident, FIR Ext. PW3/A was lodged and he was taken to IGMC Shimla where he remained under treatment for a pretty long time, was operated, discharged and had to undergo follow up for long period. The Tribunal has reproduced the statements of PW4 Dr. Ravinder Mokta and PW5 Dr. L.R. Verma in the impugned award. Thus, I deem it proper not to reproduce the same in this judgment. Dr. Ravinder Mokta (PW4) has stated that the claimant has sustained the permanent disability to the extent of 40% in terms of disability certificate Ext. PW4/A.

8. The question is-whether the compensation has been rightly assessed by the Tribunal?.

9. It is beaten law of land that the compensation is to be awarded in an injury case under pecuniary and non-pecuniary heads by making guess work.

10. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

11. This Court has also laid down the same principle in a series of cases.

12. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the entire life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.

....

18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."

13. The disability has affected his earning capacity in *toto* for one year and it has also affected his earning capacity to the extent of 50% for ever. The Tribunal has held the injured as skilled labourer, earning Rs.5000/- per month at that time. It appears that the Tribunal has fallen in an error. At the relevant point of time, at best, a labourer would have been earning Rs.4000/- per month while making a guess work. The claimant has suffered 40-50% disability and it can safely be held that the claimant has lost source of income to the tune of Rs.2000/- per month, was 25 years of age, the multiplier applicable is "15".

14. Thus, the claimant is entitled to compensation to the tune of Rs.2000x12x15= Rs.3,60,000/-, under the head "loss of future income."

15. The Tribunal has rightly awarded a sum of Rs.75000/- on account of cost of medical treatment past and prospective, Rs.5,000/- on account of travel expenses, Rs.20,000/- on account of attendant charges for six months and Rs.10,000/- on account of physical pain and shock.

16. The Tribunal has fallen in an error in not awarding compensation for loss of amenities of life. Thus, the claimant also held entitled to Rs.50,000/- for loss of amenities of life.

17. Thus, in all, the claimant is entitled to compensation to the tune of Rs.3,60,000/-+Rs.75000/-+Rs.5000/-+Rs.20,000/ +Rs.10,000/- + Rs.50,000/- = Total Rs.5,20,000/-., with interest @ 7.5% per annum from the date of impugned award on the amount of Rs.3,60,000/- and from the date of claim petition on the amount of Rs.1,60,000/-.

18. The insurer is directed to deposit the amount alongwith interest @ 7.5% as indicated hereinabove, within eight weeks from today in the Registry, if not already deposited. The Registry, on deposit, is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by

depositing the same in his bank account, after proper verification. Excess amount, if any be release in favour of the appellant-insurer through payees cheque account.

19. Viewed thus, impugned award is modified as indicated hereinabove and the appeals are disposed of accordingly, alongwith pending applications, if any.

20. Send down the record forthwith, after placing a copy of this judgment.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

ICICI Lombard General Insurance Company Ltd. ....Appellant

Versus

Rakesh Kumar @ Suresh Kumar & others ....Respondents

FAO No. 405 of 2012
Decided on : 18.11.2016

Motor Vehicles Act, 1988- Section 166- It was contended that Tribunal fell in error in accessing compensation under the head loss of earning/future income and in granting interest from the date of filing of the claim petition- the injured was a student aged 14 years – he had sustained 15% permanent disability – his right leg was operated – it can be safely held that after attaining the age of majority, he would have earned atleast Rs.4,000/- per month- he is working as a driver and his income can be taken as Rs.6,000/- per month- the loss under the future head will be Rs.600/- per month – multiplier of 12 is applicable and claimant is entitled to Rs.600 x 12 x 15= Rs. 1,08,000/- under the head loss of earning/future income- Rs.10,000/- awarded under the head medical expenses for the future medical treatment- interest awarded on all heads except the future income from the date of claim petition and on the future income from the date of the award. (Para-6 to 18)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

For the Appellant : Mr. Jagdish Thakur, Advocate.

For the Respondents: Mr. Dinesh Bhanot, Advocate, for respondent No. 1.
Mr. Piyush, Advocate vice Mr. T.S. Chauhan, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

<u>Mansoor Ahmad Mir, Chief Justice</u> *<u>(oral)</u>*

Subject matter of this appeal is the judgment and award, dated 6th July, 2012, made by the Motor Accident Claims Tribunal-I, Solan, District Solan, H.P. (for short 'the Tribunal') in MAC Petition No. 41/NL/2 of 2008, titled as **Rakesh Kumar alias Suresh Kumar** versus **Ashok Dharmani & others**, whereby compensation to the tune of Rs. 3,35,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant-injured and insurer was saddled with liability (for short 'the impugned award').

2. The claimant-injured, owner-insured and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

4. Learned Counsel for the appellant-insurer argued that the Tribunal has fallen in an error in assessing compensation under the head 'loss of earning/future income' and in granting interest under the aforesaid head from the date of filing of the claim petition.

5. Admittedly, the claimant-injured was a student of the age of 14 years at the time of accident and was a minor. He suffered 15% permanent disability in terms of Disability Certificate Ext. PW-1/A. PW-1, Dr. Amarjeet Singh has given details of the injuries suffered by the claimant-injured in his statement before the Tribunal.

6. I have gone through the record. The claimant-injured remained admitted in the hospital w.e.f. 16.08.2008 to 04.09.2008 and his right leg was got operated.

7. By guess work, it can safely be held that on attaining the age of majority, he would have earned at least Rs. 4,000/- per month.

8. At this stage, learned Counsel for the claimant-injured stated at the Bar that at present, the claimant-injured is working as a driver.

9. In the given circumstances, at the best, the monthly income of the claimant can be taken as Rs. 6,000/-. Thus, loss under the head 'future income' comes to Rs. 600/- per month.

10. The multiplier of '12' is applicable in this case in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.**

11. Thus, the claimant-injured is held entitled to compensation to the tune of Rs. 600 x 12 x 15 = Rs. 108,000/- under the head 'loss of earning/future income'.

12. The Tribunal has also fallen in an error in not granting compensation under the head 'expenses for future treatment'.

13. Accordingly, I deem it proper to award Rs. 10,000/- under the head 'medical expenses for future treatment'.

14. The compensation amount awarded by the Tribunal under the other heads is not challenged. Accordingly, the amount awarded under the other heads is maintained.

15. The Tribunal has fallen in an error in awarding interest 7.5% per annum under all the heads from the date of the claim petition. Interest at the rate of 7.5% per annum was to be awarded for all heads except for future income from the date of the claim petition and for future income, it was to be awarded from the date of impugned award.

16. Accordingly, the claimant-injured is held entitled to total compensation under the following heads:

1.	Loss of earning/future income	Rs. 108,000/-
2.	Medical expenses	Rs. 10,000/-
3.	Loss of amenities of life	Rs. 75,000/-
4.	Attendant charges	Rs. 25,000/-
5.	Pain and sufferings	Rs. 40,000/-
6.	Special diet and nutrition	Rs. 5,000/-
7.	Medical expenses on future treatment	Rs. 10,000/-

Total: Rs. 2,73,000/-

17. On the aforesaid amount of compensation, interest @ 7.5% per annum is payable for all heads except for future income from the date of the claim petition and under the head 'loss of earning/future income', it is payable from the date of impugned award.

18. The Registry is directed to release the entire amount in favour of the claimant-injured, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing it in his account. The excess amount be refunded to the insurance company through payees' cheque account or by depositing it in its bank account.

19. Accordingly, the impugned award is modified and the appeal is disposed of.

20. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Smt. Inder Kaur & others ….Appellants
Versus
Smt. Shanti Devi & others ….Respondents

FAO No. 398 of 2012
Decided on : 18.11.2016

Motor Vehicles Act, 1988- Section 149- Driver was having a license to drive light motor vehicle – he was driving a three wheelers, which falls within the definition of light motor vehicle- no endorsement of PSV was required- the Tribunal fell in error in concluding that the Driver did not have a valid licence at the time of accident- appeal allowed – award modified and the insurer saddled with liability. (Para- 5 to 15)

Cases referred:

Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791
National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906
Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110

For the Appellants : Mr. B.C. Negi, Senior Advocate with Mr. Narender Thakur, Advocate.
For the Respondents: Mr. N.K. Tomar, Advocate, for respondents No. 1 to 4.
Mr. N.K. Gupta, Advocate, for respondent No. 5.
Ms. Devyani, Sharma, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the judgment and award, dated 4th June, 2012, made by the Motor Accident Claims Tribunal-I, Sirmour, District Sirmour at Nahan, H.P. (for short 'the Tribunal') in MAC Petition No. 49-MAC/2 of 2009, titled as **Smt. Shanti Devi & others versus Kuldeep Singh & others**, whereby compensation to the tune of Rs. 3,70,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the legal heirs of the owner-insured were saddled with liability (for short 'the impugned award').

2. The claimants, insurer and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

3. The legal heirs of the insured-owner have questioned the impugned award on the grounds that the Tribunal has fallen in an error in discharging the insurer from liability and saddling them with the same.

4. The entire controversy in this appeal revolves around Issues No. 4 & 5 framed by the Tribunal in the claim petition. It is apt to reproduce the aforesaid issues herein:

> *"4. Whether the driver of the vehicle did not possess a valid and effective driving licence at the relevant time, as alleged? …OPR-3*
>
> *5. Whether the vehicle was being plied without a valid permit and in violation of the terms and conditions of insurance policy, as alleged? …OPR-3.*

5. Admittedly, the driver was having driving licence to drive the 'light motor vehicle' and vehicle involved in the accident was Three Wheeler bearing No. HP-50-0102, which falls within the definition of 'light motor vehicle' in terms of Section 2(21) of the Motor Vehicles Act, 1988, for short 'the MV Act'.

6. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> *"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-*
>
> > *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
> >
> > *……………………..*
> >
> > *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive*

any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."

In the given circumstances of the case PSV endorsement was not required at all."

7. The mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. ....

21. ....

22. ....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

8. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. …………………

10. ……………..

11. ……………..

12. …………….

13. …………….

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. ……………………….

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

9. The Apex Court in the latest judgment in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** held that PSV endorsement is not required.

10. The same principle has been laid down by this Court in a series of cases.

11. Viewed thus, the Tribunal has fallen in an error in holding that the driver was not having a valid and effective driving licence at the relevant point of time. Accordingly, Issue No. 4 is decided in favour of the driver and owner-insured and against the insurer.

12. It was for the insurer to prove this issue, has not led any evidence, thus has failed to discharge the onus. Accordingly, this issue is also decided in favour of the driver and owner-insured and against the insurer.

13. Having said so, the impugned award is modified by holding that the insurer has to satisfy the impugned award.

14. The insurer is directed to deposit the award amount alongwith interest, within a period of eight weeks from today before the Registry. On deposit, the Registry is directed to release the entire amount in favour of the claimants, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in their accounts.

15. Learned Counsel for the appellants-legal heirs of the owner-insured stated at the Bar that the entire award amount stands deposited before the Registry.

16. The amount deposited by the appellants/legal heirs of the owner-insured be released in their favour through payees' account cheque or by depositing the same in their accounts.

17. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

Inderjit Singh Bawa ....Plaintiff
Versus
Dr. Vani Sharma ...Defendant

C.S. No. 44 of 2013.
Judgment reserved on: 10.11.2016
Date of Decision: 18.11.2016.

Code of Civil Procedure, 1908- Order 2 Rule 2- Plaintiff filed a civil suit for recovery of money – he had already instituted a suit in the Court of Civil Judge (Senior Division), Kangra prior to the institution of the present suit – held, that the defendant should not be vexed time and again for the same cause by splitting the claim and causes of action - while determining whether the subsequent suit is barred or not, the Court has to find out whether the claim in the new suit is founded upon a cause of action which was the foundation in the former suit – the burden is upon the defendant to prove the identity of the cause of action in the two suits – plaintiff had filed the earlier suit for declaration and permanent injunction for restraining the defendant from leaving the services of Kangra Valley Hospital in violation of the agreement executed between the parties- the present suit has been filed for damages on the ground of cancellation of the agreement – the plea raised in the suit was available at the time of filing of the earlier suit – the plaintiff had not soughtthe relief, which was available to him and plaintiff is clearly precluded from instituting the suit – the suit is held to be barred by Order 2 Rule 2 and is dismissed. (Para-6 to 35)

Cases referred:
Gurubux Singh vs. Bhooralal, 1964 AIR (SC) 1810
Sidramappa vs. Rajashetty and others 1970 AIR (SC), 1059
Kewal Singh vs. Mt. Lajwanti, 1980 AIR (SC) 161
Bengal Waterproof Ltd. vs. Bombay Waterproof Mfg. Co. 1997 AIR (SC) 1398
Kunjan Nair Sivaraman Nair vs. Narayanan Nair and others 2004 AIR (SC) 1761
N.V. Srinivasa Murthy and others vs. Mariyamma (dead) by Proposed LRs and Others, 2005 AIR (SC) 2897
Alka Gupta vs. Narender Kumar Gupta, (2010) 10 SCC 141
Inbasagaran and another vs. S. Natarajan (dead) through Legal Representatives (2014) 11 SCC 12
Rathnavathi and another vs. Kavita Ganashamdas, (2015) 5 SCC 223

For the Plaintiff: Ms. Bhavana Datta, Advocate.
For the Defendant: Mr. Bhupender Gupta, Senior Advocate, with Mr. Ajeet Pal Singh Jaswal, Advocate.

The following judgment of the Court was delivered:

<u>Tarlok Singh Chauhan, Judge</u>

The plaintiff has filed the instant suit for recovery of Rs. 63,58,827/- alongwith future interest at the rate of 18% per annum from the date of institution of the suit till payment thereof.

2. It is not in dispute that before filing this suit, the plaintiff had already instituted a suit in the Court of Civil Judge (Senior Division), Kangra, H.P.

3. This Court on 25.9.2014 framed the following issues:

1. *Whether the plaintiff is entitled to a decree of Rs. 63,58,827/- alongwith interest @18% per annum against the defendant? OPP*

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

3. Whether the suit is not maintainable in view of Order 2 Rule 2 of the Code of Civil Procedure, if so, its effect? OPD

4. Whether the plaintiff has no enforceable cause of action to file and maintain the present suit, if so, its effect? OPD

5. Whether the plaintiff is estopped to file and maintain the present suit on account of his act, deeds, conduct and acquiescence, if so, its effect? OPD

6. Relief.

4. Issue No.3 was treated as preliminary issue. The defendant on 4.12.2014 tendered documents Ex.D-1 to D-4 and closed her evidence and thereafter from one reason or the other, the plaintiff did not lead his evidence and it is eventually on 15.7.2016 that the statement of one witness was recorded and thereafter the plaintiff closed his evidence.

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

Issue No.3.

5. Before going into the factual aspects, it would be necessary to advert to the legal position.

6. In ***Gurubux Singh vs. Bhooralal, 1964 AIR (SC) 1810***, the Hon'ble Supreme Court held as under:

> *"6. In order that a plea of a bar under 0. 2. r. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under 0. 2. r. 2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits."*

7. In ***Sidramappa vs. Rajashetty and others 1970 AIR (SC), 1059,*** the Hon'ble Supreme Court held as under:

> "7. *The High Court and the trial court proceeded on the erroneous basis that the former suit was a suit for a declaration of the plaintiff's title to the lands mentioned in Schedule I of the plaint. The requirement of Order 2, rule 2, Code of Civil Procedure is that every suit should include the whole of the claim which the plaintiff is entitled to make in in respect of a cause of action. - 'Cause of action' means the 'cause of action for which the suit was brought'. It cannot be Said that the cause of action on which the present suit was brought is the same as that in the previous suit. Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause, ,of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot*

afterwards seek to recover the balance by independent proceedings(See. Mohd. Hafiz vs. Mohd. Zakaria, 1922, AIR (PC) 23.)"

8. In ***Kewal Singh vs. Mt. Lajwanti, 1980 AIR (SC) 161,*** the Hon'ble Supreme Court held as under:

> "5. *A perusal of Order 2 Rule 2 would clearly reveal that this provision applies to cases where a plaintiff omits to sue a portion of the cause of action on which the suit is based either by relinquishing the cause of action or by omitting a part of it. The provision has, therefore, no application to cases where the plaintiff basis his suit on separate and distinct causes of action and chooses to relinquish one or the other of them. In such cases, it is always open to the plaintiff to file a fresh suit on the basis of a distinct cause of action which he may have so relinquished."*

9. In ***Bengal Waterproof Ltd. vs. Bombay Waterproof Mfg. Co. 1997 AIR (SC) 1398,*** the Hon'ble Supreme Court held as under:

> *"8. As seen earlier, Order 2 Rule 2 sub-rule (3) requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based and unless there is identity of causes of action in both the suits the bar of Order 2 Rule 2 sub-rule (3) will not get attracted.*
>
> *20. In cases of continuous causes of action or recurring causes of action bar of Order 2 Rule 2 sub-rule (3) cannot be invoked. In this connection it is profitable to have a lock at Section 22 of the Limitation Act, 1963. It lays down that `in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the beach or the tort, as the case may be, continues'."*

10. In ***Kunjan Nair Sivaraman Nair vs. Narayanan Nair and others 2004 AIR (SC) 1761,*** the Hon'ble Supreme Court held as under:-

> *"10. Order II Rule 2, sub-rule (3) requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based. Therefore, there must be identical cause of action in both the suits, to attract the bar of Order II sub-rule (3). The illustrations given under the rule clearly brings out this position. Above is the ambit and scope of the provision as highlighted in Gurbux Singh's case (supra) by the Constitution Bench and in Bengal Waterproof Limited (supra). The salutary principle behind Order II Rule 2 is that a defendant or defendants should not be vexed time and again for the same cause by splitting the claim and the reliefs for being indicated in successive litigations. It is, therefore, provided that the plaintiff must not abandon any part of the claim without the leave of the Court and must claim the whole relief or entire bundle of reliefs available to him in respect of that very same cause of action. He will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the Court."*

11. In ***N.V. Srinivasa Murthy and others vs. Mariyamma (dead) by Proposed LRs and Others, 2005 AIR (SC) 2897,*** the Hon'ble Supreme Court held as under:

> "*13. In paragraph 11 of the plaint, the plaintiffs have stated that they had earlier instituted original suit No.557 of 1990 seeking permanent injunction against defendants and the said suit was pending when the present suit was filed. Whatever relief the petitioners desired to claim from the civil court on the basis of averment with regard to the registered sale deed of 1953 could and ought to have been claimed in original civil suit No.557 of 1990 which was pending at that time. The second suit claiming indirectly relief of declaration and injunction is apparently barred by Order 2, Rule 2 of the Code of Civil Procedure."*

12. In ***Alka Gupta vs. Narender Kumar Gupta, (2010) 10 SCC 141,*** the Hon'ble Supreme Court held as under:

"18. Further, while considering whether a second suit by a party is barred by Order 2 Rule 2 of the Code, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of plaintiff are not relevant for deciding whether the second suit is barred by Order 2 Rule 2 of the Code."

13. In ***Inbasagaran and another vs. S. Natarajan (dead) through Legal Representatives (2014) 11 SCC 12,*** the Hon'ble Supreme Court held as under:

"20. *Indisputably, cause of action consists of a bundle of facts which will be necessary for the plaintiff to prove in order to get a relief from the Court. However, because the causes of action for the two suits are different and distinct and the evidences to support the relief in the two suits are also different then the provisions of Order 2 Rule 2 CPC will not apply."*

14. In ***Rathnavathi and another vs. Kavita Ganashamdas, (2015) 5 SCC 223***, the Hon'ble Supreme Court held as under:-

"26. *One of the basic requirements for successfully invoking the plea of Order II Rule 2 of CPC is that the defendant of the second suit must be able to show that the second suit was also in respect of the same cause of action as that on which the previous suit was based. As mentioned supra, since in the case on hand, this basic requirement in relation to cause of action is not made out, the defendants (appellants herein) are not entitled to raise a plea of bar contained in Order II Rule 2 of CPC to successfully non suit the plaintiff from prosecuting her suit for specific performance of the agreement against the defendants.*

27. Indeed when the cause of action to claim the respective reliefs were different so also the ingredients for claiming the reliefs, we fail to appreciate as to how a plea of Order II Rule 2 could be allowed to be raised by the defendants and how it was sustainable on such facts.

28. We cannot accept the submission of learned senior counsel for the appellants when she contended that since both the suits were based on identical pleadings and when cause of action to sue for relief of specific performance of agreement was available to the plaintiff prior to filing of the first suit, the second suit was hit by bar contained in Order II Rule 2 of CPC.

29. The submission has a fallacy for two basic reasons. Firstly, as held above, cause of action in two suits being different, a suit for specific performance could not have been instituted on the basis of cause of action of the first suit. Secondly, merely because pleadings of both suits were similar to some extent did not give any right to the defendants to raise the plea of bar contained in Order II Rule 2 of CPC. It is the cause of action which is material to determine the applicability of bar under Order II Rule 2 and not merely the pleadings. For these reasons, it was not necessary for plaintiff to obtain any leave from the court as provided in Order II Rule 2 of CPC for filing the second suit.

30. Since the plea of Order II Rule 2, if upheld, results in depriving the plaintiff to file the second suit, it is necessary for the court to carefully examine the entire factual matrix of both the suits, the cause of action on which the suits are founded, reliefs claimed in both the suits and lastly the legal provisions applicable for grant of reliefs in both the suits."

15. From the aforesaid exposition of law, it can safely be concluded that the salutary principle behind Order 2 Rule 2 is that a defendant or defendants should not be vexed time and again for the same cause by splitting the claim and the reliefs for being indicated in successive litigations. One of the objects of Order 2 Rule 2 is to avoid multiplicity of proceedings.

16. Sub-rule (1) to Rule 2 deals with the frame of the suit and enables the plaintiff to abandon or relinquish a part of his claim before filing his plaint. The provisions of Order 2 Rule 2 indicate that if a plaintiff is entitled to several reliefs against the defendant in respect of the same cause of action, it cannot spilt up the claim so as to omit one part of the claim and sue for the other. It is, therefore, provided that the plaintiff must not abandon any part of the claim without the leave of the Court and must claim the whole relief or entire bundle of reliefs available to him in respect of that very same cause of action. He will thereafter be precluded from doing so in any subsequent litigation that he may commerce if he has not obtained the prior permission of the Court.

17. To constitute a bar to fresh suit under Order 2 Rule 2 (3) CPC, three elements are required to be proved. Firstly, it must be established that the second suit was in respect of the same cause of action as that on which the previous suit was based; secondly, in respect of that cause of action the plaintiff is entitled to more than one relief and lastly, that being so, the plaintiff without leave obtained from the Court, omitted to sue for the relief for which the second suit has been filed.

18. The correct test in cases falling under Order 2 Rule 2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit."

19. "Cause of action" means the bundle of facts which the plaintiff must prove in order to succeed in his action. The cause of action for which the suit was brought means, the cause of action, which gives occasion for and forms the foundation of the suit. Generally stated, the cause of action means every fact which is necessary to establish to support a right or obtain judgment. Another shade of meaning is that a cause of action means every fact which will be necessary for the plaintiff to prove (if traversed). The cause of action for the purpose of this Rule means all the essential facts constituting the right of its infringement. In other words, the cause of action consists of all the facts which are essential for the plaintiff to allege and to establish, if denied or controverted, for instance, the bundle of facts which taken with the law applicable to them gives him a right of some relief against the defendant.

20. The burden is on the defendant to establish that the subsequent suit is founded on a cause of action which is identical with that of which the earlier suit was founded. If the cause of action which is identical with that of which the earlier suit was founded. If the cause of action and the relief claimed in the second suit are not the same as the cause of action and relief claimed in the first suit, the second suit is not barred. It is settled law that when the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject matter.

21. A plea of bar under Order 2 Rule 2 is a highly technical plea. It tends to defeat justice and to deprive the party of a legitimate right. Therefore, care must be taken to see that complete identity of cause of action is established. It has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. Since the plea of Order 2 Rule 2, if upheld, results in depriving the plaintiff to file the second suit, it is necessary for the court to carefully examine the entire factual matrix of both the suits, the cause of action on which the suits are founded, reliefs claimed in both the suits and lastly the legal provisions applicable for grant of reliefs in both the suits.

22. Where the essential requirement for the applicability of Order 2 Rule 2 viz., the identity of the cause of action in the previous suit and subsequent suit is not established, the subsequent suit cannot be said to be barred by Order 2 Rule 2 CPC. Besides identity of cause of action, identity of the plaintiff also be looked into to invoke the bar under this Rule.

23. In case of continuous cause of action or recurring cause of action, bar under Order 2 Rule 2 (3) cannot be invoked.

24. If the cause enables a man to ask for a larger and wider relief than to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. Where the cause of action for seeking a particular relief is not available to a plaintiff at the time of filing the earlier suit, the bar under Order 2 Rule 2 is not applicable.

25. Adverting to the facts, it would be noticed that the defendant has placed on record the certified copy of the Civil Suit Ex.D-1 filed earlier before the court of learned Civil Judge (Senior Division), Kangra wherein the plaintiff prayed for a decree for declaration with permanent injunction against the defendant restraining her from leaving the services of the Kangra Valley Hospital and going to any other hospital or service in violation of the agreement dated 21.10.2007 executed between the plaintiff and defendant until the determination of the agreement as per the terms and conditions contained therein.

26. It was alleged that the defendant was a doctor by profession and had approached the plaintiff and offered her services to treat patient in the hospital, which was accepted and an agreement was thereafter entered into between the parties containing therein certain stipulations and conditions of service. It was alleged that the defendant had not been performing her duties properly and had not been attending the hospital regularly and had been coming at late hours and would leave early as a result thereof the patients remained unattended. The plaintiff had served a legal notice dated 17.3.2010 but the reply thereof was entirely evasive constraining him to file the earlier suit.

27. Now, coming to the facts of the instant suit, the plaintiff has filed the instant suit for recovery of Rs. 63,58,827/- by way of damages alongwith interest on the allegation that the defendant had approached the plaintiff and thereafter had executed an agreement on 9.7.2007. Though, certain additional averments regarding certain machines equipments etc. having been installed by the plaintiff. However, nonetheless the substantive pleading with regard to the service of legal notice and receipt of reply remain the same in both the suits. The cause of action pleaded in para-6 of the earlier suit reads thus:

> *"6. That cause of action arose to the plaintiff in beginning of July 2010 when she threatened to cancel the agreement and to leave plaintiff's hospital and join other hospital or Government institution at Mohal and Mauza Kangra, Tehsil and District Kangra, H.P."*

Whereas, the cause of action as pleaded in the instant suit in para 21 reads thus:

> *"21. That the cause of action accrued to the plaintiff in his favour and against the defendant firstly on dated 31.3.2010 when the defendant left the Kangra Valley Hospital of the plaintiff at her own sweet will without any notice, secondly, on dated 12.7.2010 when the defendant had served a legal notice on the plaintiff whereby the defendant informed the plaintiff that she is not willing to work in Kangra Valley Hospital and due to which the plaintiff has to suffer the financial losses to the tune of Rs.63,58,827/- as the defendant failed to discharge her duty and got indulged in unfair practices, gross negligence and misconduct and the cause of action is still continuing as the defendant has failed to make payment to the tune of Rs.63,58,827/- with interest @ 18% per annum from the date of institution of the present suit."*

28. Ms. Bhavana Datta, learned counsel for the plaintiff would vehemently argue that no doubt the plaintiff had filed the instant suit when the former suit was pending, however, the same was not adjudicated upon merits and therefore nothing prevents the plaintiff from filing the instant suit. She would further argue that once the Court at Kangra admittedly lacked the pecuniary jurisdiction to entertain and try the instant suit, therefore, the instant suit cannot be said to be barred by the principles laid down in Order 2 Rule 2 CPC.

29. On the other hand, Mr. Bhupender Gupta, Senior Advocate assisted by Mr. Ajeet Pal Singh Jaswal, Advocate, learned counsel for the defendant would argue that in case the plaintiff had not chosen to include the relief which was available to him at the time when he filed

the earlier suit, this would be relinquishment of claim which will preclude the plaintiff from filing the subsequent suit irrespective of whether the same is adjudicated on merits or not. He would further argue that merely because the Civil Court at Kangra would not have pecuniary jurisdiction cannot be a ground to claim that the suit would not be barred under the aforesaid provision.

30. Order 2 Rule 2 CPC reads thus:

> ***"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.*
>
> *Explanation.- For the purpose of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."*

31. It is well settled that in order to attract the bar created by this rule, it is necessary that earlier suit should be founded on the same cause of action on which the subsequent suit is based, and if in the earlier suit the plaintiff omitted to sue in respect of or intentionally relinquished any portion of his claim, he would not be entitled to sue subsequently in respect of the portion of his claim so omitted or relinquished. The bar is not avoided by an expression of intention to sue again. Nor is it avoided, by obtaining leave to sue in respect of the portion so omitted. The reason is that the leave contemplated by this section is the leave to sue for one of the several reliefs, referred to in sub rule (3) and it does not relate to ' the portion so omitted' referred to in sub rule (2).

32. Where a person is entitled to more than one relief in respect of the same cause of action, he may sue for all the reliefs or he may sue for one or more of them and reserve his right with the leave of the court to sue for the rest. However, if no such leave is obtained, he will be precluded from afterwards suing for any relief so omitted.

33. Having given my conscious consideration to the legal position as also to the arguments raised by learned counsel for the parties, I have no hesitation to conclude that it is on the same cause of action that the plaintiff has filed the instant suit. The plea as raised in this suit was already available to him at the time when he filed the earlier suit. Rather, the instant suit is based upon a cause of action of earlier date i.e. 31.3.2010, whereas, the earlier suit is based upon a cause of action of a latter date i.e. July, 2010.Having omitted to sue for the relief which was available to the plaintiff, he is now clearly precluded from raising the same. After all, the defendant cannot vexed twice for the same cause of action.

34. At this stage, it may be noticed that there are some decisions of the different High Courts which indicate that what attracted the bar under Order 2 Rule 2 CPC, the earlier suit should have been decided on merits, but was dismissed in default. However, it would not make a difference as eventually what the plaintiff is seeking is re-litigation and the same clearly defeats the salutary purpose of enacting Order 2 Rule 2 which seeks to usurp and prevent this practice and is based on the principle that no person shall be vexed twice for the same cause of action.

35. In view of the aforesaid discussion, preliminary issue No.3 is answered in favour of the defendant by holding that the instant suit is not maintainable in view of Order 2 Rule 2

CPC and the same is accordingly dismissed, so also the pending application(s) if any. The parties are left to bear their own costs. Decree sheet be drawn accordingly.

****

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

CWP No. 1283 of 2006 a/w CWP No. 1788 of 2007.
Judgment reserved on: 10.11.2016
Date of decision: 18.11.2016

1. CWP No. 1283 of 2006

National Insurance Co. Ltd. . ….. Petitioner
Versus
State of Himachal Pradesh and Ors. ….. Respondents

2. CWP No. 1788 of 2007

National Insurance Co. Ltd. ….. Petitioner
Versus
Smt. Dev Mani & Ors. ….. Respondents

Constitution of India, 1950- Article 226- One S, son of C, husband of respondent No.3 and father of respondents No.4 and 5 was engaged as work charged mate by PWD- he had gone by bus to the headquarter and while coming back in a private bus met with an accident- accident report was submitted to the authorities and a copy of the same was sent to the Commissioner- compensation along with interest and penalty was awarded by the Commissioner – in the meantime, claimants filed a petition before MACT, which was allowed –separate review petitions were filed before MACT and Employees Compensation Commissioner – claimants exercised an option to get the compensation from MACT- review petition was dismissed by MACT- held, that once a judgment is pronounced or order made, a Court Tribunal or adjudicating authority becomes functus officio – authorities under Workmen Compensation Act and Motor Vehicles Act are exercising statutory power – power of review is not inherent and must be conferred specifically- a claimant can file a claim petition before the Commissioner or MACT but not before both- claimants had not approached the Commissioner for grant of compensation- he started the proceedings after the receipt of the information of accident – claimants had opted to approach the Tribunal for grant of compensation – recording of statement of Commissioner will not make any difference – the insurance company was liable to indemnify the insured and was rightly held liable. (Para-24 to 43)

Cases referred:

Patel Narshi Thakershi & Ors. vs. Pradyuman Singhji Arjun Singhji, 1971 3 SCC 844
Oriental Insurance Co. Ltd. vs. Kala Devi, 1997 ACJ 17
National Insurance Co. Ltd. vs. Khub Ram & Anr., 2015 4 ILR 488
United India Insurance Co. Ltd. vs. Rajinder Singh & Ors., AIR 2000, SC 1165
United India Insurance Co. Ltd. vs. Bhagat Ram and Anr., 1991 ACJ 288
United India Insurance Co. Ltd. vs. Anipeddi Dhanalakshmi and Ors., 1994 ACJ 98
National Insurance Co. Ltd. vs. Mastan and Anr., 2006 ACJ 528
Oriental Insurance Co. Ltd. vs. Sudip Ranjan Deb and others, 2009 ACJ 22
Gomti Bai and Ors. vs. Dyshyant Kumar and Ors., 2012 ACT 2069
Gulamrasul Rehman Malek vs. Gujarat State Road Transport Corporation, 2015 ACJ 20
United India Insurance Co. Ltd. vs. Anthony Selvam and another, 2015 ACJ 1936

For the petitioner(s): Ms. Devyani Sharma, Advocate, in CWPs No. 1283 of 2006 and CWP No. 1788 of 2007.

For the respondents: Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals with Mr. J.S. Guleria, Assistant Advocate General for respondents No. 1, 2 and 7 in CWP No. 1283 of 2006 and for respondents No. 5 and 6 in CWP No. 1788 of 2007.

Mr. Jagdish Thakur, Advocate, for respondent No. 3 to 5 in CWP No. 1283 of 2006 and for respondents No. 1 to 3 in CWP No. 1788 of 2007.

Mr. Satyen Vaidya, Senior Advocate, with Mr. Varun Chauhan, Advocate, for respondents No. 6 in CWP No. 1283 of 2006 and for respondent No. 4 in CWP No. 1788 of 2007.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since common question of law and facts arise for consideration in these appeals, therefore, they were taken up together for hearing and are being disposed of by way of this common judgment.

2. The brief facts as pleaded are that one Shyam Sukh son of Shri Chhopal Sukh, who was the husband of respondent No. 3 and father of respondents No. 4 and 5 was engaged as work-charged Mate by the Public Works Department in Karchham Sub Division. On 15.6.2004, the deceased had gone by Bus to the headquarter and while coming back in a private bus owned by respondent No. 6 and insured with the petitioner Company, he met with an accident as the bus fell down in Sutluj river and was washed away. The dead body of the deceased was found near Nathpa on 6.7.2004. The employer of the deceased i.e., the Assistant Engineer, H.P.P.W.D, Karchham Sub Division submitted the accident report to the authorities concerned and copy of the same was also sent to the Court of learned Commissioner under the Workmen's Compensation Act-cum-Land Acquisition Collector (in short 'Commissioner') vide endorsement dated 16.6.2004.

3. The claimants thereof filed an application for compensation in Form-F under Rule 20 of the Workmen's Compensation Rules and the said petition was not resisted by respondents No. 1 and 2 rather the liability was admitted on their behalf.

4. Smt. Dev Mani - respondent No. 3 appeared as her own witness before the Commissioner and submitted various documents in support of her claim. The claim was admitted by the Udai Ram, Junior Engineer of the Division concerned and it was admitted that the compensation be paid to the claimants. After recording the evidence, learned Commissioner vide his award dated 23.2.2005 allowed the petition by awarding a sum of Rs. 3,38,880/- alongwith interest at the rate of 12% per annum w.e.f. 15.6.2004 to 23.2.2005 amounting to Rs. 28,299/- and directed the amount to be deposited within two months failing which the award was to carry interest at the rate of 12% till the same was deposited and in addition thereto a further sum not exceeding 50% of such amount was to be recovered as penalty.

5. In the interregnum i.e. before actually filing the claim petition before the Commissioner, the claimants preferred a petition under Section 166 of the Motor Vehicle Act (in short ' M.V. Act') before the Motor Accident Claim Tribunal (in short 'Tribunal'), Kinnaur, which was registered as MACT Case No. 51 of 2004. This petition was filed with respect to the same accident and with regard to the compensation for the death of Shri Shyam Sukh.

6. This petition came to be decided on 15.3.2015 whereby a compensation of Rs. 3,47,040/- was awarded in favour of the claimants and the same was directed to be deposited within two months from the date of award failing which it was to carry simple interest at the rate of 9% per annum from the date of award till its realization. The award was passed against the owner of the vehicle i.e. respondent No. 6 on account of the vehicle being insured with the petitioner. It was ultimately the petitioner, who was held liable to indemnify the insured.

7. In the later case the statement of the claimant was recorded on 28.2.2005 and even till then claimant did not disclose that the statement had already been recorded before the Commissioner under the Workmen's Compensation Act. That being so, the petitioner was unaware of any award having been passed by the Commissioner under the Act.

8. On coming to know about the award, the petitioner filed review petition before the Motor Accident Claim Tribunal. In the meanwhile, the State of Himachal Pradesh i.e. respondent No. 2 also filed review before the Commissioner for the review of the award dated 23.2.2005 on the ground that petitioners have already been awarded compensation by the Commissioner.

9. On 20.5.2006, the Commissioner recorded the statement of the claimant regarding the option of claim and the claimants by way of a joint petition under Section 151 C.P.C. stating therein that they wish to receive compensation under the award passed by the Tribunal and not from the Commissioner. Commissioner on the basis of such statement passed an order on 26.8.2006, which reads thus:-

> "26.8.2006
> Case called.
> Present: Shri Liak Ram Claimant
> Shri Rajiv Kumar JE PWD for PWD
> Shri H.K. Sharma, for NIC.
>
> The claimants stated on oath and also through their reply that they have preferred claim under MACT-cum-District Judge, Rampur and do not want to get compensation from Commissioner WC Act, though the award under WC Act has already been announced on 23.2.2005 in favour of the claimants. But the claimants do want to get compensation under MACT from D.J., Rampur. The claimants cannot get claim-compensation from both the forum. Thus, in view of the option of claimants the award passed by this Forum is directed not to be executed or enforced. The amount of money deposited by the respondent be returned to them through Bank draft.
>
> Announced.
>
> Sd/-
> Commissioner,
> Workmen's Compensation Act."

It is this order which found the subject matter of CWP No. 1283 of 2006.

10. After filing of the aforesaid writ petition CWP No. 1283 of 2006, the review petition filed by the petitioner came up for consideration before the Tribunal, however, the Tribunal vide its order dated 3.7.2007 held the review petition to be not maintainable and accordingly dismissed the same, which has given rise to CWP No. 1788 of 2007.

11. As regards CWP No. 1283 of 2006, the order passed by the Commissioner has been assailed primarily on the ground that it had no jurisdiction to entertain the review petition. In addition to that, it is averred that since the claimants themselves had elected to resort to the remedy available under the Act, it was this award which was binding upon the claimants, more particularly, when it had been passed earlier to the award passed by the Tribunal and was even otherwise more beneficial to the claimants.

12. As regards CWP No. 1788 of 2007, it is directed against the order passed by the Tribunal on 3.7.2007 and it is averred that the view of the Tribunal that it had no jurisdiction to entertain the review petition is totally based on misconception of law.

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

13. It is more than settled that normal principle of law is that once a judgment is pronounced or order made, a Court, Tribunal or adjudicating authorities becomes '*functus-officio*' ceases to have control over the matter, such judgment or order is 'final' and cannot be altered, changed, verified or modified.

14. It is not in dispute that both the authorities below i.e. Commissioner and Tribunal are specifically constituted under the Act and are not "having plenary powers" but exercising statutory power as conferred under the provisions of the respective Act under which they have been so constituted. They, therefore, cannot act outside or *de hors* the Act nor can exercise powers not expressly and specifically conferred by law.

15. It is well settled that the power of review is not an inherent power. Right to seek review of an order is neither natural nor fundamental right of any aggrieved party. Such power must be conferred by law, therefore, if there is no power of review the order, cannot be reviewed.

16. In **Patel Narshi Thakershi & Ors. vs. Pradyuman Singhji Arjun Singhji, 1971 3 SCC 844**, while dealing with the provisions of the Saurashtra Land Reforms Act, 1951 and reference to order 47 Rule 1 of the Code of Civil Procedure, 1908, the Hon'ble Supreme Court held that there is no inherent power of review with the adjudicating authorities. It was held that it is well settled that "the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implications. No provision in the Act was brought to the notice from which it could be covered that the government had power to review its own order. If the government had no power to review its own order, it is obvious that its delegate could have reviewed its order."

17. A Division Bench of this Court in **Oriental Insurance Co. Ltd. vs. Kala Devi, 1997 ACJ 17** has held that the Commissioner under the Act has no power to review his order. It is apt to reproduce the relevant observations, which reads as under:-

> "10. There is yet another aspect of the case. Admittedly, the claim petition filed by the claimants was disposed of on June 12, 1984 as having been compromised between the parties whereby the claimants had accepted the compensation of Rs. 10,000 in full and final settlement of their claim. The order dated June 12, 1984, dismissing the claim petition as having been compromised was reviewed by the compensation officer and fresh assessment of compensation was made.
>
> 11. The question which thus arises for consideration is whether the Commissioner under the Act has the power of review.
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> 12. A Division Bench of this Court in East India Hotels Ltd. v. Union of India and Ors., C. W. P. No. 155 of 1986, decided on December 29, 1995, while dealing with the power of competent authority to review its order under the provisions of Requisitioning and Acquisition of Immovable Property Act, 1952 by following the ratio laid down by the Apex Court in Patel Narshi Thakershi and Ors. v. Pradyumansinghji Arjunsinghji, AIR 1970 SC 1273, has held that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication.
>
> 13. We have perused the provisions of the Act and we are of the opinion that even by implication it cannot be said that the Commissioner under the Act had the power to review. Rather sub-rule (2) of Rule 32 of Workmen's Compensation Rules, 1924 prohibits the review by the Commissioner. This sub-rule provides as under:--
>
> > *"The Commissioner, at the time of signing and dating his judgment, shall pronounce his decision, and thereafter no addition or alteration shall be made to the judgment other than the correction of clerical or arithmetical mistake arising from any accidental slip or omission."*

18. The ratio laid down in the aforesaid judgment was thereafter followed by this Court in **National Insurance Co. Ltd. vs. Khub Ram & Anr., 2015 4 ILR 488**.

19. Earlier to this, a Division Bench of this Court in LPA No. 109 of 2007, titled **Rajinder & Ors. Vs. Gokal Chand & Anr., decided on 2.5.2015,** reiterating the ratio laid down by the Hon'ble Supreme in **Patel Narshi Thakreshi's case (supra)** that the powers of review is not inherent power observed as under:-

> ***"22.*** That apart, the order passed by the Deputy Commissioner is factually wrong because while construing clause-11 of the Scheme, he failed to make a note of the fact that the embargo prescribed for transfer of the land under the Scheme as per notification No. Rev.2-A(3)11/77 dated 11.9.1980 was 20 years as against 15 years. Therefore, once it is concluded that the proforma respondent could not have transferred the land in favour of appellants within the period of 20 years, the Deputy Commissioner had no other option but should have cancelled the land allotted in favour of the appellants and should have thereafter recommended to the government for the resumption of the land.
>
> ***23.*** The order passed by the Deputy Commissioner in the subsequent review petition cannot otherwise be sustained because it is well settled that power of review is not an inherent power. Right to seek review of an order is neither natural nor fundamental right of an aggrieved party. Such power must be conferred by the law. If there is no power of review, the order cannot be reviewed.
>
> ***24.*** The law on the subject has been succinctly dealt with by the Hon'ble Supreme Court in **Kalabharti Advertising** vs. **Hemant Vimalnath Narichania and others (2010) 9 SCC 437** in the following terms:-
>
>> *"12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed is ultra-vires, illegal and without jurisdiction. (vide: Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar & Anr., AIR 1965 SC 1457; and Harbhajan Singh v. Karam Singh & Ors., AIR 1966 SC 641).*
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>> *13. In Patel Narshi Thakershi & Ors. v. Shri Pradyuman Singhji Arjunsinghji, AIR 1970 SC 1273; Maj. Chandra Bhan Singh v. Latafat Ullah Khan & Ors., AIR 1978 SC 1814; Dr. Smt. Kuntesh Gupta v. Management of Hindu Kanya Mahavidhyalaya, Sitapu (U.P.) & Ors., AIR 1987 SC 2186; State of Orissa & Ors. v. Commissioner of Land Records and Settlement, Cuttack & Ors., (1998) 7 SCC 162; and Sunita Jain v. Pawan Kumar Jain & Ors., (2008) 2 SCC 705, this Court held that the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication and in absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in absence of any statutory provision for the same is nullity being without jurisdiction.*
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>> *14. Therefore, in view of the above, the law on the point can be summarised to the effect that in absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification/ modification/correction is not permissible."*
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> ***25.*** There is yet another reason why the subsequent order dated 20.11.2000 passed by the Deputy Commissioner in the review petition cannot be sustained. The Deputy Commissioner after pronouncing, notifying and communicating the initial order dated 26.6.2000 became *functus officio* and could not thereafter revise/ review/ modify the said order. It is only the higher forum that could have

varied the order. In observing so, we draw support from the following observations of Hon'ble Supreme Court in **State Bank of India and others** vs. **S.N.Goyal (2008) 8 SCC 92,** wherein it has been held as follows:-

> *"25. The learned counsel for respondent contended that the Appointing Authority became functus officio once he passed the order dated 18.1.1995 agreeing with the penalty proposed by the Disciplinary Authority and cannot thereafter revise/review/modify the said order. Reliance was placed on the English decision Re : VGM Holdings Ltd, reported in 1941 (3) All. ER page 417 wherein it was held that once a Judge has made an order which has been passed and entered, he becomes functus officio and cannot thereafter vary the terms of his order and only a higher court, tribunal can vary it. What is significant is that decision does not say that the Judge becomes functus officio when he passes the order, but only when the order passed is 'entered'. The term 'entering judgment' in English Law refers to the procedure in civil courts in which a judgment is formally recorded by court after it has been given.*
>
> *26. It is true that once an Authority exercising quasi judicial power, takes a final decision, it cannot review its decision unless the relevant statute or rules permit such review. But the question is as to at what stage, an Authority becomes functus officio in regard to an order made by him. P. Ramanatha Aiyar's Advance Law Lexicon (3rd Edition, Vol.2 Pages 1946-47) gives the following illustrative definition of the term 'functus officio' : "Thus a Judge, when he has decided a question brought before him, is functus officio, and cannot review his own decision."*
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> *27. Black's Law Dictionary (Sixth Edition Page 673) gives its meaning as follows :*
>
> *"Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore, of no further force or authority".*
>
> *28. We may first refer to the position with reference to civil courts. Order XX of Code of Civil Procedure deals with judgment and decree. Rule 1 explains when a judgment is pronounced. Subrule*
>
> *(1) provides that the Court, after the case has been heard, shall pronounce judgment in an open court either at once, or as soon thereafter as may be practicable, and when the judgment is to be pronounced on some future day, the court shall fix a day for that purpose of which due notice shall be given to the parties or their pleaders. Sub-rule (3) provides that the judgment may be pronounced by dictation in an open court to a shorthand writer (if the Judge is specially empowered in this behalf). The proviso thereto provides that where the judgment is pronounced by dictation in open court, the transcript of the judgment so pronounced shall, after making such corrections as may be necessary, be signed by the Judge, bear the date on which it was pronounced and form a part of the record. Rule 3 provides that the judgment shall be dated and signed by the Judge in open court at the time of pronouncing it and when once signed, shall not afterwards be altered or added to save as provided by section 152 or on review. Thus where a judgment is reserved, mere dictation does not amount to pronouncement, but where the judgment is dictated in open court, that itself amounts to pronouncement. But even after such pronouncement by open court dictation, the Judge can make corrections before signing and dating the judgment. Therefore, a Judge becomes functus officio when he pronounces, signs and dates the judgment (subject to section 152 and power of review). The position is different with*

reference to quasi judicial authorities. While some quasi judicial tribunals fix a day for pronouncement and pronounce their orders on the day fixed, many quasi judicial authorities do not pronounce their orders. Some publish or notify their orders. Some prepare and sign the orders and communicate the same to the party concerned. A quasi judicial authority will become functus officio only when its order is pronounced, or published/notified or communicated (put in the course of transmission) to the party concerned. When an order is made in an office noting in a file but is not pronounced, published or communicated, nothing prevents the Authority from correcting it or altering it for valid reasons. But once the order is pronounced or published or notified or communicated, the Authority will become functus officio. The order dated 18.1.1995 made on an office note, was neither pronounced, nor published/notified nor communicated. Therefore, it cannot be said that the Appointing Authority became functus officio when he signed the note on dated 18.1.1995."

20. Ms. Devyani Sharma, learned counsel for the petitioner vehemently contended that though the application filed before the Tribunal may have been nomenclatured as review but in substance it was for recalling of the award as the same had been obtained by practicing fraud and it is more than settled that every Court/Tribunal has power to recall such order.

21. In order to buttress her aforesaid submissions, she would rely upon the following observations of the Hon'ble Supreme Court in the **United India Insurance Co. Ltd. vs. Rajinder Singh & Ors., AIR 2000, SC 1165**, wherein it was held as under:-

> "16. It is unrealistic to expect the appellant company to resist a claim at the first instance on the basis of the fraud because appellant company had at that stage no knowledge about the fraud allegedly played by the claimants. If the Insurance Company comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that time the award was already passed, it would not be possible for the company to file a statutory appeal against the award. Not only because of bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.
>
> 17. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No Court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim."

22. On the strength of the aforesaid judgment , it is vehemently contended by the learned counsel for the petitioner that on 15.6.2004 Shyam Sukh the predecessor-in-interest of the claimants met with an accident and immediately on 16.6.2004 information regarding the accident had already been imparted by the Department to the Commissioner and therefore, it would be 16.6.2004 and not any subsequent date when the claimants may have actually filed the application for compensation in Form-F under Rule 20, (which admittedly had been filed in August, 2004) that would be date to determine institution of proceedings for compensation by claimants for the purpose of determining the 'option' as envisaged under Section 167 of M.V. Act.

23. Whereas, Shri J.S. Guleria, learned counsel for the State i.e. Respondents No. 1 and 2 contended that undoubtedly the respondents had reported the factum of accident to the Commissioner concerned on 16.6.2004 but the claim petition was actually filed by the claimants somewhere in late August, by which time the claimant has already filed claim petition before the Tribunal on 16.8.2004.

24. Therefore, in such circumstances, one must first consider the starting point or *terminus-a-quo* visualised and prescribed under the Act. Can the proceedings be said to have commenced on mere receipt of the information from the employer regarding the factum of accident and consequent notice thereupon to the claimants or is it the date when the claimants actually filed the claim petition in Form-F under Rule 20 of the Workmen's Compensation Rule before the Commissioner under the Act. It is only after this question is answered and this Court comes to the conclusion that it is 16.4.2004, which is the *terminus-a-quo*, that the further question as to whether the claimants had obtained the award by fraud before the Tribunal would alone arise for consideration, as admittedly the claim petition therein had actually been filed earlier to the petition having actually been filed before the Commissioner in Form-F under Rule 20.

25. However, before answering the question, it would be necessary to refer Section 167 of the M.V. Act, which reads thus:-

> "**167. Option regarding claims for compensation in certain cases**- Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both."

26. A perusal of the aforesaid Section makes it evidently clear that the same gives an option to claimant for claiming a compensation either before the Commissioner or before the Tribunal, but obviously both the remedies are not available at the same time.

27. The learned counsel for the petitioner would vehemently argue that the proceedings before the Commissioner are deemed to be commenced when he issued notice to the claimants and in response thereto the claimants who were not under any obligation still choose to file the claim petition. Thus, the claim petition relate back and would be deemed to have been filed on 16.6.2004. In support of her contention reliance has been placed upon the following judgments:-

(i) In **United India Insurance Co. Ltd. vs. Bhagat Ram and Anr., 1991 ACJ 288**, this Court was dealing with the case wherein a claim for compensation had been filed before the Tribunal and another claim on the same cause had also been filed before the Commissioner on account of injuries sustained in an accident and the injured stated that he neither put in appearance nor filed any application before the Commissioner and had further stated that he had neither received any amount nor intended to receive any amount under the Workmen's Compensation Act and this Court after taking notice of the fact that there was no evidence that the injured himself had exercised this option by filing an application before the Commissioner, the application before the Tribunal was maintainable. It is apt to reproduce relevant observations, which reads as under:-

> "6. On coming to know of this award, Bhagat Ram filed an application under Section 110-AA of the Motor Vehicles Act for permitting him to pursue the accident claim petition. In his application, he had clearly stated that neither he had filed any application for claiming compensation under the Workmen's Compensation Act, Nurpur, nor he had appeared before him. He further made it clear that neither he received any amount nor he intended to receive any amount under the Workmen's Compensation Act. The United India Insurance Co. Ltd. filed its reply to the application and asserted that the claim petition under the Workmen's Compensation Act was filed by Bhagat Ram and he had the knowledge of its proceedings and the award of the Commissioner.
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> 12. In the present case, despite their preliminary objection raised in the written statement, the United India Insurance Co. Ltd. did not ask for the issue that the

claim petition was barred under Section 110-AA. Their pleadings in this regard were very vague. Even when Bhagat Ram came in the witness-box, they did not care to cross-examine him at all. Though they filed the award dated 30.3.1988, yet they did not care to bring it on record. They did not lead any evidence to show that it was Bhagat Ram who has filed a claim petition before the Commissioner under the Workmen's Compensation Act, Nurpur and that he had knowledge of its pendency or award dated 30.3.1988. When the application under Section 110-AA of Bhagat Ram was allowed and he was permitted to proceed with his claim petition under the Motor Vehicles Act vide order dated 26.8.1988, the United India Insurance Co. Ltd. was yet to produce its evidence but neither it challenged the order dated 26.8.1988 in a higher court nor did it lead any evidence before the Motor Accidents Claims Tribunal to prove that Bhagat Ram had, in fact, exercised his option for the remedy under the Workmen's Compensation Act by filing the claim petition before the Commissioner under the Workmen's Compensation Act, Nurpur. In these circumstances, there was no reason to disbelieve the specific averment of Bhagat Ram made in his application under Section 110-AA of the Motor Vehicles Act, 1939 and his statement on oath that he did not file any claim petition under the Workmen's Compensation Act.

13.1 have called the record of the Commissioner under the Workmen's Compensation Act, Nurpur and gone through it carefully. The application is dated 15.11.1986. At its end the words 'Bhagat Ram' are written at two places. There is also one power of attorney on record which is dated 17.11.1986 and the words 'Bhagat Ram' are also written on it at the place meant for the signatures of a client. The application was presented before the S.D.M. (C)-cum-Commissioner under the Workmen's Compensation Act on 28.11.1986 not by Bhagat Ram in person but by S.P. Gupta, Advocate, Nurpur. At no stage did Bhagat Ram appear before the Commissioner under the Workmen's Compensation Act, Nurpur. A reply to the claim petition was filed by M/s. Jagat Ram Amrik Chand through its partner, Kulbhushan Sood, who had been attending the proceedings on some dates in person. The reply to the claim petition on behalf of United India Insurance Co. Ltd. was filed through Mr. P.C. Sharma, Advocate, Nurpur. Though issues were framed but no evidence was led as counsel for United India Insurance Co. Ltd., Mr. P.C. Sharma, Advocate, Nurpur, made a statement that compensation might be awarded according to the Schedule under the Workmen's Compensation Act. Both the United India Insurance Co. Ltd. and M/s. Jagat Ram Amrik Chand admitted the status of Bhagat Ram as workman and also his wages at Rs. 600/- per month. Had the United India Insurance Co. Ltd. cared to bring the application and the power of attorney on record of the Motor Accidents Claims Tribunal and proved these documents, Bhagat Ram would have had an opportunity to admit or deny whether these bore his signatures or not. He might have explained the circumstances under which he signed those documents.

14. Therefore, from the record of the Commissioner under the Workmen's Compensation Act, it is proved on record that Bhagat Ram did not select the remedy under the Workmen's Compensation Act and his claim petition under the Motor Vehicles Act was maintainable. I have no hesitation to hold that it is possible that M/s. Jagat Ram Amrik Chand might have got filed the claim petition under the Workmen's Compensation Act by getting the signatures of Bhagat Ram on a blank paper as well as on power of attorney by not disclosing to him the purpose for which his signatures were being obtained. A perusal of the application dated 15.11.1986 clearly shows that the words 'Bhagat Ram' were written first and the application was typed on it later. The words 'Bhagat Ram' are written at the end of the paper on which the application is typed, whereas the

application ends earlier and the place for signatures of the applicant is also little above where the words 'Bhagat Ram' are written."

(ii) In **United India Insurance Co. Ltd. vs. Anipeddi Dhanalakshmi and Ors., 1994 ACJ 98**, the High Court of Andhra Pradesh was confronted with the situation where on account of the death of a motor cyclist in accident, the claimant approached the Commissioner and obtained compensation and had also filed the claim before the Tribunal and, therefore, the question arose whether the claim petition before the Tribunal was maintainable. It was answered in negative by holding that person was not entitled to compensation before the Tribunal and could also not claim difference of compensation granted by the Tribunal minus the amount of compensation granted by the Commissioner.

(iii) In **National Insurance Co. Ltd. vs. Mastan and Anr., 2006 ACJ 528**, the Hon'ble Supreme Court was dealing with the question with regard to choice of forum available under Section 167 and Hon'ble Mr. Justice P.K. Balasubramanyan in a separate Court judgment held that under Section 167 of the M.V. Act, a claimant having opted to proceed under Workmen's Compensation Act cannot take recourse or draw inspiration from any of the provisions of the MACT Act, 1988 other than what is specifically said by Section 167 of the M.V. Act.

It was further held that since the claimant had not chosen to withdraw his claim under the Workmen's Compensation Act before it reached the point of judgment, with a view to approach Motor Accident Claim Tribunal and had pursued his claim before the Commissioner till the award was passed, therefore, he was not entitled to invoke the provisions of the MACT Act. The relevant observations reads thus:-

> "33. On the establishment of claims Tribunal in terms of Section 165 of the Motor Vehicle Act, 1988, the victim of a motor accident has a right to apply for compensation in terms of section 166 of that Act before that Tribunal. On the establishment of the Claims Tribunal, the jurisdiction of the civil Court to entertain a claim for compensation arising out of a motor accident, stands ousted by section 175 of that Act. Until the establishment of the Tribunal, the claim had to be enforced through the civil court as a claim in tort. The exclusiveness of the jurisdiction of the Motor Accidents Claims Tribunal is taken away by section 167 of Motor Vehicles Act in one instance, when the claim could also fall under the Workmen's Compensation Act, 1923. That Section provides that death or bodily injury arising out of a motor accident which may also give rise to a claim for compensation under the Workmen's Compensation Act, can be enforced through the authorities under that Act, the option in that behalf being with the victim or his representative. But section 167 makes it clear that a claim could not be maintained under both the Acts. In other words, a claimant who becomes entitled to claim compensation both under Motor Vehicles Act, 1988 and under the Workmen's Compensation Act, because of a motor vehicle accident has the choice of proceeding under either of the Acts before the concerned forum. By confining the claim to the authority or Tribunal under either of the Acts, the legislature has incorporated the concept of election of remedies, insofar as the claimant is concerned. In other words, he has to elect whether to make his claim under the Motor Vehicles Act, 1988 or under the Workmen's Compensation Act, 1923. The emphasis in the section that a claim cannot be made under both the enactments, is a further reiteration of the doctrine of election incorporated in the scheme for claiming compensation. The principle "where, either of two alternative Tribunals are open to a litigant, each having jurisdiction over the matters in dispute and he resorts for his remedy to one of such Tribunals in preference to the other, he is precluded, as against his opponent, from any subsequent recourse to the latter" [See R. v. Evans, (1854) 3 E&B 363] is fully incorporated in the scheme of section 167 of the Motor Vehicles Act, precluding the claimant

who has invoked Workmen's compensation Act from having resort to the provisions of Motor Vehicles Act, except to the limited extent permitted therein. The claimant having resorted to the Workmen's compensation Act, is controlled by the provisions of that Act subject only to the exception recognized in section 167 of the Motor Vehicles Act.

34. On the language of section 167 of the Motor Vehicles Act and going by the principle of election of remedies, a claimant opting to proceed under the workmen's compensation Act cannot take recourse to or draw inspiration from any of the provisions of the Motor Vehicles Act, 1988, other than what is specifically saved by section 167 of the Act. Section 167 of the Act vies a claimant even under the Workmen's Compensation Act, 1923 the right to invoke the provisions of Chapter X of the Motor Vehicles Act, 1988. Chapter X of the Motor Vehicles Act, 1988 deals with what is known as 'no fault' liability in case of an accident. Section 140 of Motor Vehicles Act, 1988 imposes a liability on the owner of the vehicle to pay the compensation fixed therein, even if no fault is established against the driver or owner of the vehicle. Sections 141 and 142 deal with particular claims on the basis of no fault liability and section 143 re-emphasises what is emphasized by section 167 of the Act that the provisions of Chapter X of the Motor Vehicles Act, 1988, would apply even if the claim is made under the Workmen's Compensation Act. Section 144 of the Act gives the provisions of Chapter X of the Motor Vehicles Act, 1988.

35. Coming to the facts of the case, the claimant has not chosen to withdraw his claim under the Workmen's Compensation Act before it reached the point of judgment, with a view to approach the Motor Accidents Claims Tribunal. What he has done is to pursue his claim under Workmen's Compensation Act till the award was passed and also to invoke a provision of the Motor Vehicles Act, not made applicable to claims under Workmen's Compensation Act by Section 167 of the Motor Vehicles Act. Claimant-respondent is not entitled to do so. The High Court was in error in holding that he is entitled to do so."

(iv) In **Oriental Insurance Co. Ltd. vs. Sudip Ranjan Deb and others, 2009 ACJ 22**, the Gauhati High Court was dealing with a case where the claimant had exercised its option under Section 167 by approaching the Commissioner and the award passed in his favour and even the appeal against the same had been dismissed and subsequently approached the Tribunal who allowed the compensation by directing the Insurance Company to pay the amount to the claimant after deducting the amount already received by him under Workmen's Compensation Act. The question then arose as to whether the claimant who had claimed and had been paid compensation under the Act could subsequently after the award passed by the Commissioner having attained finality exercise option to abandon his claim application for proceeding under the MACT Act. Obviously, the answer to the said proposition was in negative by holding that the claimant had already exercised his option and the same was not available till at a later stage. It was apt to reproduce the relevant observations, which reads thus:

"[8] Thus, Section 13 of Workmen's Compensation Act recognises the claim of the employer to be indemnified for the compensation paid by him to his injured/dead employee by the tortfeasor, who was liable to pay compensation in respect of the same injury. This takes care of the apprehension of learned Counsel for claimant-respondent that the tortfeasor would escape his liability under both the Acts if the injured is barred from claiming compensation from both his employer and the tortfeasor. Section 13 of Workmen's Compensation Act clearly indicates that there is no statutory scheme whittling down the liability of the tortfeasor arising under the Motor Vehicles Act even when compensation is paid by the employer under the provisions of Workmen 's Compensation Act. By virtue of this provision, the employer who has paid the compensation under the Workmen's Compensation Act, will step into the shoes of the claimant and be entitled to

recover that much amount from the tortfeasor. The tortfeasor cannot, therefore, take the plea that he cannot be held liable for compensation since the injured has already claimed and was paid the compensation by his employer under Workmen's Compensation Act. This is what has been explained by Gujarat High Court in Mahebubanbibi s case,2001 4 GauLR 2950, the case cited by the learned Counsel for claimant-respondent; how this can be of any assistance to his case is incomprehensible. Section 13 of Workmen's Compensation Act only enables the employer to get himself indemnified for the compensation paid by him to the injured employee from a stranger including the tortfeasor and does not confer any right upon the injured employee himself to proceed against the insurance company for recovery of damages. However, it is for the employer to proceed against the tortfeasor in an independent proceeding for recovery of the compensation already paid by him to the injured by invoking Section 13 of Workmen's Compensation Act. Thus, the provision of Section 13 of the Workmen's Compensation Act is apparently engrafted in the statute book to prevent unintended benefit to the tortfeasor of retaining the portion of compensation which was paid by the employer. In my judgment, the foregoing discussion completely dealt with the contention of the learned Counsel for the claimant-respondent on the possibility of the tortfeasor from escaping his liability to pay compensation already received by the employee from his employer.

[9] The next question which falls for consideration is whether the claimant-respondent, who has been paid compensation under the Workmen's Compensation Act in terms of the judgment/award dated 18.3.2004 of the learned Commissioner in W.C. Case No. M.18/WC/20 of 2003, can at this stage exercise the option to abandon his claim petition under the Workmen's Compensation Act and proceed with his claim petition under Section 166 of Motor Vehicles Act? Section 167 of Motor Vehicles Act obviously does not prescribe the period within which the person entitled to compensation should exercise his option to claim compensation under either of the two enactments. It may be noted that the order/award dated 18.3.2004 passed by the learned Commissioner has now attained finality when the appeal against the said order was dismissed by this Court in its order dated 2.6.2004 in R.F.A. No. 1 (SH) of 2004. Therefore, no further proceeding is pending before any Tribunal or court in connection with the claim petition filed by the claimant-respondent under the provisions of Workmen's Compensation Act. It is only with respect to the claim petition filed by the claimant-respondent under the Motor Vehicles Act that an appeal is pending before this Court, namely, this appeal filed by the appellant insurance company herein. The appeal before the High Court is a continuation of the original proceeding. In the instant case, as noted earlier, not even an appeal in respect of the claim petition under Workmen's Compensation Act is pending, though the appeal in respect of the claim petition under Motor Vehicles Act is pending before this Court. In this view of the matter, there is no difficulty in holding that the claimant-respondent has already exhausted the option open to him to elect his claim petition under the Motor Vehicles Act. No more choice is open to him at this stage. If both the claim petitions under the two Acts are still pending for adjudication either at the appellate stage or otherwise, it can somehow be said that the claimant-respondent has the choice to, opt for one of the pending proceedings. This is sufficiently indicated by the Apex Court in Mastan’s case, 2006 ACJ528 (SC), at para 35 of the judgment as under:

“(35) Coming to the facts of the case, the claimant has not chosen to withdraw his claim under the Workmen’s Compensation Act before it reached the point of judgment, with a view to approach the Motor Accidents Claims Tribunal. What he has done is to pursue his claim under Workmen’s Compensation Act till

> the award was passed and also to invoke a provision of the Motor Vehicles Act, not made applicable to claims under Workmen's Compensation Act by Section 167 of the Motor Vehicles Act. Claimant-respondent is not entitled to do so. The High Court was in error in holding that he is entitled to do so."
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> (Emphasis added)

(v) In **Gomti Bai and Ors. vs. Dyshyant Kumar and Ors., 2012 ACT 2069**, a Division Bench of the Chhattisgarh High Court while dealing with the case of election under Section 167 of the M.V. Act, 1988, wherein the claimant had approached the Commissioner and had been awarded compensation which was duly received by the dependents of the deceased workmen. The dependants thereafter filed claim before the Tribunal under Section 167 of the M. V. Act, contended therein that they are entitled to claim compensation because the employer had deposited the compensation amount before the Commission on its own, whereas no application under Section 10 of the Act had been filed by them. The question that arose was whether in such circumstances the claim petition before the Tribunal was maintainable, more particularly, after the claimants had already received the compensation under the Workmen's Compensation Act and the question was answered in negative by applying the doctrine of estoppel. It is apt to reproduce relevant observations, which reads thus:-

> "5. Learned counsel for appellant, placing reliance on judgment of Bombay High Court in the matter of **Santabai Parshuram Mule v. Sharda Prasadsingh, 1992 ACJ 270 (Bombay)**, contended that even after receiving the claim under the 1923 Act, the claimants are entitled to move under Section 166 of 1988 Act, because before the Commissioner the employer, of its own, had deposited the amount and no application under Section 10 of 1923 Act was moved by the claimants-appellants. On the other hand, learned counsel for the respondent has supported the impugned order by placing reliance on provision contained under Section 167 of 1988 Act.
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> 8. Dealing with the principle 'doctrine of election' as contained in section 167 of the 1988 Act, the Hon'ble Supreme Court in the matter of National Insurance Co. Ltd. v. Mastan, 2006 ACJ 528, has held thus in paras 21, 22, 23, 24, 26 and 27:
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> > (21) Under the 1988 Act, the driver of the vehicle is liable but he would not be liable in a case arising under the 1923 Act. If the driver of the vehicle has no licence, the insurer would not be liable to indemnify the insured. In a given situation, the Accidents Claims Tribunal, having regard to its rights and liabilities vis-a-vis the third person, may direct the insurance company to meet the liabilities of the insurer, permitting it to recover the same from the insured. The 1923 Act does not envisage such a situation. Role of reference by incorporation has limited application. A limited right to defend a claim petition arising under one statute cannot be held to be applicable in a claim petition arising under a different statute unless there exists express provision therefor. Section 143 of the 1988 Act makes the provisions of the 1923 Act applicable only in a case arising out of no fault liability, as contained in Chapter X of the 1988 Act. The provisions of section 143, therefore, cannot be said to have any application in relation to a claim petition filed under Chapter XI thereof. A fortiori in a claim arising under Chapter XI, the provisions of the 1923 Act will have no application. A party to a lis, having regard to the different provisions of the two Acts, cannot enforce liabilities of the insurer under both the Acts. He has to elect for one.
> >
> > (22) Section 167 of the 1988 Act statutorily provides for an option to the claimant stating that where the death of or bodily injury to any person gives rise to a claim for compensation under the 1988 Act as also the 1923 Act, the person entitled to compensation may without prejudice to

the provisions of Chapter X claim compensation under either of those Acts but not under both. Section 167 contains a non obstante clause providing for such an option notwithstanding anything contained in the 1923 Act.

(23) The 'doctrine of election' is a branch of 'rule of estoppel', in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.

(24) In Nagubai Ammal v. B. Shama Rao, 1956 AIR(SC) 593 it was stated:

It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto.

(26) Thomas, J. in P.R. Deshpande v. Maruti Balaram Haibatti, 1998 6 SCC 507, stated the law thus:

(8) The doctrine of election is based on the rule of estoppel - the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

[See also Devashayam v. P. Savithramma, 2005 7 SCC 653.

(27) Respondent No. 1 having chosen the forum under the 1923 Act for the purpose of obtaining the compensation against his employer cannot now fall back upon the provisions of the 1988 Act therefor, inasmuch as the procedure laid down under both the Acts are different save and except those which are covered by section 143 thereof.

(Emphasis supplied)

9.In view of the law laid down by the Hon'ble Apex Court in the above referred judgment of National Insurance Co. Ltd. v. Mastan, 2006 ACJ 528 (SC) and applying the said ratio in the facts of the present case wherein the appellant has already received the claim offered by the Commissioner for Workmen's Compensation, this court is of the opinion that the appellants having enforced liabilities of the employer and insurer and having received the benefit/relief under the 1923 Act are precluded/estopped by doctrine of election as envisaged under Section 167 of the 1988 Act to maintain a claim under Section 166 of the Motor Vehicle Act, 1988."

(vi) In **Gulamrasul Rehman Malek vs. Gujarat State Road Transport Corporation, 2015 ACJ 20**, the Gujarat High Court while dealing with the case where the driver had met with an accident due to his own negligence had opted to file claim petition under Motor Vehicle Act and obtained interim award under Section 140 of the M.V. Act on account of no fault liability. He approached the High Court with a prayer that he be permitted to approach the forum constituted under the Employees Compensation Act and the said contention was negated by holding that once the claimant had elected to choose forum he could not turn around and question the award passed by the forum elected by him. It is apt to reproduced the relevant observations, which reads thus:-

“15. Moreover, in the case before us, the appellant got the benefit of "No Fault" Liability under section 140 of the M.V. Act. As pointed out by the Supreme Court in the case of NATIONAL INSURANCE CO. LTD. v. MASTAN , if a claimant by taking aid of Section 167 of the M. V. Act elects to take resort to the provisions of the M. V. Act he is precluded from resorting to the EC Act. The following observations of the Supreme Court are relevant and are quoted below:

> "22. Section 167 of the 1988 Act statutorily provides for an option to the claimant stating that where the death of or bodily injury to any person gives rise to a claim for compensation under the 1988 Act as also the 1923 Act, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both. Section 167 contains a non-ob-stante clause providing for such an option notwithstanding anything contained in the 1923 Act.
>
> 23. The 'doctrine of election' is a branch of 'rule of estoppel', in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.
>
> 24. In Nagubai Ammal v. B. Shama Rao, 1956 AIR(SC) 593, it was stated:
>
> "It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto."
>
> 25. In C. Beepathuma v. Velasari Shankaranara-yana Kadambolithaya, 1965 AIR(SC) 241, it was stated :
>
> "The doctrine of election which has been applied in this case is well-settled and may be stated in the classic words of Maitland-
>
> "That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it."
>
> (see Maitland's lectures on Equity, Lecture 18)
>
> The same principle is stated in White and Tudor's Leading Cases in Equity Vol. 18th Edn. at p. 444 as follows :
>
> "Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both... That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."
>
> (See also Prashant Ramachandra Deshpande v. Maruti Balaram Haibatti, 1995 Supp2 SCC 539).
>
> 26. Thomas, J. in P.R. Deshpande v. Maruti Balaram Haibatti, 1998 6 SCC 507 stated that the law, thus :
>
> "The doctrine of election is based on the rule of estoppel - the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable

estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. (See also Devasahayam (Dead) by LRs. v. P. Savithramma and Others, 2005 7 SCC 653)

27. The Respondent No. 1 having chosen the forum under the 1923 Act for the purpose of obtaining compensation against his employer cannot now fall back upon the provisions of the 1988 Act therefor, inasmuch as the procedure laid down under both the Acts are different save and except those which are covered by Section 143 thereof."

16. Thus, I am unable to accept the submission of Mr Hakim and hold that after having received the benefit under Section 140 of the M. V. Act and having elected to proceed under Section 166 of the said Act, the petitioner is precluded from approaching the forum constituted under the provision of the EC Act."

(vii) In **United India Insurance Co. Ltd. vs. Anthony Selvam and another, 2015 ACJ 1936**, High Court of Madras held that the claim in accident arising out of the use of motor vehicle was entitled to claim compensation either under Motor Vehicle or Workmen's Compensation Act, but not under both the Acts as the claimant could not enjoy double benefit and the employees could not be put to double liability. In addition to that it was held that once the driver had filed claim petition before the Commissioner, who had dismissed the claim application on the ground that he was not an employee under the owner he cannot thereafter file claim petition for compensation under the Motor Vehicle Act against the owner and insurance company and the relevant observations reads thus:-

"23. From an analysis of the above said judgments and the reasoning assigned by this court, the principles governing the election provided under Section 167 of the Motor Vehicles Act, 1988 and the corresponding bar can be deduced as follows:

1) In case the accident arises out of the use of the motor vehicle and it results in death or injury, the legal heirs of the deceased or the injured shall be entitled to claim compensation under the provisions of the Motor Vehicles Act, 1988 against the owner, driver and insurer of the offending vehicle on the basis of the tortuous liability which has been made statutory;

2) In case the owner of the offending vehicle happens to be the employer of the deceased or injured, as the case may be, then the legal heirs of the deceased or the injured may make a claim either under the Motor Vehicles Act, 1988 or under the Employees' Compensation Act, 1923;

3) If the claim is made under the Employees' Compensation Act, 1923 and it is allowed by the Commissioner, then the claimants cannot make a claim under the Motor Vehicles Act, 1988;

4) If the claim made under the Employees' Compensation Act is dismissed holding that the deceased or the injured was not a workman under the alleged employer or that the accident did not arise out of and in the course of the employment of the deceased or injured, then the dismissal of the claim under the Employees' Compensation Act, 1923 will not be a bar for making a claim under the Motor Vehicles Act, 1988;

5) In case the claim is made at the first instance under the Motor Vehicles Act, 1988, there is no possibility of the claim being negatived in toto if the accident had resulted in death or permanent disability attracting the no-fault liability clauses found in the Motor Vehicles Act, 1988. In such cases, the claimants cannot make a claim under the

Employees' Compensation Act, 1923 after getting an award in the Motor Accident Claims Tribunal;

6) In case the claim is made under the Motor Vehicles Act, 1988 against the owner of the offending vehicle, who was not the employer of the deceased or injured, as the case may be, and the driver or insurer of the said vehicle, after an award is passed by the Motor Accident Claims Tribunal, a claim against the employer of the deceased or the injured, as the case may be, under the Employees' Compensation Act, 1923, who was not a respondent in the claim will be maintainable, but after ascertaining the amount payable under the Employees' Compensation Act, 1923, the Commissioner shall direct the employer and its insurer to pay only the difference between the amount calculated under the Employees Compensation Act and the amount awarded by the Motor Accident Claims Tribunal under the Motor Vehicles Act, 1988, only if the compensation payable under the Employees' Compensation Act exceeds the amount awarded under the Motor Vehicle Act;

7) In case claim is made under the Employees' Compensation Act against the employer and an award is passed and a claim for compensation is made under the Motor Vehicles Act against the owner of the offending vehicle not being the employer of the deceased or injured and against the driver and insurer of the offending vehicle on the basis of tort, then while determining the compensation under the Motor Vehicles Act, the amount obtained as compensation under the Employees' Compensation Act, 1923 shall be taken into account and that should be deducted. After deducting the same, the balance amount alone shall be awarded as compensation in the MCOP before the Motor Accident Claims Tribunal.

24. The above said principles ensure prevention of the claimants enjoying double benefit and the employers being put to double liability. Applying the above said principles, this court comes to the conclusion that the fact that the first respondent made a claim before the Commissioner for Workmen's Compensation under the Employees' Compensation Act, 1923 in W.C.No.219/2007 on the file of the Commissioner No.2, Deputy Commissioner of Labour-II, Teynampet, Chennai and the same was dismissed on the ground that he was not an employee under the owner of the auto-rickshaw driven by the first respondent at the time of accident, would not be a bar for the maintainability of the claim made by him under the Motor Vehicles Act, 1988 against the second respondent and the appellant herein being the owner and insurer of the other vehicle, which is projected as the offending vehicle, namely lorry bearing Regn. No.TNG 7876. The order of the Commissioner for Workmen's Compensation marked as Ex.P8 will make it clear that the first respondent was not an employee under the owner of the auto-rickshaw involved in the accident and he was only a person who took the auto-rickshaw for hire and he alone was his master, since his liability towards the owner of the vehicle was only to pay particular amount per day as rent for the auto-rickshaw. The same was the reason why the Commissioner for Workmen's Compensation held that he was not an employee under owner of auto-rickshaw and that consequently he was not entitled to maintain a claim under the Employees' Compensation Act, 1923. As the claim made under the Employees' Compensation Act, 1923 was negatived holding that such a claim was not maintainable, the same will not provide a bar for making a claim under the Motor Vehicles Act, 1988 against the different set of persons, namely the owner and insurer of the offending vehicle, namely lorry bearing Regn. No.TNG 7876. Hence first and second points for determination are answered in favour of

the claimant-respondent No.1 and against the insurance company, appellant herein."

28. It would be noticed that none of the judgments relied upon by the learned counsel for the petitioner visualises the factual situations obtaining in the instant case.

29. It is not in dispute that the claimants on their own had never approached the Commissioner for grant of compensation and it is only pursuant to the notice issued to them by the Commissioner after receipt of information of accident from the employer vide letter dated 16.6.2004 that they approached and thereafter in late August filed their application for compensation in Form-F under Rule 20 of the Workmen's Compensation Rule.

30. It is also not in dispute that earlier to that the claimants had consciously elected and opted to approach Tribunal for grant of compensation by filing an application under Section 166 of the Motor Vehicle Act on 24.8.2004.

31. The information imparted to the Commissioner under Workmen's Compensation Act with respect to the accident was in discharge of its duty of the employer under Workmen's Compensation Act.

32. Likewise, the information thereafter imparted by the Commissioner to the claimants with regard to the factum of accident and their entitlement to file a claim petition was further in discharge of its duties and obligations cast / fastened upon him under the provisions of the Act.

33. However, the action of the claimant in approaching the Tribunal with the claim petition was not on account of any duty of obligation being cast upon them by any statutory or non statutory provision but was an election consciously made by them whereby they opted to approach the Tribunal with their claim petition out of their free will and violation. This was a conscious decision on their part and not one of compulsion.

34. The mere fact that the statement of the claimant and also the award passed by the Commissioner was at an earlier point of time would hardly make any difference as the *Terminus-a-quo* in such like situation, as per my humble understanding would be the date on which the claimants consciously elected to choose the forum and in this case the *terminus-a-quo* would be 24.8.2004 when the petitioner consciously elected to approach the Tribunal by filing the claim petition under Section 167 of M.V. Act.

35. Therefore, in such circumstances to contend that the award obtained by the claimants before the Tribunal was on account of fraud or to contend that the State i.e. Respondents No. 1 and 2 themselves have contended before the Commissioner that the award obtained by the claimants before him had been obtained by fraud, would rather not even arise for consideration in the present case.

36. However, at this stage, it needs to be clarified that even the Commissioner had no power to review his earlier order and after having announced his award, he ceased to have any jurisdiction and had become '*functus-officio*' as he has no jurisdictional authority to review his order as the power of review is not inherent power and had otherwise not been conferred upon him by the statute i.e. Workmen's Compensation Act.

37. It is, however, needs to be clarified that there is a distinction between powers of Court to review on merit and the procedural review where a Court or quasi judicial authority having jurisdiction to adjudicate on merit proceeds to do so, this judgment or order can be reviewed on merit only if the Court or quasi judicial authority is vested with the power of review by express provision or by necessary implications. Whereas, procedural review belongs to a different categories. In such a review, the Court of quasi judicial authority having jurisdiction to adjudicate proceeds to do so. But in doing so, ascertains whether it had committed a procedural illegality which goes to the route of the matter and invalidate the proceedings itself and consequently the order passed therein (Refer- ***M/s Sangum Tape Co. vs. Hans Raj, 2005 9 SCC***

331 and ***Kapra Mazdoor Ekta Union vs. Birla Cotton Spinning & Weaving Mills Ltd. & Anr. 2005 13 SCC 777***).

38. It needs to be clarified that **accession** review is used in two distinct senses, namely (i) procedural review – it is either inherent or implied in a Court or Tribunal whereby it can set aside a palpably erroneous order passed under any misapprehension and (ii) review on merits – where the error sought to be correct is one of law and is apparent on the face of record. In the case of **Patel Narshi Thakershi's case (supra)**, it was held that no review lies on merits unless statute specifically provides for it. Obviously, when a review is sought due to procedural defect, the inadvertent error committed by the Tribunal must be correct '*exddlojutas'* to prevent the abuse of its process and such power *inheres* in every Court or Tribunal. Section 169 of the M.V. Act, reads thus:-

> "169. Procedure and powers of Claims Tribunal –(1) In holding any inquiry under Section 168, the claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.
>
> (2) The Claims Tribunal shall have all the powers of a Civil court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXVI of the code of Criminal Procedure, 1973 (2 of 1974).
>
> (3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry."

39. Applying the test laid down in **Thakreshi's case supra**, a review application before the Tribunal would be maintainable only when it is sought due to procedural defect or inadvertent error committed by the Tribunal to prevent the abuse of its process.

40. Therefore, even if the review filed by the petitioner before the Tribunal is held to be maintainable, the same would have no power or effect on the merits of these cases, as this Court has categorically come to the conclusion that the claimants having consciously elected under Section 167 of the M.V. Act are only entitled then irrespective of it being comparatively less than the one passed by the Commissioner or even the interest therein being awarded at a lesser rate by the Commissioner.

41. Ms. Devyani Sharma, learned Counsel for the petitioner strenuously argued that once it is established on record that the deceased was the employee of the State i.e. Respondents No. 1 and 2, therefore, it is the State who alone should be held responsible and liable to pay the compensation and the same cannot be fastened upon the petitioner only on account of it having insured the vehicle.

42. I am afraid that such contention cannot be accepted. Whereas the claimants had exercised the option under Section 167 of the Motor Vehicle Act and an award passed in their favour whereby the owner of the vehicle is held to be liable then the insurance company being the indemnifier has obviously to pay the award amount. Incidentally, in this case, the opposite party is the State, would such a contention be available if the opposite party was an individual. Obviously, the answer would be in negative. That apart, there can be no gainsaying that the very purpose of insuring the vehicle is to seek indemnity, in case, of unforeseen accident of the present kind.

43. In view of the aforesaid discussion, I find no merit in these petitions and the same are accordingly dismissed, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.

FAOs (MVA) No. 320 and 321 of 2012.
Date of decision: 18th November, 2016.

FAO No. 320 of 2012.
Oriental Insurance Co. Ltd. …Appellant
Versus
Smt. Savitra Devi and others …Respondents.
FAO No. 321 of 2012.
Oriental Insurance Co. Ltd. …Appellant
Versus
Smt. Maina Devi and others …Respondents.

Motor Vehicles Act, 1988- Section 149- It was for the insurer to plead and prove that driver was not having a valid and effective driving licence and the owner had committed willful breach- no evidence was led to prove that deceased were gratuitous passengers – in these circumstances, the insurer was rightly held liable. (Para-9 to 13)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant(s): Mr. Deepak Bhasin, Advocate.
For the respondent(s): Mr. G.R. Palsara, Advocate, for respondents No. 1 to 4 in FAO No. 320 of 2012 and for respondents No. 1 to 8 in FAO No. 321 of 2012.
Mr. H.S. Rangra, Advocate, for respondents No. 6 and 7 in FAO No. 320 of 2012 and for respondents No. 9 and 10 in FAO No. 321 of 2012.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

Both these appeals are outcome of one accident, hence are taken up together for disposal by this common judgment.

2. FAO No. 320 of 2012 is directed against the judgment and award dated 28.4.2012, in claim Petition No. 101 of 2007 titled Smt. Savitra and others versus Partap Singh and others and FAO No. 321 of 2012, is directed against the award dated 28.4.2012, in claim petition No. 35 of 2008, titled Smt. Maina Devi and others versus Partap Singh and others, for short "the impugned awards", passed by the Motor Accident Claims Tribunal (II), Mandi, H.P. hereinafter referred to as "the Tribunal", for short.

3. Claimants being the victims of a vehicular accident invoked the jurisdiction of the Tribunal for the grant of compensation as per the break-ups given in their respective claim petitions, on account of death of deceased Daya Ram and Naresh Kumar in a motor vehicle accident, involving truck bearing registration No. HP-32-1054 on 1.10.2007 at 5 p.m. at Dohra Nala near Magru Gala on Janjehali road.

4. Parties have led evidence and two separate awards, as referred to above, came to be passed by the Tribunal.

5. Claimants and driver have not questioned the impugned awards on any ground, thus the same have attained the finality, so far as the same relate to them.

6. In both these appeals the insurer has questioned the impugned awards on the grounds taken in the memo of appeals.

7. Learned counsel for the appellant argued that the seating capacity of the vehicle is only 1+3, hence, the liability be restricted only in terms of the seating capacity of the vehicle and risk covered, in terms of the insurance policy. His statement is taken on record.

8. I have gone through the evidence as well as the pleadings. The claimants have proved that the accident was outcome of rash and negligent driving by the driver of the offending vehicle. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

9. It was for the insurer to plead and prove that the driver was not having a valid and effective driving licence at the time of accident and owner has committed willful breach, has failed to discharge the onus in terms of **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. ....*
>
> *(i) ....*
>
> *(ii) ....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v)........................*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

10. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as*

the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

11. At this stage, the learned counsel for the appellant argued that the deceased were gratuitous passengers has not led any evidence before the Tribunal to prove this fact. The Tribunal has rightly made discussion in the impugned awards. Accordingly, the findings returned by the Tribunal on this issue are upheld.

12. I have gone through the impugned awards. The Tribunal has rightly held that the vehicle was insured and the insurer has to satisfy the awards. The learned counsel for the appellant was not in a position to show that the Tribunal has wrongly saddled the insurer with the liability.

13. Having said so, the insurer is held liable to pay compensation as per the terms and conditions contained in the insurance policy.

14. The insurer is directed to deposit the amount alongwith interest as awarded by the Tribunal in both the appeals, within eight weeks from today in the Registry, if not already deposited. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned awards, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

15. Accordingly, the impugned awards are upheld and the appeals are dismissed.

16. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Limited …..Appellant
Versus
Dila Kumari & others …..Respondents

FAO No.175 of 2012
Date of decision: 18.11.2016

Motor Vehicles Act, 1988- Section 173- The insurer challenged the award on the quantum of compensation – held, that Insurer has to seek the permission to contest the claim petition on all the grounds available to it and in case permission has not been sought and granted, it is precluded from questioning the award on the ground of adequacy of compensation – it can challenge the award only on the grounds, which are available to it- no permission was sought to

contest the claim petition on all grounds and therefore the appeal by the insurer is not maintainable -otherwise also, the compensation is meager and the same has not been questioned by the claimants- hence, the same is reluctantly upheld. (Para-11 to 18)

Cases referred:

United India Insurance Co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541
Josphine James versus United India Insurance Co. Ltd. & Anr., 2013 AIR SCW 6633

For the appellant: Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate.
For the respondents: Mr.G.R. Palsra, Advocate, for respondents No.1 and 2.
Nemo for respondents No.3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 16th January, 2012, passed by the Motor Accident Claim Tribunal (II), Mandi, H.P. (for short, "the Tribunal") in Claim Petition No.90 of 2007, titled Dila Devi & another vs. Ram Singh & others, whereby a sum of Rs.2,80,000/-alongwith interest at the rate of 7.5% per annum came to be awarded as compensation in favour of the claimants and the insurer was saddled with the liability (for short the "impugned award").

2. The claimants, the owner-insured and the driver have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. Brief facts of the case are that on 23.8.2007 at about 2.30 pm at village Julah, the claimants were working in the fields and their son and daughter were playing nearby. Vehicle bearing registration No.HP-33-A-0376, being driven by driver, namely, Jai Parkash rashly and negligently, rolled down the road and the son of the claimants was crushed resulting into his instantaneous death, and their daughter also sustained injuries. Thus, the claimants filed claim petition before the Tribunal for grant of compensation to the tune of Rs.10,00,000/- as per break-ups given in the claim petition.

4. The claim petition was resisted by the respondents and following issues came to be framed by the Tribunal:

"1. Whether deceased Rewat Singh died due to rash and negligent driving of Canter No.HP-33-A-0376 by respondent No.2 as alleged? OPP

2. If issue No.1 is proved in affirmative, whether the petitioner is entitled for compensation, if so, to what amount and from whom? OPP

3. Whether the respondent No.2 was not holding a valid and effective driving licence at the time of accident? OPR-3

4. Whether the vehicle in question was being plied in contravention of the terms and conditions of the Insurance Policy? OPR-3

5. Relief."

5. In order to prove their case, the claimants examined Devinder Kumar as PW-2, while one of the claimants, namely, Dila Devi appeared as PW-1. Driver of the offending vehicle stepped into the witness box as RW-2 and one Diwan Chand has been examined as RW-1.

6. Heard learned counsel for the parties and gone through the record. My issue-wise findings are as follows.

Issue No.1

7. The Tribunal after examining the evidence held that the driver had driven the offending vehicle rashly and negligently and caused the accident. There is no challenge to the said findings recorded by the Tribunal. However, I have gone through the impugned award. The Tribunal has rightly made discussion in paragraphs 13 to 19 of the impugned award and held that Jai Parkash had driven the offending vehicle rashly and negligently and caused the accident. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

8. Before issue No.2 is taken up, I deem it proper to deal with issues No.3 and 4 at the first instance.

Issue No.3

9. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident, has failed to discharge the onus. On the contrary, copies of the driving licence have been placed on record as Mark R-1 and R-2, a perusal whereof shows that, at the relevant point of time, the driver of the offending vehicle was having a valid and effective driving licence. Accordingly, findings returned by the Tribunal on issue No.3 are upheld.

Issue No.4

10. Onus to prove this issue was on the insurer. It was for the insurer to plead and prove that the vehicle was being driven in contravention of the terms and conditions contained in the insurance policy. One of the grounds taken by the insurer in the memo of appeal is that the deceased was traveling in the offending vehicle as gratuitous passenger. The positive case of the claimants is that the deceased, at the time of accident, was playing in the fields and all of a sudden, the offending vehicle rolled down the road and fell on the deceased as a result of which the deceased got crushed and lost his life. The insurer has not led any evidence to prove that the deceased was traveling in the offending vehicle as gratuitous passenger. Thus, under no circumstance, it can be said that the deceased was traveling in the offending vehicle as a gratuitous passenger. Accordingly, the findings returned by the Tribunal on issue No.4 are upheld.

Issue No.2.

11. This issue pertains to the quantum of compensation. It is moot question whether the insurer can question the adequacy of compensation.

12. The insurer can seek permission to contest the claim petition on all grounds available to it and in case permission has not been sought and granted, it is precluded from questioning the award on adequacy of compensation or any other ground, which is not otherwise available to it.

13. This question arose before the Apex Court in the case titled as **United India Insurance Co. Ltd. Versus Shila Datta & Ors.,** reported in **2011 AIR SCW 6541,** and the matter was referred to the larger Bench.

14. The question again arose before the Apex Court in the case titled as **Josphine James versus United India Insurance Co. Ltd. & Anr.,** reported in **2013 AIR SCW 6633.** It is apt to reproduce paras 8, 17 and 18 of the judgment herein:

> *"8. Aggrieved by the impugned judgment and award passed by the High Court in MAC Appeal no. 433/2005 and the review petition, the present appeal is filed by the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi's case and instead, placing reliance upon the Bhushan Sachdeva's case. Nicolletta Rohtagi's case was exhaustively discussed by a three judge bench in the case of United India Insurance Company Vs. Shila Datta, 2011 10 SCC 509. Though the Court has expressed its reservations against the correctness of the legal position in Nicolletta Rohtagi*

decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside.

9. to 16. ....

17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (2002) 7 SCC 456 : AIR 2002 SC 3350 : 2002 AIR SCW 3899, and earlier decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to though the correctness of the aforesaid decision is referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.

18. In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V. Act. Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to 4,20,000/- under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs. 5,000/- and applying 14 multiplier, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. Delhi Transport Corporation, 2009 6 SCC 121 instead of applying the principle laid down in Baby Radhika Gupta's case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the M.V. Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under section 149(2) of the M.V. Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."

15. Thus, the insurer can question the adequacy of compensation only if it has sought permission under Section 170 of the Motor Vehicles Act.

16. In the present case, it has to be seen whether the insurer has sought any such permission?

17. I have gone through the record, which does disclose that neither any such application was filed by the insurer nor such permission was granted. Learned counsel appearing on behalf of the insurer frankly conceded that no such permission was sought.

18. The amount of compensation appears to be meager. Unfortunately, the claimants have not questioned the impugned award on the ground of adequacy of compensation. Therefore, the same is reluctantly upheld and the appeal is dismissed.

19. The Registry is directed to release the award amount in favour of the claimants strictly in terms of the impugned award by depositing in their respective bank accounts or through payees account cheque.

20. Send down the record after placing a copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd. ……Appellant
Versus
Smt. Bhuvneshwari Devi and others …….Respondents.

FAO (MVA) No. 38 of 2012.
Judgment reserved on: 11.11.2016
Date of decision: 18.11.2016.

Motor Vehicles Act, 1988- Section 149- Claimants specifically pleaded that deceased had gone with his truck for carrying the cement - this fact was not denied by the respondents- the deceased was travelling in the vehicle as a gratuitous passenger and not as the employee of the owner- the insured had committed the breach of the terms and conditions of the insurance policy and insurer was rightly absolved of its liability – however, rate of interest reduced to 7.5% from 9%. (Para- 8 to 14)

Cases referred:

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others vs National Insurance Company Limited and others, (2012) 11 SCC 738
Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

For the appellant: Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For the respondents: Ms. Leena Guleria, advocate, vice Mr. G.R. Palsara, Advocate, for respondents No. 1 to 3.
Respondent No. 4 ex parte.
Nemo for respondent No.5.
Mr. O.P. Sharma, Advocate, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 18.8.2011, passed by the Motor Accident Claims Tribunal-cum-Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. hereinafter referred to as "the Tribunal", for short, in Claim Petition No. 197/2005

(04/2003), titled *Smt. Bhuvneshwari Devi and others versus Sh. Virender Singh and others*, whereby compensation to the tune of Rs.3,85,000/- alongwith interest @ 9% per annum came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. The claimants, owner, and driver have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. The claimants being the victims of a vehicular accident, have filed claim petition for the grant of compensation to the tune of Rs.10 lacs, as per the break-ups given in the claim petition on account of death of Shri Om Prakash, who died in a motor vehicle accident which took place on 16.9.2002, at Darla-ghat near Ambuja Cement Factory gate due to rash and negligent driving of respondent No.2 Parvin Kumar while driving Truck No. HP-51-4035.

5. The claim petition was resisted by the respondents and following issues came to be framed.

1. *Whether the accident occurred due to rash and negligent driving of respondent No.2? OPP*
2. *Whether the deceased died due to the Motor Vehicle accident of truck No. HP-51-4035? OPP*
3. *Whether the petitioners are entitled for any compensation and to what amount and from whom? OPP*
4. *Whether the deceased Om Prakash died due to his own act and conduct? OPR*
5. *Whether the vehicle was being driven in violation of Insurance Policy and driving licence? OPR*
6. *Whether deceased was gratuitous passenger at the time of accident as alleged? OPR-3.*
7. *Relief.*

6. The claimants have examined five witnesses and one of the claimants, namely, Bhuvneshwari Devi also stepped into the witness box as PW1. Respondents have examined only one witness, namely, Rajesh Pal as RW1.

7. The only question to be determined in this appeal is-whether the Tribunal has rightly saddled the insurer with the liability? The answer is in negative for the following reasons.

8. The claimants in para 24 (ii) of the claim petition have specifically stated as under:

> *"24 (ii) On 16.9.2002, the deceased had gone with his above truck to Ambuja Cement Factory, Darlaghat for the carriage of Ambuja Cement. Another Truck of the same owner bearing No. HP-11-1634 driven by one Hoshiar Singh driver had also gone for the same purpose. After parking the above Trucks, the deceased and Hoshiar Singh were coming from the Factory premises to Darlaghat Bazar and in the meantime at the Gate of the Factory, respondent No.2 after loading his Truck No. HP-51-4035 was coming from Factory premises to Darlaghat Bazar. Respondent No.2 on seeing the deceased and Hoshiar Singh (who were his professionist colleagues) stopped his truck and gave lift to them up to Darlaghat Bazar. Before reaching the Bazar, due to rash and negligent driving of respondent No.2, the vehicle received a big jolt due to which the window of the vehicle opened and deceased fell down on the ground from the Truck and he was crushed by the tyre of the said Truck and he died on the spot. The respondent No.2 after abandoning the deceased on spot of accident, had fled away with his truck."*

9. The owner and the driver have not denied the averments contained in para 24 (ii) of the claim petition, referred to supra, for want of knowledge. Thus, it can be safely said that the deceased was not travelling in the said vehicle as an employee of the employer/owner, was gratuitous passenger. It is also not the case of the claimants that the deceased was an employee or the labourer of the owner/insured of the truck. Thus, the owner has committed breach in terms of Sections 147 and 149 of the Motor Vehicles Act, 1988 for short "the Act" read with the terms and conditions contained in the insurance policy. Having said so, the Tribunal has fallen in an error in saddling the insurer with the liability.

10. The claimants are the third party. Thus, it is the obligation of the insurer to satisfy the award at the first instance and recover the same from the insured/owner.

11. The Tribunal has awarded interest @ 9% per annum. However, interest was to be awarded at rate of 7.5% per annum, for the following reasons.

12. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, reported in (2002) 6 SCC 281; Satosh Devi versus National Insurance Company Ltd. and others, reported in 2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others reported in (2012) 11 SCC 738; Smt. Savita versus Binder Singh & others, reported in 2014, AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn., reported in 2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, reported in (2015) 4 SCC 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, reported in (2015) 4 SCC 434,* and discussed by this Court in a batch of *FAOs, FAO No. 256 of 2010*, titled as *Oriental Insurance Company versus Smt. Indiro and others*, being the lead case, decided on 19.06.2015.

13. Accordingly, interest @7.5% per annum is awarded from the date of claim petition till realization of the amount.

14. Viewed thus, the appeal is allowed and the impugned award is modified by providing that the insurer has to satisfy the award at the first instance and recover the same from the owner/insured. The insurer is at liberty to file application for recovery before the Tribunal.

15. The Registry is directed to release the amount in favour of the claimants, alongwith interest @ 7.5% per annum from the date of filing the claim petition till its realization, forthwith, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification and excess amount, if any, be released in favour of the appellant/insurer, through payees cheque account.

16. Viewed thus, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

17. Send down the record forthwith, after placing a copy of this judgment.

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

Praveen Singh and another .....Petitioners.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWP No.: 4810 of 2009
Reserved on : 03.11.2016
Date of Decision: 18.11.2016

Constitution of India, 1950- Article 226- Petitioner No.2 was owner in possession of the land, which was acquired for Chamera Hydro Electric Project Stage-I- he was given compensation and was granted employment as per re-settlement and rehabilitation Scheme- some other land was acquired for the reservoir of Chamera-2- name of petitioner No.1, son of petitioner No.2 was sponsored for employment- however, the employment was not provided – held, that rehabilitation and re-settlement schemes are different for Chamera-1 and Chamera-2 project – schemes provide for employment of the family member of the oustee – names of the petitioners are recorded in the parivar register showing them to be the member of the same family – it was not permissible for the respondent No.6 to ignore the entry unilaterally – the land was purchased prior to the notification under Section 4 and the petitioners fulfill the criteria laid down in the scheme – writ petition allowed – respondents directed to provide the benefits as per the scheme. (Para-9 to 28)

For the petitioners: Mr. B.C. Negi, Senior Advocate, with Mr. Pranay Pratap Singh, Advocate.
For the respondents: Mr. Vikram Thakur, Deputy Advocate General, for respondents No. 1 to 4.
Mr. K.D. Shreedhar, Senior Advocate, with Ms. Shreya Chauhan, Advocate, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this petition, the petitioners have prayed for the following reliefs:

"(i) Issue a writ of certiorari to quash Annexures P-14, P-15, P-21, P-23, P-25 and P-29.

(ii) Issue a writ of mandamus directing respondents to implement Annexure P-7.

(iii) Issue a writ of certiorari to call for the records pertaining to the case at hand.

(iv) Direct the respondent authorities to pay the cost of the petition.

(v) Such other order, which this Hon'ble Court deems fit and proper, may also be passed in favour of the petitioner, in the interest of justice and fair play."

2. Facts emerging from the pleadings of the parties are as under:

Petitioner No. 2 was owner in possession of land in village Thadi, which was acquired for Chamera Hydroelectric Project Stage-I and was awarded compensation in lieu of his land and house which was acquired for the above project. Besides this, he was also provided employment in Chamera Hydroelectric Project Stage-I against his acquired land and house as per the provisions of the Resettlement and Rehabilitation Scheme for Chamera-1 Project.

3. Petitioner No. 2 was also owner of land measuring 0-5-0 bighas in Mohal Gurad, out of which, land measuring 0-1-15 bighas alongwith a house of petitioner No. 2 was acquired for the reservoir of Chamera Hydroelectric Project Stage-II in Mohal Gurad vide Notification dated 23.07.2001 issued under Section 4 of the Land Acquisition Act and award qua which acquisition was announced on 31.01.2003

4. Respondent-State has framed Resettlement and Rehabilitation Scheme for rehabilitation of persons/families displaced/affected due to construction of Chamera Hydroelectric Project Stage-II. Name of petitioner No. 1, who is son of petitioner No. 2 was sponsored for employment in Chamera Hydroelectric Project Stage-II in lieu of 0-1-15 bighas of land of petitioner No. 2 (father of petitioner No. 1) having been acquired for construction of Chamera Hydroelectric Project Stage-II. This was done by respondent No. 2 vide letter dated 27.07.2004 (Annexure P-7). This was followed by various correspondences made in this regard by respondent No. 2 with the Project authorities.

5. It is an undisputed position that Chamera Hydroelectric Project Stage-I and Chamera Hydroelectric Project Stage-II are different Projects and separate Resettlement and Rehabilitation Schemes were framed and approved by the Government of Himachal Pradesh for resettlement and rehabilitation of displaced/affected persons of both these projects. Incidentally, both these projects belong to same executing agency, i.e. respondent No. 6-National Hydro Electric Power Corporation Ltd.

6. The case of petitioner No. 1 was refused to be considered by respondent No. 6-Corporation under the Resettlement and Rehabilitation Scheme framed and approved by the Government of Himachal Pradesh for rehabilitation of the persons/families displaced/affected due to construction of Chamera Hydroelectric Project Stage-II on the following grounds:-

(a) that petitioner No. 1 as per the records was resident of village Thadi, Tehsil and District Chamba, hence he could not be said to be a displaced person on account of construction of Chamera Hydroelectric Project Stage-II;

(b) that Notification for acquisition of land for Chamera Hydroelectric Project Stage-II was issued on 23.07.2001 and petitioner No. 2 has purchased land in village Gurad immediately before the issuance of said Notification, hence the petitioners could not be considered to be permanent residents or affected persons for the purpose of Resettlement and Rehabilitation Scheme;

(c) that under Resettlement and Rehabilitation Scheme, only one member of the affected family can be granted employment and petitioner No. 2 has already been given employment under Chamera Hydroelectric Project Stage-I; and

(d) that entry in favour of the petitioners in the Parivar register of village Gurad was a fake entry.

7. The factum of the acquisition of land of petitioner No. 2 for Chamera Hydroelectric Project Stage-II is not denied even by respondent-State and they have further stated in their reply that detailed reasons for denial of employment to the petitioner were submitted by respondents No. 6 and 7.

8. I have heard the learned counsel for the parties and also gone through the pleadings placed on record by the respective parties.

9. The Resettlement and Rehabilitation Scheme for the persons who became oustees on account of acquisition of their lands, houses etc. for the construction of Chamera Hydroelectric Project Stage-II in Chamba District (hereinafter referred to as "the R & R Scheme Stage-II) is on record as Annexure P-5. A perusal of the same demonstrates that this Scheme has been framed for the Resettlement and Rehabilitation of oustees of Chamera Hydroelectric Project Stage-II. In other words, it is not as if there was a composite single Resettlement and Rehabilitation Scheme for oustees of Chamera Hydroelectric Project Stage-I and Chamera Hydroelectric Project Stage-II. It has also come in the reply of the respondent-State that Chamera Hydroelectric Project Stage-I and Chamera Hydroelectric Project Stage-II are different projects being executed by the same Corporation and separate Resettlement and Rehabilitation Schemes have been framed and approved by the Government of Himachal Pradesh for both the said projects.

10. Under the definition Clause of R & R Scheme for Chamera Hydroelectric Project Stage-II, oustees or affected family, family, employment and holding have been defined as under:

> *"(i) 'Oustees' or 'affected family' means a Land Owner who has been depirived of his/her land, house or both on account of acquisition of his/her land for Chamera Hydro Electric Project State-II, Karian and is entitled to compensation in lieu thereof and includes his/her successors in interest.*

(ii) 'Family' means husband/wife, who is entered as owner in the Revenue record, their children including step or adopted children and includes his/her parents and those brothers and sisters who are living jointly with him/her as per entries of Panchayat Parivar Register as on the date of Notification of Section-4 of the Land Acquisition Act, 1894.

Provided that only the Panchayat Parivar Register entry, as it stood on the date of Notification of Section-4 of Land Acquisition Act, 1894, shall be taken into account for the purpose of 'Separate Family' for rehabilitation benefit i.e. employment in the Project

(iii) The word 'employment' means employment on regular basis.

(iv) 'Holding' means the existing land holding possessed by the family of an oustee immediately after acquisition of his property."

11. It is further mentioned in the said Scheme that one member of each affected family shall be eligible for employment in the Chamera Hydroelectric Project Stage-II as elaborated therein. It is further provided in the Scheme that no member of affected family shall be eligible for employment if quantum of his acquired land is one biswa or less. The scheme further contemplates that no person shall be eligible for employment in the Project, who is not entered as member of the concerned affected family in the Panchayat Parivar Register.

12. Clause (x) of Part-III of the Scheme which deals with employment reads as under:

"(x) No person or his family member shall be eligible for employment if he become owner of land by way of sale, gift, exchange etc. of land after the date of notification of Section-4 of Land Acquisition Act, 1894"

13. In this background, this Court has to consider as to whether respondents No. 6 is justified in not conferring the benefits under the R & R Scheme for Chamera Hydroelectric Project Stage-II in favour of the petitioners including grant of employment in favour of petitioner No. 1?

14. The petitioners have appended a copy of Parivar Register of Gram Panchayat Gurad, village Gurad-II, Development Block Mehla, as per which, the names of the petitioners are reflected in the Parivar register of Gram Panchayat Gurad much before the Notification under Section 4 of the Land Acquisition Act was issued for acquiring land under Chamera Hydroelectric Project Stage-II. As per respondents No. 6 and 7, entry so recorded in the Parivar register is a fake entry. In justification of this contention of their's, it is averred by respondents No. 6 and 7 that register shows that it was on the basis of an affidavit dated 30.07.1999 that this family was registered in village Gurad from village Thadi. It is further the stand of respondents No. 6 and 7 that register is not conclusive evidence of fact that petitioners are living in village Gurad and as per respondent No. 6, the Parivar register has been manipulated by the petitioners.

15. I am afraid that there is no merit in this contention of respondent No. 6 that there is a fake entry in favour of the petitioners in the Parivar register of Gram Panchayat, Gurad because in my considered view, respondent No. 6 does not has any competence to unilaterally decide as to whether entry of a family in the Parivar register in a Gram Panchayat in the State of Himachal Pradesh is fake or not. It is not as if respondent No. 6 had challenged the entry so made in favour of the petitioners in the Parivar register before the competent authority and they have obtained adjudication on this aspect of the matter from the competent authority.

16. Similarly, the stand of respondent No. 6 that Parivar register is not conclusive evidence of the fact that the petitioners have been living in village can also not be accepted in view of the fact that it is clearly and categorically contemplated in the R & R Scheme for Chamera Hydroelectric Project Stage-II in Part-III of the same which deals with employment that entry in Panchayat Parivar register will confer eligibility for employment in the project and no person shall be eligible for employment in the Project who has not entered as member of the concerned affected family in the Panchayat Parivar register.

17. Clause (viii) of para-III is quoted hereinbelow:-

> *"(viii) No person shall be eligible for employment in the Project, who is not entered as member of the concerned affected family in the Panchayat Parivar Register."*

18. Therefore, in this view of the matter, when there exists an entry in favour of the petitioners in Panchayat Parivar register, respondent No.6 cannot arbitrarily and unilaterally ignore it on the pretext that the same is a fake entry and not a conclusive evidence of the fact that petitioners have been living in village Gurad.

19. The contention of respondent No. 6 that petitioners were not displaced on account of acquisition of their land is also not sustainable because it is not a disputed fact that land of petitioner No. 2 measuring more than 1 biswa has been acquired for the purpose of Chamera Hydroelectric Project Stage-II.

20. A perusal of R & R Scheme for Chamera Hydroelectric Project Stage-II demonstrates that as per this Scheme, persons whose land has been acquired for setting up of Chamera Hydroelectric Project Stage-II are entitled to different benefits depending upon the extent of the land which has been acquired and the effect which acquisition of such land has upon the affected family. It is contemplated in the Scheme that a landless person as defined in the Scheme shall be entitled for houseless grant as contemplated therein. It is further contemplated in the Scheme as to what are the benefits which accrue to persons who are rendered landless or become oustees on account of the acquisition of land for Chamera Hydroelectric Project Stage-II or the persons who have been defined as "eligible persons" under the Scheme.

21. Under Part-II of the Scheme which deals with sanction of rehabilitation grant, providing of employment, rehabilitation grant, infrastructural facility grant and houseless grant, an eligible person has been defined as under:

> *"Eligible persons means a person who after acquisition holds less than 5 bighas of land as a land owner or as a tenant"*

22. Part-III of the Scheme, which deals with employment further provides that one member of each affected family shall be eligible for employment in the Chamera Hydro Electric Project State-II in the mode and manner as prescribed therein.

23. As I have already mentioned above, the Scheme also contemplates that no member of affected family shall be eligible for employment if quantum of his acquired land is one biswa or less and no person shall be eligible for employment in the Project, who is not entered as member of the concerned family in the Panchayat Parivar register and further no person or his family member shall be eligible for employment if he become owner of land by way of sale, gift, exchange etc. after the date of Notification under Section 4 of the Land Acquisition Act, 1894.

24. In the present case, admittedly, land was purchased by petitioner No. 2 which was subsequently acquired for Chamera Hydroelectric Project Stage-II before the issuance of Notification under Section 4 of the Land Acquisition Act, 1894 for the acquisition of land in issue. In this view of the matter, the stand of respondent-Corporation that petitioners are not entitled for the benefits under the R & R Scheme for Stage-II Project because they had purchase land immediately before the issuance of Notification under Section 4 of the Land Acquisition Act is without any merit because there is no bar in the Scheme that the persons who purchased land immediately before the issuance of Notification under Section 4 of the Land Acquisition Act shall not be entitled for the benefits of R & R Scheme for State-II Project.

25. Similarly, as the petitioners fulfill all the eligibility criteria which are laid down in the R & R Scheme for Stage-II Project to be considered for some of the benefits which accrue to an affected family whose land is acquired for Stage-II Project, including employment, the same cannot be denied to the petitioners on the ground that the petitioners have not been displaced on account of acquisition of their land for the Project or that petitioner No. 2 had already been

granted employment in lieu of acquisition of land for State-I Project. There is no bar contemplated in the Scheme that in case of families whose land is acquired for Stage-II Project and whose one member has already been granted employment in Chamera Hydroelectric Project Stage-I in lieu of the acquisition of land of that very family for Stage-I project also, then no member of that family shall be entitled for benenfits including employment under the R & R Scheme for Chamera Hydroelectric Project Stage-II.

26. In these circumstances, respondents cannot deny the benefits of Resettlement and Rehabilitation Scheme formulated by the Government of Himachal Pradesh which are accruable to oustees/ affected families whose land has been acquired for Chamera-II project on the grounds which have been taken by them in their respective replies. If according to respondents a beneficiary of Chamera-I project should not be entitled for benefits of Resettlement and Rehabilitation Scheme for Chamera-II project or any such like subsequent project(s), then such like conditions should be contained in the Resettlement and Rehabilitation Scheme itself and in the absence of any such bar or condition contained or contemplated in the Scheme, the benefits which are accruable to oustees/ affected families whose land has been acquired for Chamera-II project cannot be denied to it on the said grounds.

27. In this view of the matter, in my considered view, the denial of the benefits of the R & R Scheme for Chamera Hydroelectric Project Stage-II to the petitioners by respondent No. 6 and 7 is arbitrary, totally irrational and does violence to the spirit and contents of the R & R Scheme for Chamera Hydroelectric Project Stage-II.

28. Accordingly, the writ petition is allowed, Annexure P-14 dated 18.11.2006, Annexure P-15 dated 02.02.2007, Annexure P-21 dated 23.05.2007, Annexure P-23 dated 15.06.2007, Annexure P-25 dated 04.07.2007, Annexure P-29 dated 18.02.2008 are quashed and set aside and respondents are directed to confer upon the petitioners all benefits including employment as are accruable to them under the Resettlement and Rehabilitation Scheme which was framed by the Government of Himachal Pradesh for the benefits of oustees/affected families of Chamera Hydroelectric Project Stage-II. The writ petition stands disposed of, so also the miscellaneous application(s), if any. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Co. .....Appellant
Versus
Lokeshawar Narah and others .....Respondents

FAO No.172 of 2012
Date of decision: 18.11.2016

Motor Vehicles Act, 1988- Section 166- Deceased was drawing salary of Rs.10,050/- per month- hence, the monthly income of the deceased can be taken as Rs.10,000/- - deceased was bachelor at the time of accident – 50% has to be deducted towards personal expenses and loss of dependency will be Rs.5,000/- per month- deceased was 26 years at the time of accident – Tribunal had wrongly applied multiplier of 14, whereas, multiplier of 16 was applicable- thus, claimants are entitled to Rs.5,000 x 12 x 16= Rs.9,60,000/- under the head loss of dependency- claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of estate and funeral expenses- thus, claimants are entitled to Rs.9,90,000/- along with interest @ 7.5% per annum from the date of filing of claim petition till deposit. (Para-16 to 21)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217
Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others vs National Insurance Company Limited and others, (2012) 11 SCC 738
Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

For the appellant: Mr.Ashwani K. Sharma, Senior Advocate, with Mr.Jeevan Kumar, Advocate.
For the respondents: Mr.Sanjay Sharma, Advocate, for respondents No.1 to 4.
Mr.Manoj Thakur, Advocate, for respondents No.5 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 14th December, 2011, passed by the Motor Accident Claims Tribunal-II, Solan, H.P., (for short, "the Tribunal") in Claim Petition No.9-S/2 of 2010, titled Lokeshawar Narah and others vs. Surinder Kumar Bansal and others, whereby the claim petition was allowed and compensation to the tune of Rs.11,64,670/-, with interest at the rate of 9% per annum, came to be awarded in favour of the claimants and the insurer/appellant was saddled with the liability, (for short the "impugned award").

2. The claimants, the owner and the driver have not questioned the impugned award on any ground, thus, the same has attained finality so far as it relates to them. Feeling aggrieved, the insurer has challenged the impugned award on the grounds taken in the memo of appeal.

3. Facts of the case, in brief, are that the claimants invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), on the ground that on 31st December, 2009, at about 9.30 p.m., the deceased was walking on left side of the road at Purolator Chowk, NH-22, Parwanoo, suddenly scooter bearing registration No.HP-15-4795, being driven rashly and negligently by Atinder Pal Singh (original respondent No.2), hit the deceased resulting into fatal injuries to the deceased and ultimately, he succumbed to the injuries. Claimants, being the parents, brother and sister of the deceased, filed the claim petition for compensation to the tune of Rs.15.00 lacs as per the break-ups given therein.

4. The claim petition was resisted by the respondent by filing reply and following issues came to be framed:

'1. Whether deceased Dipen Narah died in an accident on account of rash and negligent driving of respondent No.2? OPP

2. If issue No.1 is proved in affirmative, to what amount and from whom, the petitioners are entitled for compensation? OPP

3. Whether the petition is not maintainable? OPR

4. Whether the vehicle in question was driven in breach of terms and conditions of policy? OPR-3

5. Relief.”

5. Parties have led evidence.

6. During the course of hearing, the learned counsel for the appellant/insurer has made threefold submissions. Firstly, it was submitted that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident; secondly, the owner had committed willful breach of the terms and conditions and; thirdly, the Tribunal has wrongly assessed the compensation while making discussion in paragraphs 23 to 25 of the impugned award.

7. Heard learned counsel for the parties and gone through the record.

Issue No.1.

8. The Tribunal, after scanning the evidence, held that the driver had driven the offending scooter rashly and negligently on the appointed day and had caused the accident, in which the deceased sustained injuries and lost his life. There is no challenge to the said findings recorded by the Tribunal on issue No.1, accordingly the same are upheld.

9. Before Issue No.2 is dealt with, I deem it proper to determine issues No.3 and 4.

Issue No.3

10. It was for the insurer to plead and prove how the claim petition was not maintainable, has not led any evidence. In accident claim cases, the Court has to grant compensation while keeping in view the aim and object of granting compensation, which is social and beneficial one. The Act has gone through a sea change and sub section (6) to Section 158 and sub section (4) to Section 166 have been added. Section 158(6) provides that the Incharge of the Police Station concerned has to submit a report about the traffic accident to the Tribunal having the jurisdiction and that report has to be treated as Claim Petition by the Tribunal in terms of Section 166(4) of the Act. Thus, even filing of claim petition is not mandatory for grant of compensation in terms of the said amendment. Accordingly, it is held that the Tribunal has rightly decided this issue against the insurer.

Issue No.4:

11. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident. According to the learned counsel for the appellant/insurer, the driver, at the time of accident, was having two licences, but it is not the case that the driver was not having a valid and effective driving licence at the time of accident. The Tribunal has made detailed discussion in paragraphs No.13 to 16 of the impugned award. Having said so, it is held that the Tribunal has rightly held that the driver of the offending vehicle was having a valid and effective driving licence at the time of accident.

12. The insurer has also not led any evidence to prove that the owner had committed willful breach of the terms and conditions contained in the insurance policy. It is settled proposition of law that it is the duty of the insurer to plead and prove that the insured had committed willful breach of the terms and conditions of the insurance policy read with the mandate of Sections 147 to 149 of the Act, has not led any evidence and has failed to discharge the onus.

13. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

“105. ....

(i) ....

(ii) ....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings: but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v)........................

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

14. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran ingh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

15. Having said so, the findings returned by the Tribunal on issue No.4 are also upheld.

Issue No.2

16. It has been claimed that the deceased was a qualified electric engineer and was working in M/s Federal Mogul Bearing India Limited, Parwanoo. Salary certificate of the deceased has been proved on record as Ext.PW-2/A, which shows that he was drawing salary to the tune of Rs.10,050/- per month. Thus, the monthly income of the deceased can be said to be Rs.10,000/-. The deceased was bachelor at the time of accident, therefore, 50% was to be deducted towards his personal expenses, in view of the judgment of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120.** Therefore, after deducting 50%, monthly loss of source of dependency can be said to be Rs.5,000/-.

17. The deceased was 26 years of age at the time of death. The Tribunal has fallen into an error in applying the multiplier of 14, instead, in view of the law expounded by the Apex Court in **Sarla Verma's case (supra)** and the 2nd Schedule attached with the Motor Vehicles Act, 1988, multiplier of 16 was just and appropriate and is applied accordingly.

18. In view of the above discussion, the claimants are held entitled to compensation to the tune of Rs.5,000/- x 12 x 16 = Rs.9,60,000/- under the head loss of source of dependency. In addition, the claimants are also held entitled to Rs.10,000/- each, i.e. Rs.30,000/- in all, under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'.

19. Thus, the claimants are held entitled to Rs.9,60,000/- + Rs.30,000/- = Rs.9,90,000/-.

20. The Tribunal has also wrongly awarded interest at the rate of 9%, which is on the higher side. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,*** **reported in** ***(2002) 6 Supreme Court Cases 281; Santosh Devi versus National Insurance Company Ltd. and others,*** **reported in** ***2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others,*** **reported in** ***(2012) 11 Supreme Court Cases 738; Smt. Savita versus Binder Singh & others,*** **reported in** ***2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,*** **reported in** ***2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,*** **reported in** ***(2015) 4 Supreme Court Cases 433,*** **and** ***Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another***, reported in ***(2015) 4 Supreme Court Cases 434***, and discussed by this Court in a batch of FAOs, ***FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others***, being the lead case, decided on **19.06.2015**.

21. Accordingly, it is held that the amount of compensation shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit.

22. In view of the above discussion, the impugned award is modified, as indicated above. The Registry is directed to release the amount, alongwith interest, strictly in terms of the impugned award, in favour of the claimants, through their bank accounts after proper verification, and the excess amount, if any, be released in favour of the insurer through payee's account cheque.

23. The impugned award is modified, as indicated above and the appeal stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Company Limited …Appellant.
Versus
Sh. Mohan Lal and others …Respondents.

FAO No. 281 of 2012
Decided on: 18.11.2016

Motor Vehicles Act, 1988- Section 163-A- It was contended that claim petition was not maintainable as the claimants had claimed the income of the deceased to be Rs.8,000/- per month- held, that the claim petition under Section 163-A was not maintainable as the income was more than Rs.40,000/- per annum- however, the claim petition can be treated to be filed under Section 166- the deceased was driving the vehicle himself as per the FIR- 50% of the amount has been released to the claimants with interest – therefore, the same ordered not to be recovered from them in the interest of justice- appeal disposed of. (Para-4 to 16)

Cases referred:

Oriental Insurance Company Limited versus Premlata Shukla & others, 2007 AIR SCW 3591
Ningamma and another versus United India Insurance Company Limited, (2009) 13 Supreme Court Cases 710
Surinder Kumar Arora & another versus Dr. Manoj Bisla & others, 2012 AIR SCW 2241

For the appellant: Mr. Pritam Singh Chandel, Advocate.
For the respondents: Mr. Maan Singh, Advocate, for respondents No. 1 and 2.
Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to award, dated 9th May, 2012, made by Motor Accident Claims Tribunal-II (Fast Track Court), Kullu, H.P. (for short "the Tribunal") in MAC No. 01 of 2012, titled as Sh. Mohan Lal and another versus Jhabe Ram and another, whereby compensation to the tune of ₹ 80,500/- with interest @ 6% per annum from the date of filing of petition till its realization came to be awarded in favour of the claimants and insurer was saddled with liability (for short "the impugned award").

2. The claimants and the owner-insured of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer has called in question the impugned award on the grounds taken in the memo of the appeal.

4. Learned counsel for the appellant-insurer argued that the claim petition was filed under Section 163-A of the Motor Vehicles Act, 1988 (for short "MV Act") and was not maintainable as the claimants had claimed the income of the deceased to be ₹ 8,000/- per month.

5. The argument of the learned counsel for the appellant-insurer is forceful for the reason that the Division Bench of this Court in a case titled as **Oriental Insurance Company Ltd. versus Sh. Sihnu Ram and others,** being **FAO No. 474 of 2010,** decided on 28th September, 2016, has held that claim petition under Section 163-A of the MV Act can be maintained if the income of the victim of a vehicular accident is less than ₹ 40,000/- per annum. Thus, the claim petition under Section 163-A of the MV Act was not maintainable.

6. But, keeping in view the fact that granting of compensation is a social legislation, this Court can treat the claim petition under Section 166 of the MV Act.

7. At this stage, learned counsel appearing on behalf of the appellant-insurer argued that the deceased was himself driving the offending vehicle rashly and negligently at the time of the accident and the claimants are the parents of the deceased, thus, the claim petition under Section 166 is also not maintainable.

8. Rash and negligent driving is *sine qua non* for maintaining a claim petition seeking compensation in terms of the provisions of Section 166 of the Act.

9. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **Oriental Insurance Company Limited versus Premlata Shukla & others,** reported in **2007 AIR SCW 3591.** It is apt to reproduce para-10 of the judgment herein:-

> "10. *The insurer, however, would be liable to re-imburse the insured to the extent of the damages payable by the owner to the claimants subject of course to the limit of its liability as laid down in the Act or the contract of insurance. Proof of rashness and negligence on the part of the driver of the vehicle, is therefore, sine qua non for maintaining an application under Section 166 of the Act."*

10. The Apex Court in another case titled as **Ningamma and another versus United India Insurance Company Limited,** reported in **(2009) 13 Supreme Court Cases 710,** has laid down the same principle. It is apt to reproduce pars 21, 24 and relevat portion of para 25 of aforesaid judgment herein.

> *"21. In our considered opinion, the ratio of the aforesaid decision is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike. We have already extracted Section 163A of the MVA hereinbefore. A bare perusal of the said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle.*
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> *22. ....*
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> *23. ....*
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> *24. However, the question remains as to whether an application for demand of compensation could have been made by the legal representatives of the deceased as provided in Section 166 of the MVA. The said provision specifically provides that an application for compensation arising out of an accident of the nature specified in Sub-section (1) of Section 165 may be made by the person who has sustained the injury; or by the owner of the property; or where death has resulted from the accident, by all or any of the legal representatives of the deceased; or by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be.*
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> *25. When an application of the aforesaid nature claiming compensation under the provisions of Section 166 is received, the Tribunal is required to hold an enquiry into the claim and then proceed to make an award which, however, would be subject to the provisions of Section 162, by determining the amount of compensation, which is found to be just. Person or persons who made claim for compensation would thereafter be paid such amount. When such a claim is made by the legal representatives of the deceased, it has to be proved that the deceased was not himself responsible for the accident by his rash and negligent driving............."*

11. It would be profitable to reproduce paras 9 & 10 of the judgment rendered by the Apex Court in **Surinder Kumar Arora & another versus Dr. Manoj Bisla & others,** reported in **2012 AIR SCW 2241,** herein:

> "*9. Admittedly, the petition filed by the claimants was under Section 166 of the Act and not under Section 163-A of the Act. This is not in dispute. Therefore, it was the entire responsibility of the parents of the deceased to have established that respondent No.1 drew the vehicle in a rash and negligent manner which resulted in the fatal accident. Maybe, in order to help respondent No.1, the claimants had not taken up that plea before the Tribunal. Therefore, High Court was justified in sustaining the judgment and order passed by the Tribunal. We make it clear that if for any reason, the claimants had filed the petition under Section 163-A of the Act, then the dicta of this Court in the case of Kaushnuma Begum (Smt.) & Ors. (AIR 2001 SC 485 : 2001 AIR SCW 85) (supra) would have come to the assistance of the claimants.*
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> 10. *In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in the case of Oriental Insurance Co. Ltd. (AIR 2007 SC 1609 : 2007 AIR SCW 2362) (supra). In the said decision the Court stated:*
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> > *"…….Therefore, the victim of an accident or his dependents have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."*

12. Applying the test to the instant case, the deceased was himself driving the offending vehicle at the time of the accident as is evident from the perusal of the FIR, Ex. PW-2/A.

13. At this stage, Mr. Maan Singh, learned counsel appearing on behalf of the claimants, stated at the Bar that the claimants have received 50% of the awarded amount with interest, are poor, rustic villagers.

14. Keeping in view the fact that the claimants are the parents of the deceased, have been dragged to the lis due to the traffic accident and are contesting the claim petition from the year 2012 till today, I deem it proper to direct that no recovery be effected from the claimants.

15. The amount, which is still lying deposited before this Court, be released in favour of the appellant-insurer through payee's account cheque.

16. The impugned award is modified and the appeal is disposed of accordingly.

17. Send down the record after placing copy of the judgment on the Tribunal's file.

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

Krishna Devi ….Petitioner.

Versus

State of H.P. …..Respondent.

Cr. Revision No.138 of 2016.
Judgment reserved on: 16.11.2016.
Date of decision: November, 21st , 2016.

Code of Criminal Procedure, 1973- Section 482- Petition has been filed for quashing the charges framed under Sections 302, 212 and 120-B of I.P.C – held, that at the time of framing of charge, the evidence is not to be meticulously judged nor is any weight to be attached to the probable defence of the accused – the Court is to see that there is ground for presuming that accused had committed an offence – the statements of informant and other witnesses show that involvement of the petitioner cannot be ruled out- the Court had meticulously perused the material placed on record and had framed the charge thereafter - petition dismissed.

(Para- 3 to 12)

Cases referred:

State of Bihar versus Ramesh Singh AIR 1977 SC 2018
Union of India versus Prafulla Kumar Samal and another AIR 1979 SC 366
State of Maharashtra versus Priya Sharan Maharaj and others AIR 1997 SC 2041
Keshub Mahindra versus State of M.P. (1996) 6 SCC 129
State of M.P. versus S.B.Johari and others (2000) 2 SCC 57
State of Delhi versus Gyan Devi and others (2000) 8 SCC 239
State of A.P. versus Golconda Linga Swamy and another (2004) 6 SCC 522
Amit Kapoor versus Ramesh Chander and another (2012) 9 SCC 460
State of Tamil Nadu versus Mariya Anton Vijay (2015) 9 SCC 294

For the Petitioner : Mr.Manoj Pathak, Advocate.
For the Respondent : Ms.Meenakshi Sharma & Mr.Rupinder Singh Thakur, Additional Advocate Generals with Mr.J.S.Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Aggrieved by the framing of charges under Sections 302, 212, 120-B of the IPC, the petitioner has filed the instant revision petition praying therein for quashing of the same.

2. The case emanates from the FIR lodged by Balwant Singh on the allegations that he was travelling in Bolero Camper bearing No.HP-06C-0750 (for short 'Jeep') being driven by Raghubir Singh to see a cultural programme during 'Lavi' fair. After programme had finished, Shri Ajay Kumar, son of Shri Rajender Thakur (now deceased) met them at Rampur and accompanied them on their way back to Nogli (Khakhrola). Accused Vijay Kumar happened to meet them and he sought help from the occupants of the Jeep on the pretext that his vehicle bearing No.HP-06A-2195 had skidded and was stuck in the road. Ajay Kumar deceased alighted from the vehicle to help the accused Vijay Kumar, whereas, Balwant Singh and Raghubir Singh went home in the Jeep. When Ajay Kumar did not return back for quite some time, efforts were made to contact him on his phone, however, he did not attend the call. When searched by complainant Balwant Singh and Raghubir Singh, they had found him lying in a pool of blood on the road at that very place where he had been dropped. Police was informed and on the statement of Balwant Singh recorded under Section 154 Cr.P.C., FIR was registered under Section 302 of the IPC as the deceased was last seen in the company of the accused Vijay Kumar.

Before going into the relative merits of the case, the contours and parameters for quashing of charges will have to be delineated.

3. In ***State of Bihar*** *versus* ***Ramesh Singh AIR 1977 SC 2018***, it was held by the Hon'ble Supreme Court that at the time of framing of charges, evidence which the prosecutor proposes to adduce is not to be meticulously judged nor is any weight to be attached to the probable defence of the accused. It is not even obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. At the time of framing of charges, the Court is not to see whether there are sufficient grounds for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion, at this stage, which may lead the

Court to think that there is a ground for presuming that the accused has committed an offence, is sufficient ground for proceeding against the accused. It is apt to reproduce the relevant observations which read thus:-

> "4. *Under section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. 'The Judge has to pass thereafter an order either under section 227 or section 228 of the Code. If "the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-*
>
> *…….. …… …… …… ……..*
>
> *(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused", as provided in section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under section 227 or section 228 of the Code. At that stage the Court is not to 'see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the, initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. if the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the, trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But, if, on the other hand, it is so at the initial stage of making an order under section 227 or section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under section 228 and not under section 227."*

4. In ***Union of India*** *versus* ***Prafulla Kumar Samal and another AIR 1979 SC 366***, the Hon'ble Supreme Court laid down the following principles which are required to be borne in mind by the Courts at the time of framing of charges.

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out;

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial;

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Court cannot act merely as a Post-Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

5. In ***State of Maharashtra*** *versus* ***Priya Sharan Maharaj and others AIR 1997 SC 2041***, it was held by the Hon'ble Supreme Court that at the stage of Sections 227 and 228 of the Code, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge, the Court has to consider the material with a view to find out as to whether there is any ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.

6. At the stage of framing of charges, all that is required to be established is that a prima facie case is made out by the prosecution. Sufficiency of the evidence resulting into conviction is not to be seen. Charges can be framed if there is some material showing possibility of crime as against certainty. (*Refer:* ***Keshub Mahindra*** *versus* ***State of M.P. (1996) 6 SCC 129, State of M.P.*** *versus* ***S.B.Johari and others (2000) 2 SCC 57, State of Delhi*** *versus* ***Gyan Devi and others (2000) 8 SCC 239*** and ***State of A.P.*** *versus* ***Golconda Linga Swamy and another (2004) 6 SCC 522***.

7. In ***Amit Kapoor*** *versus* ***Ramesh Chander and another (2012) 9 SCC 460,*** the Hon'ble Supreme Court laid down the following principles to be considered for proper exercise of jurisdiction, particularly with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 have been summarized as follows:-

"1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

10. It is neither necessary nor is the court called upon to hold a fullfledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.

> *{Ref. State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. [AIR 1982 SC 949]; Madhavrao Jiwaji Rao Scindia & Anr. v. Sambhajirao Chandrojirao Angre & Ors. [AIR 1988 SC 709]; Janata Dal v. H.S. Chowdhary & Ors. [AIR 1993 SC 892]; Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Ors. [AIR 1996 SC 309; G. Sagar Suri & Anr. v. State of U.P. & Ors. [AIR 2000 SC 754]; Ajay Mitra v. State of M.P. [AIR 2003 SC 1069]; M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors. [AIR 1988 SC 128]; State of U.P. v. O.P. Sharma [(1996) 7 SCC 705]; Ganesh Narayan Hegde v. s. Bangarappa & Ors. [(1995) 4 SCC 41]; Zundu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque & Ors. [AIR 2005 SC 9]; M/s. Medchl Chemicals & Pharma (P) Ltd. v. M/s. Biological E. Ltd. & Ors. [AIR 2000 SC 1869]; Shakson Belthissor v. State of Kerala & Anr. [(2009) 14 SCC 466]; V.V.S. Rama Sharma & Ors. v. State of U.P. & Ors. [(2009) 7 SCC 234]; Chunduru Siva Ram Krishna & Anr. v. Peddi Ravindra Babu & Anr. [(2009) 11 SCC 203]; Sheo Nandan Paswan v. State of Bihar & Ors. [AIR 1987 SC 877]; State of Bihar & Anr. v. P.P. Sharma & Anr. [AIR 1991 SC 1260]; Lalmuni Devi (Smt.) v. State of Bihar & Ors. [(2001) 2 SCC 17]; M. Krishnan v. Vijay Singh & Anr. [(2001) 8 SCC 645]; Savita v. State of Rajasthan [(2005) 12 SCC 338]; and S.M. Datta v. State of Gujarat & Anr. [(2001) 7 SCC 659]}.*

16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance of the requirements of the offence."

8. Similar reiteration of law can be found in the recent judgment of the Hon'ble Supreme Court in ***State of Tamil Nadu*** *versus* ***Mariya Anton Vijay (2015) 9 SCC 294***.

9. Shri Manoj Pathak, learned counsel for the petitioner, has vehemently argued that the learned Court has failed to appreciate that there is no reliable and cogent evidence to prove the involvement of the petitioner in the alleged offence. Rather, a perusal of the charge-sheet would clearly goes to show that there are no allegations against the petitioner that she had harboured or concealed principal accused Vijay Kumar.

10. Shri J.S.Guleria, learned Assistant Advocate General, on the other hand, has vehemently contended that even strong suspicions, at this stage, can be a sufficient ground to frame the charges and has drawn my attention to the statements of the complainant and other persons associated during the course of investigation.

11. Having gone through the statements of the complainant coupled with those of Medh Ram, Raghubir Singh and Balwant Singh, the involvement of the petitioner, at this stage, cannot be ruled out. However, I need not further delve on this issue, lest it causes prejudice to the case of the petitioner. But, suffice it to say that no ground for quashing of the charge-sheet at the threshold is made out. Moreover, the learned Court below appears to have meticulously perused the material placed on record by the prosecution and only thereafter has framed the

charges that too after coming to the conclusion that a prima facie case has been made out by the prosecution for trial of the petitioner.

12. For all the aforesaid reasons, the present revision petition is devoid of any merit and accordingly the same is dismissed. Pending application, if any, also stands disposed of.

13. However, before parting, it is clarified that any observation made hereinabove shall not be taken as an expression of opinion on merits of the case and the trial Court shall decide the matter uninfluenced by the same.

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

Sanjay ....Petitioner.
Versus
State of Himachal Pradesh. ...Respondent.

Cr. MP (M) No.1288 of 2016.
Decided on: 21st November, 2016.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Sections 342, 323 and 506 of I.P.C – the accused prayed for pre-arrest bail – held, that considering the nature of the offence, the fact that the petitioner is a permanent resident of the place, he is joining/co-operating in the investigation and is not in a position to flee from justice or to temper with the prosecution evidence, the petition allowed and the petitioner admitted on bail subject to the conditions. (Para-4 to 6)

For the petitioner : Mr. Surender Verma, Advocate.
For the respondent : Mr. Virender Kumar Verma, Addl. AG, Mr. Pushpinder Singh Jaswal, Dy. Advocate General and Mr. Rajat Chauhan, Law Officer.
ASI Sunil Kumar, Police Station, Theog, District Shimla, H.P, present in person.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral).

The present bail application is maintained by the petitioner under Section 438 of the Code of Criminal Procedure for releasing him on bail in case FIR No. 177/2016, dated 13.10.2016, registered at Police Station Theog, District Shimla, H.P. under Sections 342, 323 and 506 of the Indian Penal Code.

2. Police report stands filed. As per the prosecution story, the petitioner has given beatings to the complainant, i.e. Sh. Sunil Kumar, and intentionally caused injuries to the complainant. On the basis of which, FIR No. 177/2016, dated 13.10.2016, under Sections 342, 323 and 506 of the Indian Penal Code, was registered at Police Station Theog, District Shimla, H.P.

3. Learned counsel for the petitioner has argued that the petitioner is innocent and has been falsely implicated in this case. On the other hand learned Additional Advocate General has argued that the petitioner is habitual of doing such type of offences earlier also. He has further argued that if the petitioner is released on bail, he will repeat the same offences and tamper with prosecution evidence and he is likely to flee from justice.

4. In rebuttal, learned counsel appearing on behalf of the petitioner has argued that the petitioner will neither tamper with the prosecution evidence, nor he will do anything to hamper the investigation, in any manner.

5. Heard. Taking into consideration the nature of the offence and the facts that the petitioner is resident of the place, he is joining/cooperating in the investigation and not in a position to flee from justice and also not in a position to tamper with the prosecution evidence, this Court finds that, interest of justice would be met in case the judicial discretion to admit the petitioner on bail is exercised in favour of the petitioner. So, it is ordered that in the event of his arrest in the case, he be released on bail, on his furnishing personal bond in the sum of Rs. 10,000/- (rupees ten thousand only) with one surety in the like amount to the satisfaction of Investigating Officer. The bail is granted subject to the following conditions:

i. That the petitioner will join investigation of case as and when called for by the Investigating Officer in accordance with law.

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.

6. Accordingly, the petition is disposed of.

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

CWP No. 2317 of 2011 a/w CWP No. 1498 and COPC No. 235 of 2010
Judgment reserved on: 3.10.2016
Date of decision: 21.11.2016

1. CWP No. 2317 of 2011

Shivalik Agro Poly Products Ltd. ..... Petitioner
Versus
Union of India and others. ..... Respondents

2. CWP No. 1498 of 2010

Shivalik Agro Poly Products Ltd. ..... Petitioner
Versus
Union of India & others ..... Respondents

3. COPC No. 235 of 2010

Shivalik Agro Poly Products Ltd. ..... Petitioner
Versus
Anil Kumar Dahiya & Anr. ..... Respondents

Constitution of India, 1950- Article 226- Petitioner is aggrieved by the construction of National Highway passing through its land – it was pleaded that there is continuous threat to the life of the people and the building premises due to the construction – respondent pleaded that some part of the land of the petitioner was utilized believing it to be part of acquired land, which error has been rectified -the damaged boundary wall would be restored – the walls would be constructed as per the requirement- continuous mandamus cannot be issued – no grievance was raised regarding the deficiency in the remedial measures- the fact that remedial measures were not to the liking or to complete satisfaction of the petitioner cannot be ground to initiate contempt proceedings- the petitioner had purchased the land despite the knowledge of the construction of National Highway – petition dismissed. (Para-13 to 29)

Case referred:
Gujarat Maritime Board versus L & T Infrastructure Development Projects Ltd. and Another AIR 2016 SC 4502

For the petitioners:	Mr. Baldev Sharma and Mr. Rakesh Thakur, Advocates.
For the respondents:	Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Ajay Chauhan, Advocate, for respondent No. 1 in CWPs No. 2317 of 2011 and 1498 of 2010. Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Charu Bhatnagar, Advocate, for respondent No. 2 in CWPs No. 2317 of 2011 and 1498 of 2010 and for respondent No. 1 in COPC No. 235 of 2010. Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals with Mr. J.K. Verma, Deputy Advocate General, for respondents-State. Mr. Abhishek Barowalia, Advocate, for respondent No. 4 in CWPs No. 2317 of 2011 and 1498 of 2010. Mr. B.C. Negi, Senior Advocate, with Mr. Raj Negi, Advocate, for respondent No. 6 in CWPs No. 2317 of 2011 and 1498 of 2010 and for respondent No. 2 in COPC No. 235 of 2010.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since the basic facts are common in all the petitions, therefore, these were heard together and are being disposed of by common judgment.

CWP No. 1498 of 2010

2. Certain bare minimum facts as pleaded may be noticed. The petitioner is an industrial unit situated at Parwanoo, Himachal Pradesh and is aggrieved by the construction of the national highway, which passes through some of the land of the petitioner.

3. The petitioner has its unit at Sector-3, Parwanoo, under the name and style of Shivalik Agro Poly Products Limited, which is operational for the last about 30 years.

4. Petitioner purchased land comprised in Khasra No. 450 vide sale deed dated 31.7.2007 and thereafter vide sale deed dated 25.7.2008 purchased another piece of land comprised in Khasra No. 449 for the purpose of expansion of its existing unit.

5. After seeking approval from the competent authority, the petitioner raised some construction on both these lands including chemical tanks constructed over Khasra No. 449. It is claimed by the petitioner that in the notifications under Sections 3A & 3D of the National Highways Act, 1956 (for short 'Act'), issued on 16.3.2007, 24.1.2008 and 9.10.2009, its land had not been included, however despite this, the respondents began construction of the national highway adjoining to its land and because of the vibrations emitted from the heavy machinery deployed at the spot, cracks initially appeared in the retaining wall which later on collapsed and thereafter cracks even appeared in some portion of the premises of the petitioner. Petitioner claimed that on account of such construction work, there was continuous threat to the life of the people as well as the building premises of the petitioner.

6. This constrained the petitioner to file CWP No. 1498 of 2010 seeking therein the quashment of notifications issued under Section 3A of the Act dated 16.3.2007, notification under Section 3D, dated 24.1.2008 and notification under Section 3A, dated 9.10.2009 and in addition thereto the direction was also sought against the respondents to refrain from carrying out further damage to the hill on which land and industrial units of the petitioner are situated and to take all remedial measure in accordance with law.

7. When the case initially came up for consideration on 19.4.2010, this Court passed the following orders:

> "There will be direction to the Deputy Commissioner, Solan District, to forthwith conduct a site inspection with notice to 2nd, 5th and 6th respondents and submit a report regarding the state of affairs as alleged in the Writ Petition. This report shall be filed within a week. The petitioner will produce a copy of this order alongwith a copy of the Writ petition before the Deputy Commissioner, Solan on 20.4.2010. Post on 28.4.2010. It is made clear that the construction work shall be done without causing any damage to the adjoining property. Post on 28.4.2010."

8. The Deputy Commissioner submitted his report, however, this Court vide order dated 21.5.2010 issued directions to the Chairman, District Legal Services Authority, Solan to visit the place and submit its report. He accordingly visited the spot and submitted his report. On 1.6.2010, this Court passed the following orders:-

> "Learned counsel appearing for the respondents, in view of the report of the District Legal Services Authority and after getting instruction from the Engineers, submitted that required temporary measure of providing concrete covering duly supported by steel beam and re-enforced with wire mesh above abutment No. 2 is being undertaken. It is also submitted that the work of filling and construction of breast and crate walls will be done on war footing basis so as to finish it in any case before the end of June, 2010. Post on 19.6.2010."

9. The National Highway Authority (Respondent No.2) in his short reply stated that it had bonafidely presumed Khasra No. 450 to be a part of Khasra No. 472 and had been executing the work over the said land and it is only on 8.3.2010 when the land was demarcated by the revenue officials that it became apparent that an area measuring 646 sqm which was earlier believed to be a part of Khasra No. 472 was actually a part of Khasra No. 450. Since the error in not covering part of Khasra No. 450 in acquisition notification occurred due to discrepancy in the demarcation record, therefore, once these facts became apparent, the mistake was sought to be rectified and requisite notification in accordance with the Act of 1956 would be issued.

10. As regards the contention regarding damage to the property of the petitioner, it has been stated that on account of steep slope and stone retaining wall of the petitioner being old, some damage had occurred inspite of the best protection taken at the site during the execution of the work. The boundary wall had been damaged at two places, which had been undertaken to be restored by the respondent at the earliest. As regards the present status of the work, it was stated that excavation work on the site had already been completed, therefore, there will be no occasion for the alleged vibration and the already excavated portion of the foundations shall be filled with earth, compacted in layers to the height varying from 10-12m to give support to the remaining slopes of the strata/hill. In addition to that two walls, breast wall and small retaining wall would be constructed as per the requirement and best engineering solutions/principles. Wherever, rock is available, the same would be covered with the short-crate treatment for retaining the same, which is common and well known treatment of rock support. It was lastly averred that the project is of national importance and timely completion thereof is in nation's interest.

Contempt Pet. No. 235 of 2010

11. It is claimed by the petitioner that respondents on 1.6.2010 had given an undertaking before this Court that they would carry out the work on war footing basis so as to finish it in any case before the end of June, 2010, as is reflected in order itself. However, the progress of the work was slow and tardy and not up to the mark and thereby the respondents had deliberately and willfully disobeyed the undertaking so furnished to the Court, constraining the petitioner to file the COPC No. 235 of 2010.

CWP No. 2317 of 2011

12. As regards CWP No. 2317 of 2011 the same has been filed for seeking quashment of notification dated 21.6.2010 (Annexure P-12) issued under Section 3A and notification dated 7.3.2011 (Annexure P-21) issued under Section 3D of the Act wherein the land of the petitioner was sought to be acquired. These notifications have been assailed on the ground that the same were totally illegal and malafide and issued under colourable exercise of power and the same have been issued without following any procedure as provided and contemplated under the Act.

Discussion

13. It is not in dispute that national highway is operational for the last more than 4 years and, therefore, the most of the issues raised in these petitions have only been rendered academic.

14. In CWP No. 1498 of 2010, as observed above, apart from seeking quashment of the various notifications, petitioner had also sought directions to the respondents for taking remedial measure so as to ensure complete protection of its property. The affidavits filed from time to time by the petitioner as also by the respondents up till the year, 2011, would indicate that sufficient steps have been taken by the respondents to protect the property of the petitioner and even the petitioner appears to have been satisfied with the same because the petitioner did not make any grievance thereafter.

15. The same is the position in CWP No. 2317 of 2011, wherein again the petitioner made no grievance till the passage of nearly 4 ½ years and all of a sudden in this year filed miscellaneous applications wherein it has been prayed that respondents be directed to construct proper RCC retaining wall and also repair the damage, which have occurred due to incomplete remedial measures undertaken by the respondents.

16. The petitioner cannot insist upon this Court to issue writ of continuous mandamus, more particularly, when there is no public interest and that apart, the silence of the petitioner over the last 4 ½ years speaks volumes of its conduct.

17. As noticed above, the National Highway is in operation for the last more than 4 years and the petitioner had made no grievance qua any deficiency in the remedial measures for protection of the so-called damage to the petitioner. The further question that whether certain remedial measures are still required to be taken is a matter which cannot be decided on the basis of affidavits and photographs alone. These facts have to be established by leading clear, cogent and convincing evidence that too before a competent Court of law.

18. It is more than settled that the High Court having regards to the facts of the case, has a discretion to entertain or not to entertain the writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power and this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determinations, then this Court will normally refrain from exercising such discretion.

19. Similar issues came up for consideration before this Court in ***LPA No. 48 of 2011***, titled ***Shri Satija Rajesh N Vs. State of H.P. & Ors***, decided on 26.8.2014, wherein, it was held as under:-

> "31. The writ Court has also brushed aside the affidavit filed by the Chief Executive Officer of writ respondent No. 2-HIMUDA, who has mentioned in the affidavit that the bid of the successful bidders-appellants in LPA No. 1 of 2011 was received on 14th September, 2006. How the writ Court came to the conclusion that the affidavit of the Chief Executive Officer is not correct or it should have been supported by other affidavits. It appears that the writ Court has fallen in error in returning findings on disputes questions of facts.
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> 32. The Apex Court in a case titled as D.L.F. Housing Construction (P) Ltd. versus Delhi Municipal Corpn. and others, reported in AIR 1976 Supreme Court

386, has held that the disputed question of facts cannot be gone through by the writ Court and the writ Court cannot return findings on disputed questions of facts. It is apt to reproduce para 18 of the judgment herein:

> "18. In our opinion, in a case where the basic facts are disputed, and complicated questions of law and fact depending on evidence are involved the writ court is not the proper forum for seeking relief. The right course of the High Court to follow was to dismiss the writ petition on this preliminary ground, without entering upon the merits of the case. In the absence of firm and adequate factual foundation, it was hazardous to embark upon a determination of the points involved. On this short ground while setting aside the findings of the High Court, we would dismiss both the findings of the High Court, we would dismiss both the writ petition and the appeal with costs. The appellants may if so advised, seek their remedy by a regular suit."

33. The same principle has been laid down by the Apex Court in Daljit Singh Dalal (dead) through L.Rs. Versus Union of India and others, reported in AIR 1997 Supreme Court 1367 and Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) and others versus Smt. Sukamani Das and another, reported in AIR 1999 Supreme Court 3412.

34. The Apex Court in a case titled as State of Karnataka & Ors. versus KGSD Canteen Employees Welfare Association & Ors., reported in 2006 AIR SCW 212, has held that High Court should not exercise its powers under Article 226 of the Constitution of India in cases where disputed questions of facts have been raised. It is apt to reproduce paras 37 and 40 of the judgment herein:

> "37. In a case of this nature, where serious disputed questions fact were raised, in our opinion, it was not proper for the High Court to embark thereupon an exercise under Article 226 of the Constitution. The High Court in its judgment relied upon a large number of decisions of this court, inter alia, in Reserve Bank of India (supra) and State Bank of India and others v. State Bank of India Canteen Employees' Union (Bengal circle) and others (AIR 2000 SC 1518) ignoring the fact that all such disputes were adjudicated in an industrial adjudication.
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> 38. ....
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> 39. ....
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> 40. It was, furthermore, reiterated that a disputed question of fact normally not be entertained in a writ proceeding."

35. The same view has been taken by the Apex Court in Orissa Agro Industries Corporation Ltd. and others versus Bharati Industries and others, reported in AIR 2006 Supreme Court 198 and Rajinder Singh versus State of Jammu and Kashmir & Ors., reported in 2008 AIR SCW 5157."

20. The legal position has been reiterated by the Hon'ble Supreme Court in its recent judgment titled as ***Gujarat Maritime Board versus L & T Infrastructure Development Projects Ltd. and Another AIR 2016 SC 4502*** wherein it was held as under:-

> "10. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit "... if the contract had frustrated on account of impossibility..." but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor-bank and the guarantee-appellant. The guarantee is unconditional. No doubt, the performance guarantee is against the breach by the lead promoter, viz., the first respondent. But between the bank and

the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved. Recently, this Court in Joshi Technologies International Inc. v. Union of India and others[1], where one of us (R.F. Nariman, J.) is a member, has surveyed the entire legal position on exercise of writ jurisdiction in contractual matters. The paragraphs which deal with the situation relevant to the case under appeal, read as follows:

"68. The Court thereafter summarised the legal position in the following manner: (ABL International Ltd. Case (2004) 3 SCC 553) "

27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks. [(1998) 8 SCC 1]) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

> 69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances."

21. As regards contempt petition No. 235 of 2010, we from a perusal of order dated 1.6.2010, really do not find any undertaking actually having been furnished by respondent No. 6 so as to initiate the contempt proceedings against the said respondent. The mere fact that the remedial measures undertaken by the respondent No. 6 were not to the liking or complete satisfaction of the petitioner, in itself cannot be a ground to initiate contempt proceedings against respondent No. 6.

22. Now, adverting to CWP No. 2317 of 2011, it would be noticed that the petitioner has assailed the notifications dated 9.10.2009 and 21.6.2010 issued by the respondents under sections 3-A and 3-D of the Act, respectively on the ground that the same is colourable exercise of power and have been issued without following the procedure prescribed under the Act, and therefore, illegal and arbitrary and liable to be quashed mainly that the petitioner was not afforded an opportunity of hearing. It is contended that the petitioner had specifically requested for providing an opportunity of being heard as envisaged under section 3-C of the Act, but to no avail. Even the objections filed by the petitioner were not considered and, thus, the land of the petitioner has been acquired without following due process of law.

23. Respondent No.2 in a short reply has disputed all the contentions and has stated that as per the Act, no permanent construction is allowed within specified limit. The Section 3-A notification intended land acquisition showing intention of the National Highway Authority of India (for short 'NHAI') of four laning of Zirakpur-Parwanoo section on NH-22 and construction of bypass as a part of the project was published on 16.3.2007. The petitioner despite having full knowledge of this development had still purchased the land comprised in Khasra No.450 and executed the sale deed on 31.7.2007 for the reasons best known to it. Khasra No. 472 was part of section 3-A notification, which is a Government land, whereas Khasra No. 450 abuts Khasra No. 472. The alignment plans were available wherein Khasra No. 450 was earlier being considered part of Khasra No. 472, and therefore, was got omitted from incorporation in section 3-A notification. Even after issuance of notification under section 3-D, the petitioner purchased the land comprised in Khasra No. 449 and executed sale deed on 25.7.2008. In fact, the petitioner had full knowledge of forthcoming NH developments over which he purchased the land where no construction was legally permissible. The petitioner did not approach the NHAI seeking permission and rather sought permission for the unit right up to the end of the road boundary, which is contrary to National Highways Act.

24. It is further averred that the fact of issuance of notifications under sections 3-A and 3-D of the Act were well within the knowledge of the petitioner and were suppressed by him before the concerned authorities. According to this respondent, it has followed all the procedures that were envisaged under the Act by issuing notices in the newspaper before the acquisition and thereafter, opportunity was afforded before taking possession and the petitioner has been paid nearly 100 times the compensation, as per the averments contained in para 4 of the reply, which reads thus:

> "4. That it is submitted that the Competent Authority has announced the award for the acquired land measuring 646 sqm. in Khasra No.450, of the petitioner, amounting to Rs. 2196400/-. On perusal of the registered sale deed having account/sub account No.29/55, 56, 57, land No. 450/Purla/444, 445, 446, 447, 5 Nos. area 0-99-00 Hec its ½ share i.e. 0-46-45 Hect. which is registered for Rs. 163068 and by comparing the compensation for the 464 sqm, the compensation amount comes to 96.84 times the value as compared to the registered value of the land. It is brought out that the sale deed registered in 2007 by the petitioner is getting a return, that too from Govt. acquisition for a portion of land nearly 100 times within a span of 4 years. NHAI has received communication for award from competent Authority and further action being taken by NHAI as per the provisions of NH Act, 1956."

25. The petitioner has filed rejoinders wherein, it is averred that the award passed by the Collector appears to be ante dated and has been passed without affording an opportunity of hearing to him, as would be evident from the averments made in para 34 of the rejoinder to the reply of respondent No. 5, which reads thus:

> "34. That the contents of para No. 34 of the reply are wrong and hence denied and that of the writ petition are reiterated. No hearing was afforded to the petitioner by the competent authority as repeatedly requested by the petitioner and as has been lighted in detail in the writ petition as well as in the foregoing paragraphs. The order cannot be said to be speaking and appears to have been passed in an ante-dated manner after the institution of the writ petition. The said apprehension has been created in the mind of the petitioner on account of the fact that firstly the petitioner was not afforded any opportunity of being heard through a legal practitioner as repeatedly requested and secondly, has no copy of the order purported to have been passed on 29.11.2010 to the petitioner before the institution of the writ petition or issuance of notice by this Hon'ble Court. It is wrong and denied that the petitioner was heard by the competent authority on 24.11.2010."

26. It would be evident from the pleadings reproduced hereinabove that the specific claim of the petitioner is that the Collector had antedated the award. Obviously this question is of a complex nature and will require oral evidence for its determination and cannot be gone into by this Court in exercise of its jurisdiction.

27. It is not in dispute that earlier to filing of this petition i.e. CWP No. 2317 of 2011, the petitioner had already filed and had been pursuing CWP No. 1498 of 2010 and was, therefore, fully aware of all the developments that have taken place during interregnum. This would include the notification that was issued by the respondents from time to time under National Highways Act. That apart, the only right, which the petitioner had was a right of hearing and in case the same was denied to it, its remedy was elsewhere and not by way of the instant petition. More particularly, when the petitioner has not even sought the quashment of the award and has only sought for staying the operation of the various notifications issued under Sections 3-A and 3-D of the Act, which obviously cannot be done at this stage as the National Highway Authority of India was not only being constructed but is in operation for the last more than four years, rendering the prayer made in the writ petition redundant. However, in case, the petitioner still has any grievance, it is free to take recourse to such remedy as may be available to it under law.

<u>Conclusion</u>

28. In view of the aforesaid discussion, CWP No. 1498 of 2010 and CWP No. 2317 of 2011 are dismissed and notice issued in COPC No. 235 of 2010 is ordered to be discharged and the contempt petition is accordingly dismissed.

29. With the aforesaid observations, all the petitions are dismissed, so also the pending application(s), leaving the parties to bear their own costs.

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

LPA No. 445 of 2012 a/w LPA Nos. 99, 100 and 101 of 2015
Judgment reserved on: 7.11.2016
Date of decision: 21.11.2016

<u>LPA No. 445 of 2012</u>

State of Himachal Pradesh & Ors. …Appellants.
Versus
Amar Chand Thakur & Ors. …Respondents.

LPA No. 99 of 2015

State of Himachal Pradesh & Ors. … Appellants.

Versus

Balwant Singh & Ors. …Respondents

LPA No. 100 of 2015

State of Himachal Pradesh & Ors. … Appellants.

Versus

Kanta Nanda …Respondent

LPA No. 101 of 2015

State of Himachal Pradesh & Ors. … Appellants.

Versus

Mohar Singh …Respondent

Constitution of India, 1950- Article 226- Petitioners were working in the health and family welfare department as Computers and Junior statistical Assistants- there was parity with the computers and field investigators in economic and statistical department which was disturbed in the year 1994- representations were made and rejected – a writ petition was filed, which was allowed – respondents were directed to restore the parity- held, that there cannot be a straight jacket formula to hold that two posts having same or similar nomenclature should have same pay scale – merely because two posts have same name does not lead to any inference that posts are identical in every manner – this exercise can be carried out by the pay commission – the job profile and recruitment rules for the posts in two departments are different – principle of equal pay for equal work is applicable only when it is shown that the incumbents in the two posts discharge similar duties and responsibilities – the petitioners had failed to prove this fact- the writ petition was wrongly allowed- appeal allowed and judgment of writ Court set aside.

(Para- 15 to 31)

For the Appellants: Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals with Mr. J.K. Verma, Deputy Advocate General, for the appellants in LPA No. 445 of 2012 and LPA Nos. 99, 100 and 101 of 2015.

For the Respondents: Mr. Dalip Sharma, Senior Advocate with Mr. Manish Sharma, Advocate, for respondents No. 1 to 8, LRs of respondent No. 9 and respondents No. 10 to 33 in LPA No. 445 of 2012.

Mr. Sunil Awasthi, Advocate, for the respondents in LPA Nos. 99 and 101 of 2015.

Nemo for the respondent in LPA No. 100 of 2015.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since common questions of law and facts arise for consideration in all these appeals, the same were taken up together for hearing and are being disposed of by way of common judgment. In order to maintain clarity, facts of LPA No. 445 of 2012 have been taken into consideration. The party shall be referred to as the 'writ petitioners' and 'Department' respectively.

2. Material facts as borne out from the pleadings of the parties are that the writ petitioners were working in the Health and Family Welfare Department as Computers and Junior Statistical Assistants (for short 'Department'). As per the Recruitment and Promotion Rules notified on 7.12.1973 for Health and Family Welfare Department Subordinate Class-III Services, computers/ Computers-cum-clerks were placed in the pay scale of Rs.110-250. These posts were

to be filled up 100% by way of direct recruitment and the essential qualification for the same was Matric/Higher Secondary Part-I.

3. The post of Statistical Assistant appearing against Sl. No. 9 was in the pay scale of Rs. 200-500, whereas the post of Statistical Assistant at Sl. No. 10 was in the pay scale of Rs. 140-300. It was averred that the Computers in Economics and Statistics Department (for short 'E&S Department) were re-designated on 50:50 basis as Field Investigators Grade-I & Grade-II in the pay scale of Rs. 140-399 and Rs. 120-250 respectively w.e.f. 10.12.1974 vide memorandum dated 19.7.1978, whereas in the 'Department', the Computers were in the pay scale of Rs. 110-250 comparable to Field Investigators Grade-I in E&S Department and Junior Statistical Assistants were in the pay scale of Rs.140-300 comparable to Field Investigators Grade-II in E&S Department.

4. When the revision of pay scale took place w.e.f. 1.1.1986, the parity of pay scales of Computers of the 'Department' was again maintained with Field Investigators Grade-II (Rs.950-1800) and that of Junior Statistical Assistants (1200-2100) was maintained with that of Field Investigators Grade-I of E&S Department.

5. However, vide notification dated 8.7.1994, the pay scales of Computers and Junior Statistical Assistants of the 'Department' vis-a-vis Field Investigators Grade-I & Grade II of E&S Department was disturbed by revising the pay scale of Field Investigators Grade-II w.e.f. 1.1.1994 by allowing them three tier pay scales (950-1800 with initial start of Rs.1000, Rs. 1200-2130 and Rs.1500-2700 on 20:40:40 basis). However, the corresponding revision was not given to the Computers/Junior Statistical Assistants of the 'Department' and the Computers were continued in the pay scale of Rs.950-1800.

6. Thereafter, the State vide notification dated 17.10.1995 clubbed and re-designated the post of Field Investigators Grade-II and Field Investigator Grade-I in E&S Department as Investigators w.e.f. 1.1.1994 by again allowing them three tier pay-scale in the ratio of 20:40:40 as already granted vide notification dated 8.7.1994. Subsequently, from 1.1.1996 even the pay scales were revised by allowing them the revised pay scale of Rs. 3120-5160 with initial start of Rs. 3220 and Rs.4400-7000 with five years experience on 50:50 basis in place of 20:40:40 admissible before 1.1.1996, whereas the Computers in the Department were allowed revised pay scale of Rs. 3120-5160 in place of Rs. 950-1800 w.e.f. 1.1.1996 and three tier pay scale allowed to Field Investigators Grade-I and Grade-II was further revised and extended to them w.e.f. 1.1.1986 instead of 1.1.1994.

7. The writ petitioners represented and pursuant to such representations, Director (Health Services) brought to the notice of Principal Secretary (Health) that the pay scales of Statistical Personnel of E&S/Planning Department alongwith other Departments had been revised w.e.f. 1.1.1986 whereas Statistical Personnel of the 'Department' had been left out in that revision even though the pay scales and Recruitment and Promotion Rules of the posts were same in all the Department of the State. It was also pointed out that the appointments were made in various Departments, including present Department through H.P.P.S.C. on the basis of combined test/examinations as well as through Departmental Promotion Committee. However, the representations were rejected constraining the petitioners to approach this court by filing writ petitions wherein they claimed parity with the so-called similarly situated employees working in the E&S Department.

8. The Department filed its reply wherein it raised preliminary submissions to the effect that it was for the Government to decide the pay scales which were admissible to its employees. As regards the 'Department', it was submitted that the post of Computers was upgraded to the level of Investigators Grade-I & Grade-II and the revision of such post(s) has been made on post to post and Department to Department basis on Punjab pattern as such the pay scales of the category of posts of Investigators in the Department have also been revised from time to time, whereas the same pay scale cannot be granted to the post of Computers in the Department in question as their pay scales have been revised. It is the prerogative of the State

Government and the revision to the respective Department has been made on the basis of Punjab Pattern, therefore, petitioners cannot claim parity for grant of pay scale.

9. It was also averred that the nature of job responsibilities of the Statistical Assistants cannot be compared with those of the Computers and therefore there cannot be any parity between the two categories. It was further averred that the equation of post and equation of salary is a complex matter which is best left to expert body.

10. It was further averred that ordinarily pay scales are evolved keeping in mind several factors, e.g.

(i) method of recruitment,

(ii) level at which recruitment is made,

(iii) the hierarchy of service in a given cadre,

(iv) minimum educational / technical qualifications,

(v) avenues of promotion,

(vi) the nature of duties and responsibilities,

(vii) the horizontal and vertical relativities with similar jobs,

(viii) public dealings,

(ix) satisfaction level,

(x) employer's capacity to pay etc.

11. Lastly, It was averred that it is keeping in view the nature and duties of the category of the Computers in the Planning Department and E&S Department that the post of Computers was upgraded to the level of the Field Investigator Grade-I and Grade-II, which subsequently formed a single cadre as Investigators on the basis of the Punjab government. Since, the nature of the duties of the writ petitioners and similarly situated persons was not at all comparable to the duties of the Field Investigators / Investigators of Planning, Economics & Statistics Departments, their pay scales from retrospective effect could not be equated at par with the pay scales provided/granted to the field Investigators Grade-I and Grade-II from a retrospective date i.e. 1.1.1986 over and above the decision of the State Government taken from time to time on Punjab pattern.

12. The learned writ Court allowed the writ petition and directed the respondents to restore the parity in the pay scales of the Computers/Junior Statistical Assistants at par with their counterparts, i.e. field Investigator Grade-II and Field Investigator Grade-I (now re-designated as Investigators) in E&S Department w.e.f. 1.1.1986 with all the consequential benefits, within a period of three months from the date of production of certified copy of this judgment by the petitioner(s), failing which the petitioners will be entitled to interest @9% per annum till the implementation of this judgment.

Aggrieved by the aforesaid order, the 'Department' has filed these Letter Patent Appeals.

13. It is vehemently argued by Shri Anup Rattan, learned Additional Advocate General that the findings arrived at by the learned Writ Court to conclude that the writ petitioners were discharging the same and similar duties, responsibilities and the essential qualification and method of recruitment is highly erroneous and therefore the judgment be set-aside.

14. On the other hand, Shri Dalip Sharma, Sr. Advocate duly assisted by Mr. Manish Sharma, Advocate, contended that findings rendered by the learned Writ Court with respect to there being parity in duties and essential qualification, method of recruitment etc. should not be disturbed as these are well reasoned and prayed for dismissal of the appeal.

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

15. At the outset it may be observed that this Court after placing reliance upon various judgments of the Hon'ble Supreme Court has categorically held that there cannot be a straight jacket formula to hold two posts having same or similar nomenclature would have to be given the same pay-scale as this exercise is of a complex nature, which requires assessment of the nature and quality of the duties performed and the responsibilities shouldered by the incumbent on different posts. Even though two posts may be referred by the same name, it would not lead to the necessary inference that posts are identical in every manner. These matters are to be dealt with by expert body like Employer Pay Commission and it is not for the service Tribunal or the Writ court to normally venture to substitute its own opinion for the opinion rendered by the expert as they lack necessary expertise to undertake the complex exercise for the equation of post for the pay-scale.

16. References in this regard can conveniently be made to the judgment rendered in CWP No. 873 of 1993, titled **Roshan Lal vs. Hon'ble High Court of Himachal Pradesh**, decided on 27.10.1994, LPA No. 59 of 2009, titled as **H.P.S.E.B. vs. Rajinder Upadhayay**, decided on 11.9.2014, LPA No. 11 of 2014, titled as **Principal Secretary Vs. Partap Thakur**, decided on 22.9.2014, LPA No. 99 of 2010, titled as **H.P. State Electronics Development Corporation Ltd. vs. Vijay Sikka**, decided on 6.10.2015, and LPA No. 81 of 2012, titled as **Kameshwar Gautam vs. HPMC**, decided on 2.12.2015.

17. In addition to the aforesaid, we find that the issue in question now stands succinctly but lucidly considered and expounded by Hon'ble Supreme Court in its recent judgment in a batch of appeals titled **State of Punjab and Ors. Vs. Jagjit Singh & Ors. Civil Appeal No. 213 of 2013, decided on 26.10.2016**, wherein the Hon'ble Supreme Court in paragraphs 7 to 24 of the report has dealt with the cases of employees engaged on regular basis, who were claiming higher wages under the condition equal pay for equal work. It was premised on the ground that the duties and responsibilities rendered by them, were against the same post for which higher pay-scale was being allowed in other government department though their duties and responsibilities were the same as of the other posts with different designation but they were placed in a lower scale.

18. Hon'ble Supreme Court after taking into consideration the entire gamut of law on the subject in a well articulated judgment has laid down by the following principles to be followed in matters relating to 'equal pay for equal work' which reads as under:-

> **(i) The 'onus of proof', of parity in the duties and responsibilities of the subject post with the reference post, under the principle of 'equal pay for equal work', lies on the person who claims it. He who approaches the Court has to establish, that the subject post occupied by him, requires him to discharge equal work of equal value, as the reference post (**see –Orissa University of Agriculture & Technology, 2003 5 SCC 188 Union Territory Administration, Chandigarh v. Manju Mathur, 2011 2 SCC 452, the Steel Authority of India Limited, 2011 11 SCC 122 and the National Aluminum Company Limited case**).**
>
> **(ii) The mere fact that the subject post occupied by the claimant, is in a "different department" vis-a-vis the reference post, does not have any bearing on the determination of a claim, under the principle of 'equal pay for equal work'. Persons discharging identical duties, cannot be treated differently, in the matter of their pay, merely because they belong to different departments of Government (**see – Randhir Singh case, 1982 1 SCC 618 , and the D.S. Nakara case 1983 1 SCC 304**).**

(iii) The principle of 'equal pay for equal work', applies to cases of unequal scales of pay, based on no classification or irrational classification (see – Randhir Singh case**).**

For equal pay, the concerned employees with whom equation is sought, should be performing work, which besides being functionally equal, should be of the same quality and sensitivity (see –Federation of All India Customs and Central Excise Stenographers (Recognized) case 1983 3 SCC 91, the Mewa Ram Kanojia case, 1989 2 SCC 235, the Grih Kalyan Kendra Workers' Union case, 1991 1 SCC 619 and the S.C. Chandra case, 2007 8 SCC 279**).**

(iv) Persons holding the same rank/designation (in different departments), but having dissimilar powers, duties and responsibilities, can be placed in different scales of pay, and cannot claim the benefit of the principle of 'equal pay for equal work' (see – Randhir Singh, 1982 1 SCC 618, State of Haryana v. Haryana Civil Secretariat Personal Staff Association, 2002 6 SCC 72 and the Hukum Chand Gupta, 2012 12 SCC 666)**.**

Therefore, the principle would not be automatically invoked, merely because the subject and reference posts have the same nomenclature.

(v) In determining equality of functions and responsibilities, under the principle of 'equal pay for equal work', it is necessary to keep in mind, that the duties of the two posts should be of equal sensitivity, and also, qualitatively similar. Differentiation of pay-scales for posts with difference in degree of responsibility, reliability and confidentiality, would fall within the realm of valid classification, and therefore, pay differentiation would be legitimate and permissible (see –Federation of All India Customs and Central Excise Stenographers (Recognized), 1988 3 SCC 91 and the State Bank of India, 2002 4 SCC 556)**.**

The nature of work of the subject post should be the same and not less onerous than the reference post. Even the volume of work should be the same. And so also, the level of responsibility. If these parameters are not met, parity cannot be claimed under the principle of 'equal pay for equal work' (see - State of U.P. v. J.P. Chaurasia, 1989 1 SCC 121 and the Grih Kalyan Kendra Workers' Union, 1991 1 SCC 619)**.**

(vi) For placement in a regular pay-scale, the claimant has to be a regular appointee. The claimant should have been selected, on the basis of a regular process of recruitment. An employee appointed on a temporary basis, cannot claim to be placed in the regular pay-scale (see –Orissa University of Agriculture & Technology, 2003 5 SCC 188)**.**

(vii) Persons performing the same or similar functions, duties and responsibilities, can also be placed in different pay-scales. Such as - 'selection grade', in the same post. But this difference must emerge out of a legitimate foundation, such as – merit, or seniority, or some other relevant criteria (see - State of U.P. v. J.P. Chaurasia, 1989 1 SCC 121)**.**

(viii) If the qualifications for recruitment to the subject post vis-a-vis the reference post are different, it may be difficult to conclude, that the duties and responsibilities of the posts are qualitatively similar or comparable (see –Mewa Ram Kanojia, 1989 2 SCC 235 and Government of W.B. v. Tarun K. Roy 2004 1 SCC 347)**. In such a cause, the principle of 'equal pay for equal work', cannot be invoked.**

(ix) The reference post, with which parity is claimed, under the principle of 'equal pay for equal work', has to be at the same hierarchy in the service, as the subject post. Pay-scales of posts may be different, if the hierarchy of the

posts in question, and their channels of promotion, are different. Even if the duties and responsibilities are same, parity would not be permissible, as against a superior post, such as a promotional post (see - Union of India v. Pradip Kumar Dey, 2000 8 SCC 580 and the Hukum Chand Gupta, 2012 12 SCC 666).

(x) A comparison between the subject post and the reference post, under the principle of 'equal pay for equal work', cannot be made, where the subject post and the reference post are in different establishments, having a different management. Or even, where the establishments are in different geographical locations, though owned by the same master (see – Harbans Lal, 1989 4 SCC 459). Persons engaged differently, and being paid out of different funds, would not be entitled to pay parity (see - Official Liquidator v. Dayanand, 2008 10 SCC 1)**.**

(xi) Different pay-scales, in certain eventualities, would be permissible even for posts clubbed together at the same hierarchy in the cadre. As for instance, if the duties and responsibilities of one of the posts are more onerous, or are exposed to higher nature of operational work/risk, the principle of 'equal pay for equal work' would not be applicable. And also when, the reference post includes the responsibility to take crucial decisions, and that is not so for the subject post (see – State Bank of India, 2002 4 SCC 556)**.**

(xii) The priority given to different types of posts, under the prevailing policies of the Government, can also be a relevant factor for placing different posts under different pay-scales. Herein also, the principle of 'equal pay for equal work' would not be applicable (see - State of Haryana v. Haryana Civil Secretariat Personal Staff Association, 2002 6 SCC 72)**.**

(xiii) The parity in pay, under the principle of 'equal pay for equal work', cannot be claimed, merely on the ground, that at an earlier point of time, the subject post and the reference post, were placed in the same pay-scale. The principle of 'equal pay for equal work' is applicable only when it is shown, that the incumbents of the subject post and the reference post, discharge similar duties and responsibilities (see - State of West Bengal v. West Bengal Minimum Wages Inspectors Association, 2010 5 SCC 225).

(xiv) For parity in pay-scales, under the principle of 'equal pay for equal work', equation in the nature of duties, is of paramount importance. If the principal nature of duties of one post is teaching, whereas that of the other is nonteaching, the principle would not be applicable. If the dominant nature of duties of one post is of control and management, whereas the subject post has no such duties, the principle would not be applicable. Likewise, if the central nature of duties of one post is of quality control, whereas the subject post has minimal duties of quality control, the principle would not be applicable (see – Union Territory Administration, Chandigarh v. Manju Mathur, 2011 2 SCC 452)**.**

(xv) There can be a valid classification in the matter of pay-scales, between employees even holding posts with the same nomenclature i.e., between those discharging duties at the headquarters, and others working at the institutional/sub-office level (see – Hukum Chand Gupta, 2012 12 SCC 666)**, when the duties are qualitatively dissimilar.**

(xvi) The principle of 'equal pay for equal work' would not be applicable, where a differential higher pay-scale is extended to persons discharging the same duties and holding the same designation, with the objective of

ameliorating stagnation, or on account of lack of promotional avenues (see – Hukum Chand Gupta , 2012 12 SCC 666).

(xvii) Where there is no comparison between one set of employees of one organization, and another set of employees of a different organization, there can be no question of equation of pay-scales, under the principle of 'equal pay for equal work', even if two organizations have a common employer. Likewise, if the management and control of two organizations, is with different entities, which are independent of one another, the principle of 'equal pay for equal work' would not apply (see – S.C. Chandra case 2007 8 SCC 279, and the National Aluminum Company Limited case, 2014 6 SCC 756).

19. Bearing in mind the aforesaid exposition of law, it would be noticed that the petitioners have virtually failed to plead the case of parity and the pleadings if any to this effect are contained only in ground 'J' in CWP No. 2318 of 2011 giving rise to LPA No. 445 of 2012, which read as under:-

"J) That the duties, responsibilities, essential qualifications and method of recruitment was / is also similar in both the departments. It is submitted that the post of Sr. Statistical Assistant in H&FW Department was denied pay parity with Statistical Assistant in E&S Department on the ground that such parity was not permissible in view of Punjab pattern of pay scale"

20. Likewise in CWP No. 12472 of 2008 (LPA No. 99 of 2015) and CWP(T) No. 12509 of 2008 (LPA No. 101 of 2015), the pleadings read as under:-

"(xiv) That the applicant was equally qualified like the Field Investigators Grade-II/Investigator of Economics and Statistic Department and the applicant was well as the Investigators Grade-II/Investigators performed similar and identical nature of duties and enjoyed the same status in all respect as such the respondent State is under legal obligation to bring uniformity in pay scales between the applicant and similarly situated employees, Field Investigators Grade-II/Investigators and different measures cannot be adopted in providing the pay scales by the respondent-State. As such, the applicant is entitled for the pay scale as at par with the pay scale applicable and provided to the Field Investigators Grade-II/Investigators of Economics and Statistic Department."

21. As regards LPA No. 100 of 2015, which was arises out of decision rendered in CWP No. 8905 of 2010, it has been averred:-

"(A) That nature of duties and qualifications of Computers in the Health & Family Welfare Department are the same as in the Planning and Economics & Statistical Departments as confirmed by the respondent No. 3 himself in his letter Annexure P-7. The action of the respondent State to have two different pay scales for the same category of post, having the same nature of duties and responsibilities, especially after having adopted the same pattern for some posts ignoring others in the same cadre in different Departments within the same Government, is discriminator and violative of Articles 14 and 16 of the Constitution of India."

Obviously, these pleadings do not meet the requirement as laid down by the Hon'ble Supreme Court in ***Jagdish Singh's case supra.***

22. Apparently, the only reason spelt out by the learned Writ Court for allowing the petition and granting parity of pay scale to the petitioners was that they are discharging same and similar duties, responsibilities to their counter-parts working in the other departments, as is evidently clear from para 9 of the impugned judgment, which reads thus:-

> **"9. It is settled law that it is for the employer to grant the pay scales, however, it is equally true that while undertaking this exercise there should not be any arbitrariness or unreasonableness. In the instant case, as noticed above, petitioners are discharging the same and similar duties, responsibilities and the essential qualifications and method of recruitment is the same, but despite that they been denied the higher pay scale granted to their counterparts working in other departments. The employer in both the cases is the State and thus the petitioners cannot be discriminated against. The persons working as Computers comparable to Field Investigators Grade-II form homogenous class and they cannot be discriminated merely on the basis that they happen to work in different department. Respondents have not pointed out why the petitioners have been granted different pay scale vis-à-vis their counterparts in E&S Department in the State. There is no intelligible differentia so as to distinguish the Computers working in the respondent-Department vis-a-vis Field Investigators Grade-II and Grade-I working in other departments of the State for the purpose of pay scales."**

23. The learned Writ Court has obviously fallen into error by not taking into consideration that in E&S Department the post of Field Investigators Grade-II and Field Investigator Grade-I were in a single cadre and filled up by placement in the ratio 50:50 of total posts in the pay scale of Rs. 3120-5160 with initial start of Rs. 3220/- (50%) Rs. 4400-7000 (50%) w.e.f. 1.1.1996 respectively. Later on the total number of posts of Field Investigator Grade-II and Field Investigator Grade-I were merged to form a single cadre of Investigators w.e.f. 1.1.1986 by allowing placement in the ratio of 20:40:40 of total posts in the pay scales of Rs. 950-1800 with a start at Rs.1000/-, Rs. 1200-2100 & Rs. 1500-2640 respectively vide notification No. Fin(PR)B(7)-1/99 dated 23rd August, 2002 whereas in the H&FW 'Department', as per R&P Rules of the concerned post. Computer was in the pay scale of Rs. 950-1800 and Junior Statistical Assistant was in the pay scale of Rs.1200-2100.

24. Apart from the above, the learned Writ Court has further erred in not considering that the post and designation of Junior Statistical Assistant does not exist in any department of State Government except Health & Family Welfare Department. Secondly, in the Health & Family Department, the post of Junior Statistical Assistant is filled up 100% by promotion from amongst the Computer failing which by direct recruitment.

25. In addition, job profile of the Investigator in the E&S Department and Department in question are also different. The Investigator of E&S Department have to conduct socio-economic studies/survey (National Sample Survey, GoI), collection of data from various government and semi government departments, preparation of tabulation sheets for posting data, computation of statistical data manually and with the help of calculating machines/computer etc. whereas the Computers/Junior Statistical Assistants in Department simply collect information on various component of Health & Family Welfare Programme at sub centre level, compile data on characteristics of family planning, acceptors and MCH beneficiaries when required from the sterilization and IUD acceptors registers etc. The duties and responsibilities of the Investigators of E&S Department involves collection/preparation of data of all programmes, schemes & information through out the State whereas Computers & Junior Statistical Assistants of the Department are confined to a single department.

26. Shri Dalip Sharma, learned Sr. Counsel for the writ petitioners would still vehemently argue that the petitioners are entitled to claim parity as it has been duly established on record that not only the qualification but even the pay scale of the writ petitioners was same and similar to the other departments of the government, more especially, the E&S Department and it was only by way of notification dated 8.7.1994 that the pay scales of the Computers and Junior Statistical Assistants vis-à-vis Field Investigators Grade-I & Grade-II of E&S Department

were disturbed and thereafter the disparity continued. This disparity was, in fact, even acknowledged by the Directorate Health Services when he brought all these facts to the notice of Principal Secretary (Health).

27. However, the aforesaid submissions of the petitioners cannot be accepted in teeth of the ratio laid down by Hon'ble Supreme Court in ***Jagjit Singh's case supra,*** *w*herein the Hon'ble Supreme Court has categorically held that 'onus of proof' of parity in the duties and responsibilities of the subject post with the reference post, under the principle of 'equal pay & equal work', lies on the person who claims it and it is for him to establish that the subject post occupied by him, requires him to discharge equal work of equal value, as the reference post. For this purpose the employees concerned with whom equation as is sought should be performing work, which besides being functionally equal should be of same quality and sensitivity.

28. Further, in determining equality of functions and responsibilities, it would be necessary to keep in mind that the duties of the two posts should be of equal sensitivity and qualitatively similar. Differentiation of pay-scales for posts with difference in degree of responsibility, reliability and confidentiality, would fall within the realm of valid classification and therefore, pay differentiation would be legitimate and permissible. Therefore, the person holding the same rank/designation but having dissimilarl powers, duties and responsibilities can be placed in different scales of pay, and cannot claim the benefit of the principle of 'equal pay for equal work'.

29. It has been reiterated in ***Jagjit Singh case (supra)*** that parity in pay, under the aforesaid principal of 'equal pay for equal work' cannot be claimed merely on the ground, that an earlier point of time, the subject post and the reference post were placed in the same pay scale. The principle 'equal pay for equal work' is applicable only when it is shown, that the incumbent of the subject post and the reference post discharge similar duties and responsibilities while claiming parity in pay scales under principle of 'equal pay for equal work' equation in the nature of duties is of paramount importance and there is no comparison between one set of employees in one organisation and another set of employees in different organisations, there can be no question of equation of pay scale under this principle.

30. It would be evidently clear from the narration of the factual aspects that the petitioner has failed to discharge the onus of proof, of parity by establishing that the subject post occupied by them requires to discharge equal work of equal value as the reference post. The petitioners were required to prove that they were performing the work, which was functionally equal and of the same quality and sensitivity with the reference and the same fact that an earlier point of time the subject posts and the reference posts were placed in the same pay-scale cannot in itself be a ground to claim 'equal pay for equal work', as this principle is applicable only when it is shown that the incumbent of the said post and the reference post, discharge similar duties and responsibilities.

31. Needless to say that under the principle of 'equal pay for equal work' parity in the duties and responsibilities of the subject post with the reference post lies on the person who claims it and having failed to discharge such onus the claim of the petitioner for 'equal pay and equal work' vis-à-vis the counter-part working in the E&S and other departments is clearly not maintainable.

32. In view of the aforesaid discussion, the learned Writ Court has clearly fallen in error in allowing the writ petition and quashing the decision of the Department. The judgment passed by the learned Writ Court is accordingly set aside and consequently the writ petitions are dismissed, leaving the parties to bear their own costs. Pending application(s), if any, stands disposed of.

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

Des Raj and another ..Appellants/defendants.
Versus
Krishan Lal and others ..Respondents/plaintiffs.

RSA No. 403 of 2008
Reserved on : 8/11/2016
Date of decision: 22/11/2016

Indian Succession Act, 1925- Section 63- Plaintiffs pleaded that J was the owner of the suit land who died intestate - Will propounded by the defendants is wrong – the defendants pleaded that J had executed a Will in favour of defendants No. 1 and 2 in his sound disposing state of mind – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed- held in second appeal that finger print expert had stated that the thumb impression on the Will was different from the admitted thumb impression of the deceased – the Appellate Court had rightly allowed the appeal- appeal dismissed. (Para-7 to 9)

Case referred:
Parukuty Amma Vs. Thankam Amma, 2004(2) Civil Court cases 33

For the appellants: Mr. Anil Kumar Advocate vice Mr. Anup Rattan, Advocate.
For the respondents: Mr. Kishore Pundeer, Advocate vice Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

This appeal stands directed against the impugned judgement of the learned Additional District Judge, Una, Himachal Pradesh, whereby it allowed the appeal preferred before it by the plaintiffs and set aside the judgment and decree, rendered on 7.6.2005 by the trial Court.

2. The facts necessary for rendering a decision in the instant appeal are that suit land was owned and possessed by one Julfi Ram son of Surjan who happened to be the real brother of plaintiffs and defendant No.3. The said Julfi Ram was stated to be unmarried and had died intestate having been succeeded by his four brothers i.e. plaintiffs and defendant No.3. Plaintiffs claim that they had come in possession of the suit land and the defendants No. 1 and 2 had no right, title or interest in the suit land. The defendants No. 1 and 2 were further alleged to have got wrong and an illegal mutation No. 32 sanctioned in their favour on 14.1.1994 without any basis in connivance with the revenue officials. Decree for declaration had been sought by the plaintiffs that they and defendant No.3 are owners in possession of the suit land. The mutation of succession sanctioned on 14.1.1994 in favour of defendants No. 1 and 2 was also challenged being wrong illegal null and void. Consequently, relief of permanent injunction restraining the defendants from interfering in the possession of the plaintiffs or changing the nature of the suit land was also sought.

3. The defendants resisted and contested the suit by taking preliminary objection qua suit being bad for want of enforceable cause of action, locus standi of the plaintiffs to file the suit was denied apart therefrom its being bad for misjoinder of defendant No.3. On merits it was the case of the defendant that the entire estate of late Julfi Ram had been succeeded by defendants No. 1 and 2 on the basis of a valid will having been executed in their favour on 6.1.1993 in a sound disposing mind. As per the defendants since the said Julfi Ram was looked after by the defendants during his life time, as a token of their service the deceased Julfi Ram had executed a valid Will in their favour. As a sequel thereto the mutation was alleged to have been rightly sanctioned on the basis of the said Will.

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

1. Whether the plaintiffs and defendants No. 3 are owners in possession of the suit land? OPP.
2. Whether the mutation No. 32 dated 14.1.1994 sanctioned by A.C. 2nd Grade, Una, is wrong, illegal, null and void, as alleged? OPP.
3. Whether the plaintiffs have no cause of action? OPD.
4. Whether the suit is not maintainable, as alleged? OPD.
5. Whether the plaintiffs have no locus-standi to file the suit? OPD.
6. Whether the suit is bad for misjoinder of necessary parties, as alleged? OPD.
7. Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction as alleged? If what is correct valuation of suit property? OPD.
8. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs yet the learned First Appellate Court allowed the appeal preferred therefrom before it by the plaintiffs.

6. Now the defendants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 21.08.2008 this Court admitted the appeal on the hereinafter extracted substantial question of law:-

> "1. Whether the Appellate Court has committed illegality by shifting the burden of proof of proving the report of finger print expert on present appellants/defendants?
>
> 2. Whether the impugned judgement and decree of the Appellate Court is a result of mis-apprecitation and mis reading of evidence particularly Ext. DW-2/A?"

Substantial questions of law.

7. Defendants No. 1 and 2 had on anvil of a testamentary disposition executed vis.a.vis them qua his estate by one Julffi Ram staked claim qua the suit property. Their claim for title to the suit property ensuing from theirs holding a valid testamentary disposition of the deceased testator secured approbation from the learned A.C. 2nd Grade, Una concerned, comprised in his thereupon attesting mutation number 32 on 14.1.1994 qua the suit property vis.a.vis the defendants No.1 and 2.

8. The factum of proof of Ext.DW-2/A within the ambit of the statutory mandate of Section 63 of the Indian Evidence Act stood purveyed by the propounders of Will Ext.DW-2/A comprised in theirs affirmatively examining a marginal witness thereto. However, proof in the aforesaid manner as stood adduced by the propounders of Will comprised in Ext.DW-2/A qua thereupon its standing construeable to be proven to be validly and duly executed by the deceased testator visibly holds no vigour tritely with the finger print experts in their apposite reports in sequel to theirs holding comparison of the disputed thumb impressions of the deceased testator occurring on the relevant testamentary disposition comprised in Ext.DW-2/A with his uncontroverted admitted thumb impressions, unveiling an opinion qua the thumb impressions of the deceased testator Julfi Ram borne on Ext.DW-2/A not holding compatibility with his uncontroverted admitted thumb impressions whereupon they recorded a conclusion qua the thumb impressions of the deceased testator borne on Ext.DW-2/A not holding any aura of authenticity. The pronouncements recorded by the finger print expert(s) sweepingly effaces the concert of the defendants, to through a marginal witness to Ex. DW-2/A to prove the factum qua

its valid and due execution within the ambit of the statutory mandate also thereupon the testimony of the marginal witness to Ext.DW-2/A looses its creditworthiness. However, the learned trial Court had dispelled the vigour of the relevant report(s) furnished by the finger print expert(s) on the score of theirs being inadmissible in evidence, inadmissibility whereof stood pronounced by it to spur from omission of their respective authors standing examined in proof thereof. The sinew of the dispelling by the learned trial Court of the sanctity of the apposite opinion(s) recorded by the finger print expert(s) on the relevant material transmitted to them for theirs unveiling their opinion thereon, is magnifingly bereft of any validation. An authoritative pronouncement recorded by the Hon'ble High Court of Kerala in case **Parukuty Amma Vs. Thankam Amma 2004(2) Civil Court cases 33,** relevant paragraph whereof stands extracted hereinafter

> "In this connection, it is to be remembered that there is a different between the opinion of the expert with regard to the handwriting and the opinion of the expert with regard to the thumb impression. There is no forgery possible with regard to the thumb impression whereas an expert in forgery can write exactly like the original handwriting of another person. This distinction is well recognized by the decision of the Supreme Court in Jaspal Singh vs. State of Punjab, AIR 1979 SC 1708. the Supreme Court has stated that the science of identifying thumb impression is an exact science and does not admit of any mistake or doubt. This decision was followed by this Court in various decision including one by a Division Bench in Jamesh @ Chacko Vs. State, 1994(1) KLJ 871, even in a case where the impression was smudged but not to the extent of impossibility of comparison. According to the learned counsel whether it is thumb impression or handwriting they are only relevant facts as contained in Section 45 of the Evidence Act and this Court has to arrive at an opinion after taking into account the report of the expert with the evidence."

wherewithin it stands accentuatedly pronounced qua the solemnity of authenticity of determination by a finger print expert of thumb impressions by his adopting the relevant mode falling within the domain of best besides precise scientific evidence whereupon it concluded of the relevant opinion recorded by the finger print expert (s) being unamenable for its standing discounted. The apt ensual therefrom is qua the report(s) of the finger print expert(s) especially when hereat they emanated from a government agency holding a sacrosanct pedestal of theirs being per se admissible in evidence also reliance being imputable thereupon without insisting upon their author(s) to prove their contents unless the relevant unfoldments occurring therein stand impugned by the defendants. However, the defendants as unraveled by an order of the learned trial Court recorded on 5.4.2004 omitted to at the time of theirs standing tendered therebefore purvey thereat their apposite objections thereto rather they thereat communicated qua it being unamenable for consideration at the stage of theirs standing tendered therebefore rather their impact upon the efficacy of the evidence adduced by the defendants pronouncing upon the valid and due execution of Ext.DW-2/A being open to be determined by the learned trial Court. Consequently, the aforesaid unfoldments make a palpable display of the defendants acquiescing to the recitals occurring in the report(s) of the finger print expert(s) concomitantly also theirs not impugning the validity of the report(s) besides theirs not assailing the opinion(s) recorded therein whereupon obviously when for reasons aforestated unless they stood impugned by the defendants theirs on their mere tendering being readable without their authors proving theirs contents whereas with the defendants not purveying their objections thereto neither they impugning them whereupon hence with the apt condition for theirs being unreadable in evidence unless their respective authors stood examined remaining unsubstantiated rendered them to be readable besides admissible in evidence.

9. For reasons aforesaid this Court concludes with aplomb of the judgement and decree of the learned first Appellate Court standing sequelled by its appraising the entire relevant evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of relevant material on record by the learned appellate Court not suffering from any

perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the relevant material available on record. I find no merit in this appeal, which is accordingly dismissed and the judgment and decree of the learned Appellate Court is maintained and affirmed. Substantial questions of law stands answered against the defendants. Decree sheet be prepared accordingly. All pending applications stand disposed of accordingly. No costs.

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BEFORE HON'BLE MR. JUSTICE P. S. RANA, JUDGE.

Rakesh Kumar s/o Sh. Bansi Lal ...Petitioner/Co-defendant No.1

Versus

Suman Sharma d/o Sh.Bansi Lal & Others ...Non-petitioners/Plaintiffs & co-defendants No.2 to 5

CMPMO No. 330/2015
Order reserved on : 23.9.2016
Date of order: 22.11.2016

Code of Civil Procedure, 1908- Section 151- Order 8 Rule 6-A- A counter- claim was filed by the defendants No. 2 to 5- an application was filed by defendant No. 1 for excluding the counter-claim, which was dismissed – held, that if a counter-claim is directed against the plaintiff, a defendant can seek relief against the co-defendant – the counter-claim filed by the defendants No. 2 to 5 was not solely directed against defendant No. 1 but was also directed against the plaintiff – therefore, the Trial Court had rightly dismissed the application for excluding the counter-claim- petition dismissed.(Para-11 to 14)

Cases referred:

Rohit Singh Vs. State of Bihar, 2006(12) SCC 734

Nirmala Devi & Others Vs. Dhian Singh & Others, 2010(1) Himachal Law Reporter H.P. High Court 434

For petitioner/co-defendant No.1 : Mr. Ashwani Sharma, Sr.Advocate with Mr. Ishan Thakur, Advocate

For non-petitioners No.1 to 3/Plaintiffs : None

For non-petitioners No.4 to 7/co-defendants No.2 to 5 : Mr. Anup Rattan, Advocate

The following order of the Court was delivered:

P. S. Rana, J. (Oral)

Present petition is filed under Article 227 of Constitution of India against order dated 24.4.2015 passed by learned Civil Judge (Sr. Division) Dehra Distt. Kangra (H.P.) in C.S. No. 174/2012 title Smt. Suman Sharma & Others Vs. Rakesh Kumar & Others whereby learned Trial Court dismissed the application filed by co-defendant No.1 under section 151 CPC for excluding counter claim filed by co-defendants No.2 to 5 from civil suit No. 174 of 2012.

Brief facts of the case:

2. Smt. Suman Sharma & Others plaintiffs filed civil suit for declaration to the effect that plaintiffs are owners in possession of suit land and entitled to remain in possession of suit land in future also being successors-in-interest of deceased Bansi Lal. It is pleaded that alleged Will dated 9.10.2002 executed by deceased Bansi Lal in favour of co-defendant No.1 Rakesh Kumar is false, frivolous, fictitious and is a result of fraud and undue influence and has no effect on the rights of plaintiffs. It is further pleaded that mutation Nos. 391 and 648 sanctioned and attested on 28.4.2007 are also null and void and not binding upon the rights of

plaintiffs. Consequential relief of perpetual and prohibitory injunction sought restraining the defendants from cutting, felling and removing any type of tree from the suit land and from changing the nature of suit land and from alienating the suit land in any manner. Additional relief of rendition of accounts also sought.

3. Per contra written statement filed on behalf of co-defendant No.1 Rakesh Kumar pleaded therein that suit filed by plaintiffs is not maintainable. It is pleaded that suit is time barred. It is further pleaded that plaintiffs have deliberately suppressed material facts from the Court. It is further pleaded that plaintiffs are estopped to file the present suit by their acts, deeds, conduct and acquiescences. It is further pleaded that valuation of suit for purposes of Court fee and jurisdiction not properly mentioned. It is further pleaded that plaint filed by plaintiffs is not verified in accordance with law. It is further pleaded that plaintiffs are daughters and co-defendant No.1 Rakesh Kumar is son of late Sh. Bansi Lal. It is further pleaded that co-defendants No.2 to 5 namely C. L. Sharma, Nand Lal, Suresh Kumari and Rajni Devi are sons and daughters of deceased Smt. Shanti Devi who was daughter of Smt. Shanti Devi first wife of deceased Bansi Lal. It is further pleaded that plaintiffs and co-defendant No.1 were born from Smt. Kamla Devi who is second wife of late Sh. Bansi Lal. It is further pleaded that suit property was acquired by deceased Bansi Lal on the basis of gift deed executed by his uncle Sh. Ajudhia Dass and on the basis of Will executed by his father Sohan Lal. It is further pleaded that suit property became self acquired property of deceased Bansi Lal. It is further pleaded that Sh. Bansi Lal has executed registered Will dated 9.10.2002 in favour of co-defendant No.1 Rakesh Kumar. It is further pleaded that co-defendant No.1 after the death of Sh. Bansi Lal on the basis of testamentary document became absolute owner in possession of suit property. It is further pleaded that mutations Nos. 391 and 648 were sanctioned in accordance with law and on the basis of testamentary document i.e. registered Will dated 9.10.2002. It is further pleaded that plaintiffs pleaded mutually contradictory and destructive pleas in the pleadings. It is further pleaded that plaintiffs were married and they are residing in Punjab. It is further pleaded that co-defendant No.1 used to look after his old aged father. It is further pleaded that in view of testamentary document in favour of co-defendant No.1 plaintiffs have no legal right, title and interest over suit land. Prayer for dismissal of suit sought.

4. Per contra separate written statement filed on behalf of co-defendants No.2 to 5 namely C. L. Sharma, Nand Lal, Suresh Kumari and Rajni Devi pleaded therein that plaintiffs have no cause of action and plaintiffs are etopped from filing the suit by their act and conduct. It is further pleaded that plaintiffs did not approach the Court with clean hands. It is further pleaded that civil suit is collusive between plaintiffs and co-defendant No.1 Rakesh Kumar. It is further pleaded that deceased Bansi Lal died intestate and parties have inherited suit property. It is further pleaded that no Will was executed by deceased Bansi Lal on dated 9.10.2002 in favour of co-defendant No.1 Rakesh Kumar. Prayer for dismissal of suit sought.

5. Co-defendants No.2 to 5 namely C. L. Sharma, Nand Lal, Suresh Kumari and Rajni Devi filed counter claim under Order VIII Rule 6-A CPC in civil suit No. 174 of 2012 for declaration that counter claimants alongwith plaintiffs and co-defendant No.1 are owners in possession of suit land on the basis of legal heirs. It is pleaded that suit property is Hindu ancestral and coparcenery property. It is pleaded that parties have right and interest in the property by birth being coparcener. Additional decree of possession by way of partition of land and rendition of accounts also sought by co-defendants No.2 to 5 in counter claim. Prayer for decree of counter claim sought.

6. Written statement to counter claim filed by plaintiffs pleaded therein that deceased Bansi Lal died intestate. It is further pleaded that deceased Bansi Lal did not execute any Will on dated 9.10.2002 in favour of co-defendant No.1 Rakesh Kumar.

7. Co-defendant No.1 Rakesh Kumar filed application under section 151 CPC for excluding counter claim from civil suit No. 174 of 2012 on the ground that counter claim filed by co-defendants No.2 to 5 in C.S. No.174/2012 is not maintainable against co-defendant No.1. It is pleaded by co-defendant No.1 that property of late Sh. Bansi Lal has been inherited by co-

defendant No.1 by way of registered Will dated 9.10.2002. It is pleaded that co-defendants No.2 to 5 did not seek any relief against plaintiffs in counter claim. It is pleaded that counter claim be excluded from civil suit No. 174 of 2012.

8. Per contra response filed on behalf of co-defendants No.2 to 5 upon application filed under section 151 CPC by co-defendant No.1 pleaded therein that registered Will dated 9.10.2002 is challenged. It is pleaded that co-defendants No.2 to 5 have sought relief against plaintiffs as well as co-defendant No.1 in counter claim for declaration, possession by way of partition and rendition of accounts. It is pleaded that counter claim is maintainable. Prayer for dismissal of application filed under section 151 CPC sought. Learned Trial Court on dated 24.4.2015 dismissed application filed under section 151 CPC by co-defendant No.1 namely Rakesh Kumar for excluding counter claim from civil suit No. 174 of 2012. Feeling aggrieved against the order dated 24.4.2015 present petition filed under Article 227 of Constitution of India by co-defendant No.1 Sh. Rakesh Kumar.

9. Court heard learned Advocate appearing on behalf of petitioner and non-petitioners and Court also perused the entire records carefully.

10. Following points arise for determination in the present petition:

1) Whether petition filed under Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?

2) Relief.

<u>Findings upon point No.1 with reasons:</u>

11. Submission of learned Advocate appearing on behalf of co-defendant No.1 namely Rakesh Kumar that counter claim filed by co-defendants No.2 to 5 under Order VIII Rule 6-A CPC against co-defendant No.1 cannot be filed as per law and same be excluded from civil suit No.174/2012 is decided accordingly. Counter claim under Order VIII Rule 6-A CPC was incorporated in Code of Civil Procedure 1908 w.e.f. 1.2.1977 vide amendment in CPC vide Act 104 of 1976. Order VIII Rule 6-A CPC is quoted : (1) Defendant in a suit may in addition to his right of pleadings can file counter claim against the claim of plaintiff either before or after filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired provided that counter claim should not exceed the pecuniary limits of the jurisdiction of court. (2) Counter claim would have the same effect as a cross suit so as to enable the court to pronounce final judgment in the same suit both on the original claim and on the counter claim. (3) Plaintiff would be at liberty to file written statement in answer to the counter claim of the defendant within such period as may be fixed by the court. (4) Counter claim would be treated as plaint and governed by the rules applicable to plaint. It is well settled law that counter claim is not maintainable if directed solely against other co-defendant. It is well settled law that if counter claim is directed against plaintiff then alongwith it co-defendant can seek relief against other co-defendant also. See **2006(12) SCC 734 Rohit Singh Vs. State of Bihar.** See **2010(1) Himachal Law Reporter H.P. High Court 434 Nirmala Devi & Others Vs. Dhian Singh & Others.**

12. Court has carefully perused the counter claim filed by co-defendants No.2 to 5 under Order VIII Rule 6-A CPC in C.S. No.174/2012. Co-defendants No.2 to 5 have sought counter claim for declaration that co-defendants No.2 to 5 alongwith plaintiffs and co-defendant No.1 are owners in possession of suit land in equal shares. Co-defendants No.2 to 5 have also sought additional relief in counter claim qua decree for possession by way of partition of suit land against plaintiffs and co-defendant No.1. Co-defendants No.2 to 5 have also sought additional relief of rendition of accounts against plaintiffs and co-defendant No.1. Co-defendants have impleaded plaintiffs and co-defendant No.1 as party in counter claim.

13. It is held that counter claim filed by co-defendants No.2 to 5 under Order VIII Rule 6-A CPC is not solely directed against co-defendant No.1 but is also directed against plaintiffs. It is held that co-defendants No. 2 to 5 have sought relief against co-defendant No.1 alongwith plaintiffs. It is held that Suman Sharma, Santosh Sharma, Tripta Sharma and Rakesh

Kumar would get adequate opportunity to contest counter claim in accordance with law. In view of the fact that counter claim filed under Order VIII Rule 6-A CPC is not solely filed against co-defendant No.1 namely Rakesh Kumar but is also filed against plaintiffs namely Suman Sharma, Santosh Sharma and Tripta Sharma it is held that in view of ruling cited supra order of learned Trial Court is not illegal. It is held that no interference is warranted. Point No.1 is answered in negative.

Point No.2 (Final Order).

14. In view of findings upon point No.1 present petition filed under Article 227 of Constitution of India is dismissed. Parties are directed to appear before learned Trial Court on 15.12.2016. Observations will not effect merits of the case in any manner. File of learned Trial Court alongwith certified copy of the order be sent back forthwith. CMPMO No. 330/2015 is disposed of. Pending application(s) if any also disposed of.

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

Shankar Lal (through LRs) ..Appellant/defendant

Versus

Ramesh Chander (through LRs) and others ..Respondents.

RSA No.556 of 2004
Reserved on : 7.11.2016
Date of decision: 22/11/2016

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs pleaded that revenue entries were changed in their absence – a sale deed was executed and a mutation was attested on the basis of the wrong entries- plaintiffs sought declaration and injunction – the suit was decreed by the trial Court- an appeal was filed, which was dismissed – held, in second appeal that the plaintiffs are the legal heirs of deceased R, who was the previous owner of the property – succession certificate was also granted in their favour – the plea of adverse possession was not established – the suit was rightly decreed by the Courts- appeal dismissed.(Para-7 to 19)

For the appellant: Mr. J.R.Poswal, Advocate.
For the respondents: Mr. G.D.Verma, Sr. Advocate with Mr. B.C.Verma, Advocate, for respondents No. 1(a) & 1(b) and 2 to 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

Under concurrently recorded impugned renditions of both the learned Courts below the suit of the plaintiffs for declaration besides for relief of permanent prohibitory injunction qua the suit property besides qua the defendants stood decreed. The defendants stand aggrieved by the concurrently recorded renditions of both the learned Courts below wherefrom they for seeking their reversal institute the instant appeal herebefore.

2. The facts necessary for rendering a decision in the instant appeal are that Ram Rakha died on 4th December, 1983 leaving behind the plaintiffs as his heirs. The plaintiffs and Ram Rakha were living at Lalgam in Jammu and Kashmir. The defendant No.2 took undue advantage of the absence of plaintiffs and their predecessor in interest colluded with revenue officials and Ram Swaroop and Karam Chand etc. moved application for mutation of suit land in their favour after the death of Ram Rakha and defendant No.2 succeeded in getting entered and attested the mutation in respect of suit land in her favour vide mutation No.125 on 24.12.1994 behind the back of the plaintiffs. The defendant No.2 sold some part of the land to defendant

No.1 vide sale deed No.1259 dated 3.11.1999. Consequently, the mutation was sanctioned in favour of defendant No.1 on the basis of illegal and wrong sale deed. The matter went to Hon'ble High Court in an appeal. During the pendency of the appeal before the Hon'ble High Court of Himachal Pradesh the plaintiffs moved an application under Order 1 Rule 10 CPC and they became party. The Hon'ble High Court dismissed the suit and set-aside the judgement and decess passed in favour of defendant No.2. After setting aside the decree the defendants again colluded with the revenue officials again executed sale deed. The mudations are stated to be illegal and void as a result of fraud. It is also pleaded that the defendants were known to the whereabouts of the plaintiffs and Ram Rakha was in visiting terms and was in regular touch with defendants. The plaintiffs prayed for a decree that they are absolute owners in possession of the suit land and also alternatively prayed for relief of possession.

3. The defendants contested the suit and rasied preliminary objections about maintainability, locus standi, cause of action and estoppel. On merits it is admitted that Ram Rakha was owner of the suit property and after his death defendant No.2 the next legal heir became the owner in possession of the property. It is pleaded that Ram Rakha slipped away from the house when he was minor about 40 years and was not heard by persons who could hear and knowledge about him. It is pleaded that the suit land is in possession of defendant No.2. The defendant No.1 has taken plea of bonafide purchaser after due inquiry of the title from the record and spot position. The plaintiffs are stated to be neither legal heirs nor having any concern with the property of deceased Ram Rakha.

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

1. Whether the plaintiffs are the legal heirs of deceased Ram Rakha? OPP.

2. Whether the sale deed No. 1259 dated 3.11.1999 and 529 dated 5.5.2001 are illegal, null and void having no effect on the rights of the plaintiffs?

3. Whether the suit is not maintainable? OPD

4. Whether the plaintiffs are estopped to file the present suit due to their act, conduct and acquiescence? OPD.

5. Whether the plaintiffs are having no locus standi? OPD.

6. Whether the suit of the plaintiffs is barred by limitation? OPD

6-A Whether the defendants have become the owner by way of adverse possession? OPD.

6-B Whether the defendant No.1 is bonafide purchaser for consideration?

7. Relief.

5 On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the defendants.

6. Now the defendant No.1 has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 14.12.2004, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

"1. Whether the learned First Appellate Court erred in not deciding the applications, filed by the appellant-defendant for leaving additional evidence under Order 41 Rule 27 of the Code of Civil Procedure, which resulted in grave injustice?

2. Whether the learned trial Court had no pecuniary jurisdiction to try the suit?

3. Whether the learned trial Court and the first Appellate Court erred in holding that the suit was within the period of limitation?

4. Whether the findings of the learned trial Court and the first Appellate Court are dehors the evidence on record?

Substantial questions of law.

7. On demise one Ram Rakha, the defendant No.2 who uncontrovertedly is his Class-II heir obtained qua the suit property, comprising the estate of deceased Ram Rakha, mutation No. 125 besides mutation No. 163 wherewithin a pronouncements occur declaring her to be owner of the suit property. The plaintiffs concerted to set-aside the aforesaid mutations recorded qua the suit property. Their claim qua the suit property stood anvilled upon theirs respectively being the widow besides the progeny born from the wedlock of deceased Ram Rakha with one Bhagwanti. Consequently they canvass qua with theirs holding the capacity of theirs being the Class-I heirs of deceased Ram Rakha qua hence theirs on demise of Ram Rakha holding a capacity superior to the capacity of the defendant No.1 to succeed to his estate.

8. For validating the pronouncements concurrently recorded by both the learned Courts below the evidence adduced therebefore is enjoined to hold visible portrayals qua (a) deceased Ram Rakha solemnizing marriage with one Bhagwanti. (b) the plaintiffs other than one Bhagwanti standing begotten from the wedlock which occurred inter se deceased Ram Rakha with Bhagwanti. (c) The identity of Ram Rakha displayed in jamabandi Ext.P-4 standing connected with the predecessor in interest of the plaintiffs. (d) Since defendant No.1 during the pendency of the suit before the Sub Judge 1st Class, Nalagarh acquired title qua the suit land under sale deeds respectively executed in his favour by defendant No.2, his espousal qua his falling within the ambit of an ostensible owner for thereupon the aforesaid sale deeds acquiring validation stands enjoined to be determined by this Court by its making allusion to the relevant evidence. In so far as the factum of the identity of deceased Ram Rakha as displayed in jamabandi Ext.P-4 vis.a.vis. his holding connectivity with his holding the capacity of being the pre deceased husband besides the pre deceased father respectively of the plaintiffs, is concerned, it is emphatically established on record qua his belonging to the Bhramin caste besides his residing at village Lodhimajra, Tehsil Nalagarh. PW-2 testifies qua hers residing at Lodhimajra whereat she developed intimacy with Ram Rakha who was thereat running a shop wherefrom they departed to Amritsar whereat they solemnized marriage besides her testification qua thereafter theirs residing at Siyalkot, Jammu, Ambala, Delhi, Amritsar, Sri Nagal and theirs ultimately settling at Uri in Jammu and Kashmir, holds tenacity in establishing the factum aforesaid significantly when it acquires corroborative vigour from the testifications of other plaintiffs' witnesses.

9. The vigour of evidence qua the aforesaid facet comprised in the testifications of the plaintiffs' witnesses acquires incremental momentum from their relevant testifications occurring in their respective examinations in chief remaining unshred of their efficacy despite theirs standing subjected to an exacting cross-examination by the counsel for the defendants. Also the vigour of their respective testifications qua the relevant fact aforestated attains redoubled sinew from the factum of the defendants not adducing therebefore the relevant best documentary evidence comprised in theirs adducing the photographs of Ram Rakha qua whom reflections occur in jamabandi Ext.P-4 vis.a.vis the photographs of the purported predecessor in interest of the plaintiffs whereupon with a display respectively therein qua dissimilarity occurring inter se both they would succeed in theirs delinking the identity of Ram Rakha displayed in jamabandi Ex. P-4 with the identity of the purported predecessor in interest of the plaintiffs concomitantly thereupon they would achieve success in begetting reversal of the verdicts of both the Courts below. Apart from oral evidence displaying the factum of Ram Rakha solemnizing marriage with Bhagwanti, documentary evidence comprised in Ext.P-10 (Ext.P-10A translated copy) constituting the voters list of the legislative assembly and of the Parliament, for Jammu and Kashmir when holds reflections in tandem with oral evidence also with the voters list constituting a public record within the ambit of Section 35 and Section 74 of the Indian Evidence Act whereupon it enjoys a presumption of truth, the presumption of truth enjoyed by the relevant reflections occurring therewithin acquire conclusivity for want of adduction therebefore by the defendants of cogent evidence for eroding the truth of the relevant manifestation carried therewithin Ext.b-11 comprises a copy of a diploma issued by the Jammu and Kashmir State Medical Faculty in favour

of plaintiff No.5 wherein Ram Rakha stands depicted to be her father. Rakesh Chander stands depicted in Ext.P-12 to be the son of deceased Ram Rakha. Ext.PX pronounces qua plaintiff No.1 being son of Pt. Ram Rakha Awasthi.

10. Statement of accounts comprised in Ext.P-3, P-4, P-5 and P-6 maintained by deceased Ram Rakha with the relevant banking agencies do also vividly depict the identity of the predecessor in interest of the plaintiffs.

11. Grant of succession certificate vis.a.vis. the plaintiffs comprised in Ext.P8 vis.a.vis the estate of deceased Ram Rakha conclusively establishes the relevant factum of the plaintiffs holding the capacity of theirs being construable to be the class-I heirs of deceased Ram Rakha especially when the veracity of the relevant recitals occurring therewithin remain unrepulsed by cogent evidence in rebuttal thereto standing adduced therebefore by the defendants nor when Ext.P-8 stood concerted by the defendants to beget annulment by theirs initiating before the competent Court proceedings for quashing it.

12. Even though all the aforesaid oral besides documentary evidence conclusively sustain an inference qua the plaintiffs respectively standing related to deceased Ram Rakha as his wife besides his offsprings from his wedlock with plaintiff Bhagwanti nonetheless the defendants had strived to contend qua the entering of a wedlock by Ram Rakha with Bhagwanti without prior thereto the latter annulling her previous marriage with one Karam Chand, not holding any validation. However, the aforesaid espousal of the defendants to erode the legality of the marriage entered inter se plaintiff Bhagwanti with deceased Ram Rakha is bereft of any cogent evidence for sustaining it also assuming even if plaintiff Bhagwanti without annulling her previous marriage with Karam Chand had contracted a marriage with Ram Rakha yet with the provisions of Section 16 of the Hindu Marriage Act holding a mandate qua the offsprings born from a void marriage holding the capacity to succeed to the estate of their deceased father renders them to hold the relevant capacity of theirs being construable to be Class-I heirs of deceased Ram Rakha also hence empowers them to on his demise acquire his estate in supersession to the right if any of defendant No.2 uncontrovertedly his class-II heir to succeed to the estate of Ram Rakha. Moreover in making the aforesaid inference strength stands marshaled by the factum, for reasons aforestated qua the identity of Ram Rakha reflected in Jamabandi Ext.P-4 holding connectivity with the identity of the predecessor in interest of the plaintiffs.

13. Be that as it may, the defendant No.2, had on anvil of Ext.P-2 comprising the verdict recorded by the Civil Court on 1.12.1994, verdict whereof of the Civil Court stood affirmed by the learned Appellate Court wherewithin the defendant No.2 stood declared to hold an entitlement to on demise of Ram Rakha who stood impleaded in the suit as defendant No.2 to inherit his estate, had concerted to espouse qua hence the effect of the oral testifications besides the effect of the aforesaid documentary evidence standing blunted also thereupon the concurrently recorded pronouncements rendered by both the Courts below loosing their vigour. The aforesaid espousal is bereft of authenticity in the face of Ext.P-19 holding a verdict recorded by this Court in a second appeal filed hereat by Karam Chand a party to the lis whereon the aforesaid renditions stood concurrently recorded by the learned Courts below wherewithin unfoldments occur qua defendant No.1 on demise of Ram Rakha impleaded as a defendant in the suit, standing entitled to inherit his estate whereupon this Court annulled Ext.P-2 on account qua on occurrence of demise of Ram Rakha defendant No.2 in the suit on 4.12.1983 yet his remaining unsubstituted by his LRs hence rendering the concurrently recorded renditions of both the Courts below to stand pronounced against a dead person whereupon they acquired a vice of nullity. Moreover, the factum of impleadment of aforesaid Ram Rakha in the Civil Suit aforesaid negates the effect of proceedings of Makful Ul Khabri initiated at the instance of Karam Chand before the Assistant Collector 2nd Grade, wherein he had claimed qua Ram Rakha deceased missing since the age of 17-18 years in sequel whereto a notice stood published in Vir Partap on 7th May, 1989, in aftermath whereof the contentious mutation qua the suit property stood attested in favour of Krishana defendant No. 2 herebefore. In addition, the factum of impleadment of Ram Rakha in the civil suit aforesaid begets an inference of one Karam Chand

besides defendant No.2 Krishana hence acquiescing qua his being alive also his not missing rather also when they on occurrence of his demise during the pendency of the suit whereupon they omitted to beget his impleadment by his LRs fillips a derivative qua theirs by machination excluding the participation of the plaintiffs' in the previous civil proceedings hence theirs obtaining a stained decree comprised in Ext.P-2. Further more, the effect qua theirs before the learned trial Court omitting to beget substitution of deceased Ram Rakha by his legal representatives obviously when thereupon the names of his legal representatives would occur besides would stand unfolded, identity whereof when holding dissimilarity with the plaintiffs' herein would stir an inference of deceased Ram Rakha displayed in Ex. P-4 not holding any connectivity with the predecessor-in-interest of the plaintiffs contrarily when they omitted to make the apposite endeavour before the learned trial Court, sustains an inference qua theirs acquiescing qua none other than the plaintiffs holding the capacity of the legal representatives of Ram Rakha also theirs hence acquiescing qua the compatibility of identity vis-à-vis Ram Rakha reflected in Ex. P-4 with the predecessor-in-interest of the plaintiffs.

14. Apparently Ram Rakha predecessor in interest of the plaintiffs stands depicted in Ext.P-14, copy of jamabandi for the year 1991-92 to be owner in possession of the suit land whereupon the plaintiffs on his demise especially when they are his class-I heirs stand hence entitled to succeed to his estate rendering hence mutations conferring title upon the suit land qua defendant No.2 uncontrovertedly his class-II heirs, to hold no vigour. Defendant No.1 who had acquired title to the suit land from defendant No.2 under sale deeds executed in his favour respectively on 3.11.1999 and 5.5.2001 had concerted to validate his acquisitions qua the suit land under the sale deeds aforesaid, by proclaiming his being an ostensible owner of the suit land. However, his proclamation would hold tenacity only when he was able to adduce best evidence in portrayal qua his despite holding an in-depth incisive inquiry his standing disabled to unearth therefrom qua the title of defendant No.2 qua the suit land standing clouded also thereupon he would be construable to be a bonafide purchaser for value of the suit land. However, with defendant No.2 executing the relevant sale deeds during the pendency of the civil suit before the Sub Judge 1st Class, Nalagarh besides his acquiescing qua his holding awareness qua the ongoing litigation qua the suit property, holds loud unveilings qua his despite holding knowledge qua the title of defendant No.2 qua the suit land standing clouded his yet proceeding to execute the apposite sale deeds with defendant No.2 wherefrom it is to be concluded with aplomb qua his not been amenable to be construable to be an ostensible owner nor also he can don the capacity of a bonafide purchaser for value of the suit property. Contrarily when herebefore despite the aforesaid relevant unfoldments upsurging on his relevant inquiry qua the status of the suit property besides the assailable title thereon of defendant No.2 his yet proceeding to execute them with defendant No.2 encumbers him with a disability to validate the relevant acquisition also he stands fastened with a liability to accept the concurrently recorded renditions qua the suit property by both the Courts below.

15. The learned counsel appearing for the defendants' has contended qua the suit of the plaintiffs being barred by limitation, it standing instituted beyond the prescribed period mandated in Article 58 of the Limitation Act. However, the aforesaid submission cannot stand accepted by this Court, as the aforesaid apposite article of the Limitation Act while prescribing the commencement of the relevant period of limitation proclaims qua the relevant commencement for computing therefrom the period of limitation encapsulated therein occurring on an accrual of "right to sue", right to sue whereof holds a connotation qua its spurrings or occurrings arising on actual and threatened invasion(s) qua the settled right of the plaintiff(s) upon the suit property. In sequel when the connotation borne by the apposite statutory parlance 'right to sue' is qua its upsurging on the defendant(s) committing overt act upon the suit property hence theirs explicitly pronouncing theirs casting cloud qua the title of the plaintiff(s) qua the suit land whereupon even if mutations qua the suit property stood attested on 24.12.1994 and 20.11.1999 whereas the suit of the plaintiff stood instituted in the year 2001 would not render it to be construable to stand instituted beyond limitation, as merely on attestation of relevant mutations which palpably are nonest besides stand recorded in deprivation of the vested rights of the plaintiffs qua the suit

property no title hence standing invested upon the suit land qua defendant No.2 rather when the plaintiffs' title to the suit land stood explicitly annulled besides came under a cloud by the proactive overt act of defendant No. 2 executiing sale deeds respectively on 3.11.1999 and 5.5.2001, with defendant No. 1 constituted the latter period to enliven thereat the relevant cause of action or it begot the commencement of the relevant period of limitation for the plaintiffs' instituting a suit. In sequel thereto with the plaintiffs therefrom instituting the suit within the statutorily mandated period of limitation prescribed in the relevant Article of the Limitation Act renders it to be construable to be within limitation.

16. The defendants had raised a plea qua theirs perfecting their title qua the suit property by adverse possession. However, the aforesaid plea stands benumbed by (a) the principle requisite for sustaining their claim comprised in theirs asserting it against a true owner being amiss imperatively when acquisition of the suit property by defendant No.1 from defendant No.2 occurred under sale deeds executed inter se both whereupon obviously with defendant No.1 accepting defendant No.2 to be owner of the suit property, he stood debarred from espousing qua the plaintiffs holding title to the suit property nor also he holds any leverage to contend of his standing capacitated to the rear plea against the plaintiffs. (b) likewise with defendant NO.2 executing the sale deeds aforesaid she thereupon acquiescing qua hers holding title as owner to the suit property concomitantly she also hence stands debarred from proclaiming the plaintiffs to be owners nor also she holds any capacity to rear the aforesaid plea against the plaintiffs conspicuously when she contests their title qua the suit land with defendant No.1. Moreover, with defendant No. 1 concerting to validate the relevant acquisitions qua the suit property under sale deeds executed qua him by defendant No.2 estopes him from contending qua the plaintiffs holding title qua the suit property nor also hence when the relevant ingredient for sustaining his plea stands provenly unsatiated he stands incapacitated to rear it.

17. The learned counsel for the defendants has contended qua the omission of the Appellate Court to pronounce an adjudication on his application constituted therebefore under Order 41 Rule 27 CPC wherein he sought leave of the Appellate Court to through the documents embodied therein deestablish the identity of Ram Rakha besides whereby he concerted to establish qua Ram Rakha borne in jamabandi comprised in Ext.P-4 not being the predecessor in interest of the plaintiffs, has throttled his relevant concert. The effect of the learned Appellate Court court not recording its pronouncement on the aforesaid application would not beget an inference qua the sinew of the aforestated oral besides documentary evidence which existed therebefore holding therewithin vivid articulations in portrayal of Ram Rakha being the predecessor in interest of the plaintiffs, hence standing eroded also by his canvassing therein qua with Ram Rakha being a permanent resident of Nalagarh he stood statutorily barred to purchase property in Jammu and Kashmir whereas with his acquiring property in Jammu and Kashmir renders the identity of the predecessor in interest of the plaintiffs to stand unrelated with one Ram Rakha who made acquisitions in Jammu and Kashmir also hence with one Ram Rakha whose name occurs in Ext.P-4, he would not succeed in benumbing the effect of the aforesaid evidence especially when the relevant acquisitions made by Ram Rakha in Jammu and Kashmir in purported infraction of the law prevailing thereat barring permanent residents other than of Jammu and Kashmir to acquire property therein, would only hold a ground for the acquisitions made thereat by Ram Rakha in purported infraction of the prevailing law thereat standing concerted by the appropriate agency(s) to be set-aside. Consequently it does not give any ground to this Court in pronouncing qua with the learned first Appellate Court omitting to pronounce a verdict upon the application of the defendants' constituted therebefore under Order 41 Rule 27 CPC belittling the tenacity besides the effect of the aforesaid oral as well as documentary evidence tellingly pronouncing upon the similarity of identity of Ram Rakha inter se apposite reflections occurring in the apposite jamabandi vis.a.vis his holding the capacity of the predecessor in interest of the plaintiffs'.

18. The suit of the plaintiffs for declaration apparently is properly valued for the purpose of Court fees also is apparently properly valued qua the apposite relief claimed in the

Civil Suit, therefore, it is held that the learned trial Court had the pecuniary jurisdiction to try the suit.

19. For reasons aforesaid this Court concludes with aplomb of the judgements and decrees of the Courts below standing sequelled by theirs appraising the entire evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of material on record by the learned Courts below not suffering from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather they have aptly appreciated the material available on record. I find no merit in this appeal, which is accordingly dismissed and the judgments and decrees of the both the Courts below are maintained and affirmed. Substantial questions of law stands answered against the defendants. Decree sheet be prepared accordingly. All pending applications stand disposed of accordingly. No costs.

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

Aruna Bedi ....Appellant/applicant

Versus

Subhash Kapil and others. .....Respondents/non-applicants

CMP(M) No. 273 of 2016
in RSA in 2016
Decided on: 23rd November, 2016

Limitation Act, 1963- Section 5- An application for condonation of delay in filing the appeal was filed pleading that the husband of the applicant was not party to the suit or in the appeal- an amount of Rs.1,40,004/- has been ordered to be recovered from him- held, that the husband of the applicant was not arrayed as a defendant in the suit – the suit was dismissed by the Trial Court- an appeal was preferred and the suit was decreed- the decree was passed against department of I & PH but the department was left free to recover the amount from the husband of the applicant- the explanation furnished by the applicant is plausible – the application allowed and the delay condoned. (Para-4)

For the applicant:	Mr. B.L. Soni and Mr. Narender Thakur, Advocates.
For the non-applicants:	Mrs. Jyotsna Rewal Dua, Sr. Advocate with Ms. Charu, Advocate for respondent No.1. Mr. Neeraj K. Sharma, Dy. A.G for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Heard.

2. The appeal against the judgment and decree passed by learned District Judge, Kullu on 1.4.2009 in Civil Appeal No. 33 of 2007 is barred by a period over six years. The delay as occurred has been sought to be condoned on the grounds inter-alia that Shri J.S. Bedi, the husband of the applicant/appellant was not a party to the suit nor in the appeal in the Court of learned District Judge, Kullu and to the contrary learned lower appellate Court has ordered to recover the decretal amount i.e. Rs. 1,40,004/- from him. Said Shri J.S. Bedi had expired during the pendency of the suit in the trial Court i.e. on 8th October, 2006. Neither he nor the applicant/appellant were aware of the Civil Suit which was filed in the Court of learned Civil Judge (Senior Division), Kullu and also the appeal in the learned lower appellate Court. When the applicant came to know about the filing of the suit and also the appeal in the Court below,

she applied for certified copy of the judgment and decree, under challenge in the month of June, 2015 and thereafter filed the appeal along with this application in this Court.

3. The application, no doubt, has been resisted and contested on behalf of the respondents/non-applicants, however, in rejoinder, the applicant/appellant has further explained the delay as occurred in filing the appeal.

4. Having regard to the submissions made by learned counsel on both sides as well as record available at this stage, admittedly, Shri J.S. Bedi, the deceased husband of applicant was not arrayed as defendant in the suit. The suit was dismissed by the trial Court. The same, however, has been decreed by learned lower appellate Court for the recovery of Rs. 1,27,908/- with pendente-lite interest @ 12% per annum. The future interest @ 7.5% per annum has also been awarded on the decretal amount. The decree though has been passed against the defendant i.e. the Department of Irrigation and Public Health, Division No. 1, Kullu and the State of Himachal Pradesh through Collector Kullu District at Kullu, however, learned lower appellate Court has left it open to the defendant to recover the same from Shri J.S. Bedi. No such direction could have been passed without hearing said Shri J.S. Bedi, who as a matter of fact, had already expired during the pendency of the suit in the trial Court. No doubt, as per stand of the defendant-State, the applicant was informed vide letter dated 20.10.2009, Annexure R-1 about the judgment passed by learned lower appellate court and the recovery of the amount in question from said Shri J.S. Bedi, however, it cannot be said that this letter was delivered to her or that she failed to respond to the same intentionally and deliberately. On the other hand, the plea of the applicant/appellant that she came to know about the recovery of Rs. 1,70,170/- vide office order Annexure RA-1 dated 5.9.2014 qua sanction of gratuity modified further vide another office order Annexure RA-2 dated 28.01.2015 from due and admissible amount seems to be nearer to the factual position. She has further claimed that on coming to know about the recovery of above-said amount, she approached the defendant, however, the necessary details were not supplied to her. When she came to know about the filing of the suit and the judgment and decree passed by learned lower appellate court, she applied for certified copies thereof in the month of June, 2015 and immediately after receipt thereof, filed the appeal in this Court. The explanation as set-forth is not only reasonable but plausible also, because when the husband of the applicant was not a party to the suit, it can reasonably be believed that institution of the suit and the appeal in the learned lower appellate court was not in her knowledge. Otherwise also, that part of the judgment and decree which pertains to a direction qua recovery of decretal amount from Shri J.S. Bedi, the deceased husband of the applicant/appellant is patently illegal. Since said Shri J.S. Bedi had already expired on the day when the trial Court has passed the impugned judgment and decree, no such direction could have been issued without ascertaining as to whether he was alive or not on that day and if alive, without affording an opportunity of being heard to him. Therefore, without impleading the applicant/appellant as party in the appeal and affording her an opportunity of being heard, a direction, penal in nature could have not been issued. The present as such is a fit case where on condonation of delay, the appeal deserves to be entertained and decided on merits. Being so, I allow this application and order to condone the delay as occurred in filing the appeal. The application stands accordingly disposed of.

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

Bachittar Singh …..Petitioner.

Vs.

Central Bank of India and others …..Respondents.

CWP No.: 1057 of 2011
Date of Decision: 23.11.2016

Constitution of India, 1950- Article 226- **Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002**- Section 13- Notice was issued under Section 13 of the SRFAESI Act –a writ petition was filed challenging the notice- held, that no representation or reply was filed to the notice – the possession was taken over by the bank and the property was ultimately sold – the remedy under Section 17 lies before Debt Recovery Tribunal – the Writ petition is not maintainable in view of alternative and efficacious remedy available to the petitioner- petition dismissed. (Para- 6 to 14)

Cases referred:
General Manager, Sri Siddeshwara Cooperative Bank Limited and another Vs. Ikbal and others (2013) 10 Supreme Court Cases 83
Punjab National Bank and another Vs. Imperial Gift House and others (2013) 14 Supreme Court Cases 622
Devi Ispat Limited and another Vs. State Bank of India and others (2014) 5 SCC 762

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Ashok Kumar Sood, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. *(Oral)***:**

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

"(a) That the impugned Annexures P-1 & P-2 may very kindly be quashed and set aside with directions to the respondents to adhere to the recovery from the petitioner after waiving of the interest and as per procedure as is applied to other similarly situated persons, i.e. after adhering to One Time Settlement procedure prescribed and available with the respondents;

(b) That the respondents may very kindly be directed to spell out the terms of the One Time Settlement and petitioner in the process undertakes to deposit half of the same in lumpsum and remaining in instalments;

(c) That the entire record pertaining to the case may also be summoned by this Hon'ble Court for its kind perusal;

(d) That cost of the writ petition may also be awarded in favour of the petitioner;

(e) Any other or further relief as this Hon'ble Court may deed just and proper keeping in view the facts and circumstances of the case may also be passed in favour of the petitioner and against the respondents."

2. Annexure P-1, quashing of which has been sought by way of this writ petition is a notice dated 16.06.2010, which was issued under Section 13(2) of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 and Annexure P-2 is advertisement issued by the respondent-Bank for the auction of the land and house of the petitioner to realize the amount which is due to the respondent-Bank from the petitioner.

3. When this case was taken up for arguments on 20.10.2016, the following order was passed:

"When this case was taken up for arguments today, it was submitted by Mr. Ashok Kumar Sood, learned counsel appearing for the respondents that the present petition was not maintainable as the petitioner had directly approached this Court without exhausting the alternative remedy. Mr. Kishore Pundir, learned vice counsel appearing for the petitioner submits that some time may be granted to him to have necessary instructions in this regard. List on ***3rd November, 2016****. In the meanwhile, rejoinder, if any, be also filed to the reply filed by the respondents.*

4. Despite opportunity, neither any rejoinder was filed by the petitioner to the reply so filed by the respondents nor any rejoinder was intended to be filed.

5. I have heard the learned counsel for the parties on the issue of maintainability of the writ petition.

6. It is evident from the averments made in reply to the writ petition that no representation or reply was filed by the petitioner to the notice which was issued under Section 13(2) of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 nor he raised any objection against the said notice in any manner. It is further mentioned in the reply by the respondent-Bank that as petitioner failed to raise any objection against the notice as well as taking over possession of the property nor he came forward with the proposal for repayment of the said loan amount, therefore, the Bank was left with no other option but to proceed for sale of the mortgaged property. It was further mentioned in the reply that the proceedings of taking over possession of the property of the petitioner and sale of the property were strictly as per the provisions of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002.

7. Be that as it may, the fact of the matter remains that the petitioner has challenged a notice issued under Section 13(2) of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 and subsequent advertisement issued by the Bank for sale of the assets of the petitioner to recover its amount. The steps so taken by the Bank are as envisaged under Section 13 of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002.

8. Section 17 of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 provides that any person aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorized officer may make an application alongwith such fee as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken. Advertisement for sale of the property is obviously a measure taken under sub-section (4) of Section 13 of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002. The petitioner rather than pursuing his remedy as was available under the provisions of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 has directly approached this Court without any cogent justification being there in the writ petition as to why the alternative remedy available to the petitioner has not been exhausted.

9. On the contrary, para-8 of the writ petition reads as under:

> *"8. That there is no other alternative and efficacious remedy available to the petitioner except to approach this Hon'ble Court for the redressal of his grievances."*

10. In these circumstances, when there was an alternative and efficacious remedy available to the petitioner and no cogent explanation has been given by the petitioner as to why he has not invoked the said alternative remedy, there is merit in the contention of the learned counsel for the respondents that the present writ petition is not maintainable in view of alternative and efficacious remedy being available with the petitioner.

11. In **General Manager, Sri Siddeshwara Cooperative Bank Limited and another** Vs. **Ikbal and others** (2013) 10 Supreme Court Cases 83, Hon'ble Supreme Court has held that against the action of the Bank under Section 13(4) of the SARFAESI Act, the borrower has a remedy of appeal to the Debts Recovery Tribunal (DRT) under Section 17 and the said remedy is an efficacious remedy. It was further held by the Hon'ble Supreme Court that no doubt an alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 of the Constitution of India, but by now it is well settled that where a Statute provides efficacious and adequate remedy, the High Court will do well in not entertaining a petition under

Article 226. It was further held by the Hon'ble Supreme Court that on misplaced considerations, statutory procedures cannot be allowed to be circumvented.

12. A three Judges Bench of the Hon'ble Supreme Court in **Punjab National Bank and another** Vs. **Imperial Gift House and others** (2013) 14 Supreme Court Cases 622 has held:

> "2. *By the impugned order, in effect and substance, the High Court has quashed notice issued by the bank under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, [for short, "the Act"].*
>
> 3. Upon receipt of notice, respondents filed representation under *Section 13(3)(A)* of the Act, which was rejected. Thereafter, before any further action could be taken under *Section 13(4)*of the Act by the Bank, the writ petition was filed before the High Court.
>
> 4. In our view, the High Court was not justified in entertaining the writ petition against the notice issued under *Section 13(2)* of the Act and quashing the proceedings initiated by the bank.
>
> *5. Accordingly, the appeal is allowed, impugned order passed by the High Court is set aside and the writ petition filed before it is dismissed."*

13. In **Devi Ispat Limited and another** Vs. **State Bank of India and others** (2014) 5 Supreme Court Cases 762, the Hon'ble Supreme Court has held that in view of an alternative remedy to make a representation to the Bank being available under the provisions of Section 13 (3-A) of the Act, there is no reason to by-pass the statutory mechanism.

14. Therefore, keeping in view the reliefs prayed for by the petitioner and the provisions of SARFAESI Act as well as law laid down by the Hon'ble Supreme Court as discussed above, in my considered view, the present writ petition is not maintainable in view of efficacious and adequate remedy being available to the petitioner under Section 17 of the SARFAESI Act.

15. Writ petition is accordingly dismissed with liberty to the petitioner to invoke the alternative remedy available to him. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Charan Dass deceased through LRs …Appellants.

Versus

Subhadra Devi and others …Respondents.

LPA No. 184 of 2007
Reserved on: 03.11.2016
Decided on: 23.11.2016

Constitution of India, 1950- Article 226- Writ-respondent No. 2 purchased the land vide two sale deeds – mutation was attested in his presence- subsequently an application for the correction of the revenue record was filed pleading that the possession was not correctly recorded – the application was rejected – appeal and revision were dismissed- a second revision was filed, which was allowed- writ court set aside the order passed in the revision petition- held in the appeal that the revisional powers are to be exercised with great care and caution- the revisional authority has to examine the orders on the touch stone of legality and not on the question of facts, unless it is found that orders are perverse and factually incorrect – the revisional Court cannot re-appreciate the evidence and set aside the concurrent findings of the facts, unless the findings are perverse or there has been a non-appreciation or non-consideration of material on record- the revisional power cannot be equated with the power to re-appreciate the evidence-

mutation was attested in the presence of respondent No. 2- he had not questioned the findings – the delay was also not explained, which should have been considered- the remedy was to file a civil suit before the Court – Writ Court had rightly passed the judgment – appeal dismissed. (Para-17 to 46)

Cases referred:

Gurudassing Nawoosing Panjwani versus State of Maharashtra and others, 2015 AIR SCW 6277
Manick Chandra Nandy versus Debdas Nandy and others, AIR 1986 Supreme Court 446
Masjid Kacha Tank, Nahan versus Tuffail Mohammed, AIR 1991 Supreme Court 455
Yunis Ali (Dead) Thru his L.Rs. versus Khursheed Akram, 2008 AIR SCW 4372
Chandmal versus Firm Ram Chandra and Vishwanath, AIR 1991 Supreme Court 1594
Gurdial Singh and others versus Raj Kumar Aneja and others, AIR 2002 Supreme Court 1003
Hindustan Petroleum Corporation Ltd. versus Dilbahar Singh, 2014 AIR SCW 5018
Narasamma & Ors., 2009 AIR SCW 2653
State of West Bengal and others versus Karan Singh Binayak and others, AIR 2002 Supreme Court 1543
I. Chuba Jamir & Ors. versus State of Nagaland & Ors., 2009 AIR SCW 5162
Banda Development Authority, Banda versus Moti Lal Agarwal and Ors, 2011 AIR SCW 2835
Chennai Metropolitan Water Supply and Sewerage Board and others versus T.T. Murali Babu, 2014 AIR SCW
State of Jammu and Kashmir versus R.K. Zalpuri and others, AIR 2016 Supreme Court 3006
Jagtar Singh and others versus Swaran Singh, 1979 Simla Law Journal (Punjab & Haryana) 89
The Chief Secretary to Government Punjab and others versus Chawli and others, 1980 Punjab Law Journal 10
Dharam Singh and others versus The State of Haryana and others, 1983 Punjab Law Journal 210

For the appellants: Mr. G.D. Verma, Senior Advocate, with Mr. Pawan Gautam, Advocate.
For the respondents: Mr. Ajay Sharma, Advocate, for respondents No. 1, 3, 4 & 2 (i) to 2 (iii).
Mr. Shrawan Dogra, Advocate General, with Mr. J.K. Verma, Deputy Advocate General, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This LPA is directed against judgment and order, dated 10th October, 2007, made by the learned Single Judge in CWP No. 992 of 2003, titled as Smt. Subhadra Devi and ors. versus State of H.P. and another, whereby the writ petition filed by writ petitioners-respondents No. 1 to 4 herein came to be allowed and order, dated 8th October, 2003, made by the Financial Commissioner (Appeals) was quashed (for short "the impugned judgment").

2. The case in hand has a chequered history, is two decades old and the parties are still litigating, is suggestive of the fact that delay has crept-in in taking the lis to its logical conclusion, which has adversely affected the parties.

3. It is beaten law of the land that delay takes away the settings of law. Thus, it is the duty of all concerned to see that the cases are decided as early as possible.

4. The way this case has been dealt with right from the year 1987 till filing of the writ petition is also a glaring example as to how the people are suffering, that too, for trivial issues.

5. It is necessary to notice the brief facts of the case herein.

6. Shri Charan Dass, the predecessor-in-interest of the appellants, i.e. writ respondent No. 2 (since deceased, now represented through his legal heirs/representatives)

purchased the land vide two registered sale deeds, dated 23rd September, 1969. Mutation No. 542 to this effect was attested on 20th April, 1970. At the time of recording the mutation proceedings, the predecessor-in-interest of the appellants- writ respondent No. 2 was present, had not raised any finger qua recording of mutation and was satisfied till 31st January, 1987, when he filed an application before the Settlement Officer, Kangra for correction of the entries in the revenue record.

7. In the said application, it was averred that the predecessor-in-interest of the appellants-writ respondent No. 2 had purchased 3 kanals 1 marla land out of 7 kanals 10 marlas land comprised in khasra No. 732 min vide registered sale deed, dated 23rd September, 1969, from one Shri Chuhru, was given possession towards the path side, but some mischievous elements had got recorded his possession on the other side and had prayed for correction of the entries.

8. The Settlement Officer, Kangra, transferred the said application to Tehsildar (Settlement), Una. The inquiry was conducted by the Settlement Naib Tehsildar, who submitted the report on 8th October, 1987. After perusing the said report, the Tehsildar (Settlement) rejected the application filed by the appellant-writ respondent No. 2.

9. Feeling aggrieved by the said order, the predecessor-in-interest of the appellants-writ respondent No. 2 questioned the same by the medium of appeal before the Settlement Collector, Kangra, who accepted the appeal vide order, dated 22nd January, 1991, and remanded the case to the Tehsildar (Settlement). The Tehsildar (Settlement) heard the parties, inquired into the matter and again rejected the application vide order, dated 31st January, 1992.

10. Dissatisfied with order, dated 31st January, 1992, made by the Tehsildar (Settlement), the predecessor-in-interest of the appellants-writ respondent No. 2 filed appeal before the Settlement Collector, Kangra, who, vide order, dated 18th June, 2003, dismissed the appeal with the observations that the predecessor-in-interest of the appellants-writ respondent No. 2 had to assail the mutation before the competent court of jurisdiction, which he had not done, thus, the correction of entry relating to possession, as sought for, could not be made in the revenue record.

11. The said order of Settlement Collector was then questioned by the predecessor-in-interest of the appellants-writ respondent No. 2 before the Divisional Commissioner, Kangra Division by the medium of revision petition, was dismissed vide order, dated 15th January, 1998. The Divisional Commissioner has given the minute details of the facts of the case and history behind it. It has specifically recorded that though, as per one of the sale deeds, dated 23rd September, 1969, the predecessor-in-interest of the appellants-writ respondent No. 2 had purchased land on the southern side *(Bhumi Zanab Janoob)*, but the spot inspections conducted by the field staff did not prove that he was in possession of the said portion of the land. Further held that mutation No. 542 was attested on 20th April, 1970, since then entries had been recorded in various records including *jamabandies* and *record-of-rights* and after lapse of such a long period, such record cannot be corrected.

12. Though, the Divisional Commissioner has recorded that since the proceedings before him were in the nature of revision, the evidence was not to be evaluated as the only issue to be determined was the legality of the orders of the revenue authorities. He, by a speaking order, has held that the facts and merits of the case in hand were rightly appreciated by the authorities below.

13. The predecessor-in-interest of the appellants-writ respondent No. 2 invoked the jurisdiction of the Financial Commissioner (Appeals) by the medium of second revision, being Revision Petition No. 224 of 1998, who accepted the same vide order, dated 8th October, 2003, and set aside the orders made by all the three revenue authorities.

14. The writ petitioners-respondents No. 1 to 4 herein questioned the said order of the Financial Commissioner (Appeals) by the medium of CWP No. 992 of 2003, was allowed and

the order made by the Financial Commissioner (Appeals) came to be quashed and set aside in terms of the impugned judgment. Hence, this appeal.

15. The following questions arise for determination in this appeal:

(i) Whether the Financial Commissioner (Appeals), while hearing the second revision, was within its limits and competence to upset the concurrent findings of facts recorded by the revenue agencies including the appellate authority and confirmed by the first revisional authority?

(ii) Whether the Financial Commissioner (Appeals) was within its jurisdiction to accept and grant the application, dated 31st January, 1987, which was highly belated?

(iii) Whether the Financial Commissioner (Appeals) was within its rights and power to direct the revenue authorities to change the entries in the revenue record made in terms of the mutation in the year 1970, came to be reflected and recorded in the *record-of-rights*?

16. The answer to all the three questions is in the negative for the following reasons:

17. The Himachal Pradesh Land Revenue Act, 1954 (for short "Act") contains a complete mechanism as to how the entries are to be recorded in the revenue record i.e. *Record-of-Rights, Misal Haqiat, Khasra Girdawari, Jamabandies* etc., and also provides remedies.

18. Section 17 of the Act provides that the Financial Commissioner may call for the record of any case pending or disposed of by any officer subordinate to him. It is apt to reproduce Section 17 of the Act herein:

*"**17. Power To call for, examine and revise proceedings of Revenue Officers :-** (1) The Financial Commissioner may at any time call for the record of any case pending before or disposed of by any Revenue Officer subordinate to him.*

(2) A Commissioner or Collector may call for the record of any case pending before, or disposed by, any Revenue Officer under his control.

(3) If in any of case in which a Commissioner or Collector, has called for a record, is of the opinion that the proceedings taken or order made should be modified or reversed, he shall report the case with his opinion thereon for the orders of the Financial Commissioner.

(4) The Financial Commissioner may in any case called for by himself under sub-section (1) or reported to him or under sub-section (3) pass such orders as he thinks fit:

Provided that he shall not under this section pass an order reversing or modifying any proceeding, or order of a subordinate Revenue Officer and effecting any question of right between private persons without giving those persons an opportunity of being heard."

19. Section 17 of the Act provides that the Financial Commissioner (Appeals) and the Divisional Commissioner have revisional powers. The Financial Commissioner (Appeals) can exercise second revisional jurisdiction. The jurisdiction of the Financial Commissioner (Appeals) in revision against the orders passed by the revenue authorities subordinate to it, is alike Section 115 of the Code of Civil Procedure (for short "CPC").

20. The Apex Court in the case titled as **Gurudassing Nawoosing Panjwani versus State of Maharashtra and others,** reported in **2015 AIR SCW 6277,** held that if revisional powers are exercised by a revenue officer having jurisdiction to do so, further revisional power can be exercised by the superior revenue officer or by the State Government. It is apt to reproduce para 30 of the judgment herein:

"30. From perusal of the entire scheme of the Code including Section 257, it is manifest that the revisional powers are not only exercisable by the State

Government but also by certain other Revenue officers. There is nothing in the Code to suggest that if these revisional powers are exercised by a Revenue officer who has jurisdiction, it cannot be further exercised by a superior Revenue officer or by the State Government. A fair reading of Sections 257 and 259 suggests that if revisional powers are exercised by a Revenue officer having jurisdiction to do so, further revisional power can be exercised by the superior officer or by the State Government."

21. In the instant case, though the Divisional Commissioner had exercised its revisional jurisdiction, but the Financial Commissioner (Appeals) was also within its rights in exercising the powers of second revisional authority, but it had to exercise the revisional powers with great care and caution, has fallen in an error in upsetting the concurrent findings of facts recorded by the revenue courts below.

22. It is beaten law of the land that the revisional authority has only to examine the orders on the touchstone of legality and not on the question of facts unless it is found that the orders are perverse and factually incorrect.

23. In the case titled as **Manick Chandra Nandy versus Debdas Nandy and others,** reported in **AIR 1986 Supreme Court 446,** the Apex Court has discussed the nature, quality and extent of revisional jurisdiction. It is profitable to reproduce para 5 of the judgment herein:

"5. We are constrained to observe that the approach adopted by the High Court in dealing with the two revisional applications was one not warranted by law. The High Court treated these two applications as if they were first appeals and not applications invoking its jurisdiction under section 115 of the Code of Civil Procedure. The nature, quality and extent of appellate jurisdiction being exercised in first appeal and of revisional jurisdiction are very different. The limits of revisional jurisdiction are prescribed and its boundaries defined by section 115 of the Code of Civil Procedure. Under that section revisional jurisdiction is to be exercised by the High Court in a case in which no appeal lies to it from the decision of a subordinate Court if it appears to it that the subordinate Court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction vested in it by law or has acted in the exercise of its jurisdiction illegally or with material irregularity. The exercise of revisional jurisdiction is thus confined to questions of jurisdiction. While in a first appeal the Court is free to decide all questions of law and fact which arise in the case, in the exercise of its revisional jurisdiction the High Court is not entitled to re-examine or re-assess the evidence on record and substitute its own findings on facts for those of the subordinate Court. In the instant case, the Respondents had raised a plea that the Appellant's application under Rule 13 of Order IX was barred by limitation, Now, a plea of limitation concerns the jurisdiction of the Court which tries a proceeding, for a finding on this plea in favour of the party raising it would oust the jurisdiction of the Court. In determining the correctness of the decision reached by the subordinate Court on such a plea. the High Court may at times have to go into a jurisdictional question of law or fact, that is it may have to decide collateral questions upon the ascertainment of which the decision as to jurisdiction depends. For the purpose of ascertaining whether the subordinate Court has decided such a collateral question rightly the High Court cannot however, function as a Court of first appeal so far as the assessment of evidence is concerned and substitute its own findings for those arrived at by the subordinate Court unless any such finding is not in anyway borne out by the evidence on the record or is manifestly contrary to evidence or so palpably wrong that if allowed to stand. would result in grave injustice to a party."

24. The Apex Court in the cases titled as **Masjid Kacha Tank, Nahan versus Tuffail Mohammed,** reported in **AIR 1991 Supreme Court 455,** and **Yunis Ali (Dead) Thru his L.Rs. versus Khursheed Akram,** reported in **2008 AIR SCW 4372,** held that the Courts, while

exercising revisional jurisdiction, cannot re-appreciate the evidence and set aside the concurrent findings of the Courts below by taking a different view of the evidence unless the findings are perverse or there has been a non-appreciation or non-consideration of the material evidence on record. It is apt to reproduce para 15 of the judgment in **Yunis Ali's case (supra)** herein:

> *"15.It is well-settled position in law that under Section 115 of the Code of Civil Procedure the High Court cannot re- appreciate the evidence and cannot set aside the concurrent findings of the Courts below by taking a different view of the evidence. The High Court is empowered 26 to interfere with the findings of fact if the findings are perverse or there has been a non-appreciation or non-consideration of the material evidence on record by the courts below. Simply because another view of the evidence may be taken is no ground by the High Court to interfere in its revisional jurisdiction."*

25. The same principle has been laid down by the Apex Court in the cases titled as **Chandmal versus Firm Ram Chandra and Vishwanath,** reported in **AIR 1991 Supreme Court 1594,** and **Gurdial Singh and others versus Raj Kumar Aneja and others,** reported in **AIR 2002 Supreme Court 1003.** It would be profitable to reproduce paras 12, 13 and 16 of the judgment in **Chandmal's case (supra)** herein:

> *"12. There is no dispute regarding the submission made in Para 9 of the additional written statement which is a part of the same written statement filed on behalf of the respondent by one of its partners, Shankarrao Marutirao Sonawane to the effect that one of the partners of the said firm, Ramchandra Madhavrao is occupying the house as a permanent tenant since Samvat 2002. Admittedly, on the basis of this additional Written Statement an additional issue No. 1 was framed at the request of the landlord appellant whether the claim of permanent tenancy of Ramchandra Madhavrao was bona fide. It is evident from the provisions of S. 15(2)(vi) as set out hereinbefore that if the tenant has claimed a right of permanent tenancy.and that such claim was not bona fide, the Controller shall make an order directing the tenant to put the landlord in possession of the house. The Additional Rent Controller as well as the District Judge considered carefully and minutely the evidence adduced on behalf of the tenant-respondent and found that claim of permanent tenancy was not bona fide. Accordingly, the courts below held that the tenant-respondent was liable to be evicted from the suit premises on this ground alone and passed order for eviction from the suit premises. The jurisdiction of the High Court in revision against the order passed on appeal by the District Judge is a limited one and it is almost pari materia with the provisions of S. 115 of the Code of Civil Procedure. The High Court while exercising the revisional jurisdiction can interfere with the order passed on appeal by the appellate authority only on three grounds i.e. (i) where the original or appellate authority exercised a jurisdiction not vested in it by law, or (ii) where the original or appellate authority failed to exercise a jurisdiction so vested, or (iii) where in following the procedure or passing the order, the original or appellate authority acted illegally or with material irregularity. It is evident from the averments made in para 9 of the additional written statement. that one of the partners of the respondent firm, Ramchandra Madhavrao occupied the said premises as a permanent tenant since Samvat 2002. This claim of permanent tenancy was held to be not bona fide by the original Court as well as by the appellate authority on a consideration and appraisement of the evidence adduced on behalf of the tenant-respondent and as such both the courts below passed order of eviction of the tenant-respondent from the suit premises. These are admittedly concurrent findings of fact arrived at by the original and the appellate authority. Moreover, these findings in any view of the matter whatsoever, cannot be held to be either without jurisdiction nor it can amount to a failure to exercise jurisdiction vested with them, nor it can be held to be made by the original or appellate authority illegally or with material irregularity.*

13. The revisional jurisdiction of the High Court under S. 26 of the said Act is confined strictly to the jurisdictional error or illegal exercise of jurisdiction. The finding of the High Court to the effect that it was the duty of the Court in the interest of justice to interfere even with the concurrent finding of facts because on the record, High Court found that there was not a single factor to come to the conclusion that the claim was mala fide or was not bona fide as required by the statute, is entirely baseless and not in accordance with the provisions of S. 26 of the said Act which confers revisional jurisdiction on the High Court. It is pertinent to mention in this connection the decision in J. Pandu v. R. Narsubai, (1987) 1 SCC 573: (AIR 1987 SC 857). It is a case under the A.P. Buildings (Lease, Rent and Eviction) Act, 1960. Sub- sec. (2)(vi) of S. 10 of A.P. Buildings (Lease, Rent and Eviction) Act which is similar to S. 15(2)(vi) of-the Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954 sets out two grounds of eviction viz. (1) denial of title of the landlord without bona fides, and(2) claim of permanent tenancy rights without bona fides. It was held that "consequently, either denial of title or claim of permanent tenancy without bona fides will itself be enough to attract S. 10(2)(vi). The. order of eviction on this ground, has, therefore, to be sustained. By reason of this conclusion alone the appeal can be dismissed."

14. ....

15. ....

16. In the premises aforesaid, the judgment and order passed in revision by the High Court is contrary to law as the High Court in exercise of its revisional jurisdiction interfered with the concurrent finding of fact arrived at by the original Court as well as the appellate authority. The High Court should not have reversed the same in exercise of its revisional Jurisdiction under S. 26 of the said Act. We, therefore, set aside the judgment and order of the High Court and uphold the orders of the courts below. The respondent is given three months' time to vacate the suit premises on filing the usual undertaking that they will not induct anybody or transfer the same to any other person and they will go on paying the rent of the premises at the usual rate and will deliver vacant and peaceful possession of the suit premises on or before the expiry of the said period to the landlord appellant. In the facts and circumstances of the case, the parties will bear their own costs."

26. In the case titled as **Hindustan Petroleum Corporation Ltd. versus Dilbahar Singh,** reported in **2014 AIR SCW 5018,** the Apex Court has held that the revisional power is not and cannot be equated with the power of re-consideration of all questions of fact as a court of first appeal. It is apt to reproduce paras 25 to 30, 32 and 45 of the judgment herein:

"25. Before we consider the matter further to find out the scope and extent of revisional jurisdiction under the above three Rent Control Acts, a quick observation about the 'appellate jurisdiction' and 'revisional jurisdiction' is necessary. Conceptually, revisional jurisdiction is a part of appellate jurisdiction but it is not vice-versa. Both, appellate jurisdiction and revisional jurisdiction are creatures of statutes. No party to the proceeding has an inherent right of appeal or revision. An appeal is continuation of suit or original proceeding, as the case may be. The power of the appellate court is co-extensive with that of the trial court. Ordinarily, appellate jurisdiction involves re-hearing on facts and law but such jurisdiction may be limited by the statute itself that provides for appellate jurisdiction. On the other hand, revisional jurisdiction, though, is a part of appellate jurisdiction but ordinarily it cannot be equated with that of a full-fledged appeal. In other words, revision is not continuation of suit or of original proceeding. When the aid of revisional court is invoked on the revisional side, it can interfere within the permissible parameters provided in the statute. It goes without saying that if a revision is provided against an order passed by the tribunal/appellate authority,

the decision of the revisional court is the operative decision in law. In our view, as regards the extent of appellate or revisional jurisdiction, much would, however, depend on the language employed by the statute conferring appellate jurisdiction and revisional jurisdiction.

26. With the above general observations, we shall now endeavour to determine the extent, scope, ambit and meaning of the terms "legality or propriety", "regularity, correctness, legality or propriety" and "legality, regularity or propriety" which are used in three Rent Control Acts under consideration.

27. The ordinary meaning of the word 'legality' is lawfulness. It refers to strict adherence to law, prescription, or doctrine; the quality of being legal.

28. The term 'propriety' means fitness; appropriateness, aptitude; suitability; appropriateness to the circumstances or condition conformity with requirement; rules or principle, rightness, correctness, justness, accuracy.

29. The terms 'correctness' and 'propriety' ordinarily convey the same meaning, that is, something which is legal and proper. In its ordinary meaning and substance, 'correctness' is compounded of 'legality' and 'propriety' and that which is legal and proper is 'correct'.

30. The expression "regularity" with reference to an order ordinarily relates to the procedure being followed in accord with the principles of natural justice and fair play.

31. ....

32. We are in full agreement with the view expressed in M/s. Sri Raja Lakshmi Dyeing Works and others v. Rangaswamy Chettiar, 1980 4 SCC 259 that where both expressions "appeal" and "revision" are employed in a statute, obviously, the expression "revision" is meant to convey the idea of a much narrower jurisdiction than that conveyed by the expression "appeal". The use of two expressions "appeal" and "revision" when used in one statute conferring appellate power and revisional power, we think, is not without purpose and significance. Ordinarily, appellate jurisdiction involves a re-hearing while it is not so in the case of revisional jurisdiction when the same statute provides the remedy by way of an 'appeal' and so also of a 'revision'. If that were so, the revisional power would become co-extensive with that of the trial Court or the subordinate Tribunal which is never the case. The classic statement in Dattonpant Gopalvarao Devakate v. Vithalrao Maruthirao Janagaval, 1975 2 SCC 246 that revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the Code but, at the same time, it is not wide enough to make the High Court a second Court of first appeal, commends to us and we approve the same. We are of the view that in the garb of revisional jurisdiction under the above three Rent Control Statutes, the High Court is not conferred a status of second Court of first appeal and the High Court should not enlarge the scope of revisional jurisdiction to that extent.

33 to 44. ....

45. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the First Appellate Court/First Appellate Authority because on re- appreciation of the evidence, its view is different from the Court/Authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the Court/Authority below is according to law and does not suffer from any error of law. A finding of fact recorded by Court/Authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or

misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to re-appreciate or re-assess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity."

27. Admittedly, mutation was attested in presence of the predecessor-in-interest of the appellants-writ respondent No. 2. He had never raised any finger and had not questioned the findings made by the revenue agencies that he was not in possession of the land in question, thus, the Financial Commissioner (Appeals) has fallen in an error in upsetting the orders made by the Divisional Commissioner, Assistant Settlement Officer and the Tehsildar (Settlement).

28. The Apex Court in the case titled as **Narasamma & Ors.,** reported in **2009 AIR SCW 2653,** held that the entries in the revenue record reflects as to who was in possession on the date of entry. It is apt to reproduce the relevant portion of para 12 of the judgment herein:

"12. ….. It is true that the entries in the revenue record cannot create any title in respect of the land in dispute but it certainly reflects as to who was in possession of the land in dispute on the date the name of that person had been entered in the revenue record……….." *(Emphasis added)*

29. The predecessor-in-interest of the appellants-writ respondent No. 2 had neither explained the delay in the application filed in the year 1987 for correction of the entries in the revenue record nor in the appeal, revision, second revision and the writ petition, thus, was caught by delay.

30. The Apex Court in the case titled as **State of West Bengal and others versus Karan Singh Binayak and others,** reported in **AIR 2002 Supreme Court 1543,** held that rectification of *record-of-rights* sought after a considerable long delay is not proper. It is apt to reproduce paras 17 and 18 of the judgment herein:

"17. The period of 25 years under the lease expired in the year 1976. The notification under the Act was issued on 11th November, 1954. In 1957 record of rights was prepared under Section 44 of the Act according to which the land was held retainable under Section 6(1)(b) of the Act. The possession was handed over to the original owners in 1981 on liquidation of the lessee on an order being passed by the High Court directing official liquidator to disclaim the property which was later transferred to the writ petitioners in terms of the agreements of sale entered in the year 1988 and sale deeds in 1992-93. Meanwhile, in the year 1991 on proceedings being taken under the ULC Act, 6145.90 square meter of the land was held to be excess under the said Act. In June 1993, the plans were sanctioned and construction commenced. It can, thus, be seen that after the preparation of record-of-rights, not only the appellants did not take any steps and slept over the matter but various steps as-above were taken by the respondents in respect of the land in question. The argument that the proceedings under the ULC Act or the preparation of record-of-rights were ultra vires and the acts without jurisdiction and, therefore, those proceedings would not operate as a bar in appellants invoking inherent jurisdiction under Section 151, C. P. C. by virtue of conferment of such power under Section 57A of the Act is wholly misconceived and misplaced. The inherent powers

cannot be used to reopen the settled matters. These powers cannot be resorted to when there are specific provisions in the Act to deal with the situation. It would be an abuse to allow the reopening of the settled matter after nearly four decades in the purported exercise of inherent powers. It has not even been suggested that there was any collusion or fraud on behalf of the writ petitioners or the erstwhile owners. There is no explanation much less satisfactory explanation for total-inaction on the part of the appellants for all these years.

18. Apart from the facts stated above, even when the appellants woke from its slumber, the manner in which they acted has already been noticed and it is apparent therefrom that at athat stage they did not proceed to take action for the correction of the record-of-rights. They did not at that stage invoke Section 57A of the Act. What they did was to issue an order suspending the sanction of the building plan and directed the Chairman of the Municipality to ask the respondents to suspend the construction according to the plain sanctioned by the municipality. In proceedings of the writ petition wherein the said order was challenged, it does not appear that appellants took the stand of the land vesting in it and the further stand that the record-of-right was prepared without jurisdiction or that the proceedings under the ULC Act were void and without jurisdiction. The stand taken by them was that proceedings under the ULC Act were not genuine. The competent authority was called in those proceedings and stood by the documents signed by him. The statements issued under the ULC Act were held to be genuine. The order directing suspension of the plans and stoppage of construction were quashed by a learned single Judge of the High Court. The order of the learned single Judge was upheld in appeal by the Division Bench of the High Court. After the decision of the Division Bench, the appellants started proceedings in question under Section 57A purporting to Act on the basis that 1957 record-of-rights was based on defective, wrongful and irregular record and it was not a bar for revision of records on the basis of new and genuine facts. The notice issued even within less than three weeks of the decision of the Division Bench itself shows that the appellants were aware of the proceedings of the writ petition but did not think it proper to move the High Court and seek a clarification that they could reopen the matter explaining to the High Court the circumstances under which in response to the writ petition they had not taken the stand before the High Court on the basis whereof they were seeking to exercise power under Section 57A after lapse of nearly 38 years. It is evident that they knew about the factum of liquidation of the lessee. Despite that, notice of proceedings under Section 57A was directed to be issued to the mill and not to writ petitioners on whose petition the order of the District Magistrate was set aside by the High Court. Two months later i.e. on 15th May, 1995, the order was passed noticing that nobody had appeared to oppose those proceedings. The appellants purported to take paper possession on 5th September, 1996. There is nothing on the record to suggest that any attempt was made to serve the notice dated 15th March, 1995 or the order dated 15th May, 1995 on the respondents who, it seems, came to know of these proceedings only towards the end of 1996 when proceedings were initiated for breach of Section 144 of the Code of Criminal Procedure. It is difficult to comprehend, the applicability of Section 144, Cr. P. C. to the fact situation. To say the least the appellants have been wholly negligent and having slept over the matter for nearly 40 years, they could not reopen the matter in the manner sought to be done." *(Emphasis added)*

31. In another case titled as **I. Chuba Jamir & Ors. versus State of Nagaland & Ors.,** reported in **2009 AIR SCW 5162,** the Apex Court has held that the inordinate delay is a very valid and important consideration. It is apt to reproduce para 17 of the judgment herein:

"17. On a careful consideration of the materials on record and the submissions made by Mr. Goswami we are unable to accept the claims of the appellants-writ

petitioners. In our view the inordinate delay of 7 or 8 years by the appellants-writ petitioners in approaching the High Court was a very valid and important consideration. This aspect of the matter was also brought to the notice of the Single Judge but he proceeded with the matter without saying anything on that issue, one way or the other. It was, therefore, perfectly open to the Division Bench to take into consideration the conduct of the appellants-writ petitioners and the consequences, apart from the legality and validity, of the reliefs granted to them by the learned single Judge."

32. The same principle has been laid down by the Apex Court in the case titled as **Banda Development Authority, Banda versus Moti Lal Agarwal and Ors,** reported in **2011 AIR SCW 2835.** It is apt to reproduce paras 15 and 25 of the judgment herein:

"15. In our view, even if the objection of delay and laches had not been raised in the affidavits filed on behalf of the BDA and the State Government, the High Court was duty bound to take cognizance of the long time gap of 9 years between the issue of declaration under Section 6(1) and filing of the writ petition and declined relief to respondent No.1 on the ground that he was guilty of laches because the acquired land had been utilized for implementing the residential scheme and third party rights had been created. The unexplained delay of about six years between the passing of award and filing of writ petition was also sufficient for refusing to entertain the prayer made in the writ petition.

xxx xxx xxx

25. In this case, the acquired land was utilized for implementing Tulsi Nagar Residential Scheme inasmuch as after carrying out necessary development i.e. construction of roads, laying electricity, water and sewer lines etc. the BDA carved out plots, constructed flats for economically weaker sections and lower income group, invited applications for allotment of the plots and flats from general as well as reserved categories and allotted the same to eligible persons. In the process, the BDA not only incurred huge expenditure but also created third party rights. In this scenario, the delay of nine years from the date of publication of the declaration issued under Section 6(1) and almost six years from the date of passing of award should have been treated by the High Court as more than sufficient for denying equitable relief to respondent No.1."

33. The Apex Court in the case titled as **Chennai Metropolitan Water Supply and Sewerage Board and others versus T.T. Murali Babu,** reported in **2014 AIR SCW,** held that the doctrine of delay and laches should not be lightly brushed aside. It is worthwhile to reproduce para 16 of the judgment herein:

"16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the

court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons - who compete with 'Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."

34. The same principle has been laid down by the Apex Court in the case titled as **State of Jammu and Kashmir versus R.K. Zalpuri and others,** reported in **AIR 2016 Supreme Court 3006,** paras 26 and 27 whereof read as under:

"26. In the case at hand, the employee was dismissed from service in the year 1999, but he chose not to avail any departmental remedy. He woke up from his slumber to knock at the doors of the High Court after a lapse of five years. The staleness of the claim remained stale and it could not have been allowed to rise like a phoenix by the writ court.

27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea and nurtures the attitude that he can sleep to avoid death and eventually proclaim "Deo gratias" - 'thanks to God'."

35. The Divisional Commissioner has rightly discussed all the aspects of the case. The predecessor-in-interest of the appellants-writ respondent No. 2 was supposed to be vigilant and had to seek the relief within time, if aggrieved, which he had not done and now the entries made in the revenue record cannot be allowed to be changed on mere asking, that too, in the *record-of-rights.*

36. The Financial Commissioner (Appeals) has not held that the inquiry/spot inspection conducted by the field staff relating to the possession was not factually and legally correct. It has also not given any reasons how the first revisional authority, appellate authority and the revenue authority failed to appreciate the facts of the case.

37. The learned Single Judge has discussed all the aspects and we are of the view that the Writ Court has rightly made the impugned judgment. If, at all, the predecessor-in-interest of the appellants-writ respondent No. 2 was aggrieved by any entries made in the *record-of-rights,* the remedy perhaps was to file a suit for declaration in terms of the mandate of Specific Relief Act, which he has not chosen to file.

38. Our this view is fortified by the judgment in the case titled as **Jagtar Singh and others versus Swaran Singh,** reported in **1979 Simla Law Journal (Punjab & Haryana) 89.** It is apt to reproduce para 5 of the judgment herein:

"5. It is settled law that when that Khasra girdawari entries have been incorporated in the latest and subsequent jamabandi, the revenue officers cannot change them in summary proceedings under the provisions of Punjab Land Revenue Act and in such case only course open to an aggrieved party is to seek relief from competent civil court by filing a regular civil suit. This view finds support from the ruling of the Financial Commissioner given in 1970-PLJ-30, Reg., Prehlad Bhagat and another Vs. Karta Ram and another in which it was held that

where entries in khasra girdawari have been incorporated in Jamabandi the Revenue Officers have no right to order corrections of a such entries and these can only be corrected by filing a regular suit. Shri B.S. Sodhi, learned counsel for respondent has not given any satisfactory rebuttal of the above proposition of Law. In view of this the orders passed by the Assistant Collector and the Collector cannot be sustained in eye of law and have to be set aside."

39. The High Court of Punjab and Haryana in the case titled as **The Chief Secretary to Government Punjab and others versus Chawli and others,** reported in **1980 Punjab Law Journal 10,** held that if any person considers himself aggrieved as to any right of which he is in possession by an entry in *record-of-rights* or in an annual record, he may institute a suit for declaration of his right under the Specific Relief Act.

40. In another case titled as **Dharam Singh and others versus The State of Haryana and others,** reported in **1983 Punjab Law Journal 210,** it has been held by the High Court of Punjab and Haryana that an aggrieved party can file a suit under the Specific Relief Act to rectify the entry in the revenue record. Further held that only the legal errors regarding jurisdiction or material irregularity could be rectified by the Financial Commissioner. It is worthwhile to reproduce para 5 of the judgment herein:

"5. From the combined reading of these provisions it is plain that the bar of jurisdiction of Civil Court is subject to other provisions of the Act and under section 45 of the Act, an aggrieved party can file a suit under the Specific Relief Act to rectify the entry in the revenue record. Even the Assistant Collector and the Collector who are the officers for the determination of the fact, had found as a fact that respondent No. 3 did not remain in possession after the death of Maya Ram, his father and the application for correction was dismissed. Only the legal errors regarding the jurisdiction or material irregularity could be rectified by the Financial Commissioner. Be that as it may, since the matter is concluded by the Civil Court, the Financial Commissioner who was performing the duties of a Revenue Officer under the Act, could not sit over the findings of the Civil Court between the parties. The decision of the Civil Court is binding, in my view on the Revenue Officers."

41. The predecessor-in-interest of the appellants-writ respondent No. 2, under the garb of the proceedings right from the year 1987, dragged the respondents No. 1 to 4 herein in the lis without any fault on their part.

42. The predecessor-in-interest of the appellants-writ respondent No. 2 wanted to have rectification in order to record his possession over the portion of land, which was not in his possession and virtually, wanted the change of *misal haqiat, record-of-rights* and *jamabandies,* which cannot be done merely by making application and the remedy was before the Civil Court, as discussed hereinabove.

43. More so, if such a belated application is allowed, that will have an effect of taking away the settings of law, which have attained finality.

44. All the questions are answered accordingly.

45. Viewed thus, the learned Single Judge has rightly made the impugned judgment, needs no interference.

46. Having said so, the appeal merits to be dismissed and is dismissed alongwith all pending applications with costs quantified at ₹ 20,000/- to be deposited with the H.P. High Court Bar Association Welfare Funds within two weeks.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Prem Prakash Gupta …..Petitioner
Versus
State of HP and others …..Respondents.

CWP No. 453 of 2016.
Reserved on 10th November, 2016.
Date of decision: 23rd November, 2016.

Constitution of India, 1950- Article 226 - A lease was granted in favour of the petitioner – the petitioner approached the respondents for renewal of lease – respondents renewed the lease for part of the land – the petitioner failed to get the lease renewed – proceedings were initiated under H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971, which resulted in eviction of petitioner – appeal was dismissed – a writ petition was filed in which a liberty was granted to initiate the fresh proceedings – fresh proceedings resulted in the eviction of the petitioner – an appeal was filed, which was dismissed- matter was remanded to the Appellate Court in the writ petition- writ petitioner contended that arguments were not marshaled and appreciated by the Appellate Court- held, that Appellate Court had properly appreciated the matter – the petitioner had failed to get the lease renewed and he was in unauthorized possession- the writ Court can only interfere if Appellate Court has wrongly appreciated the facts and evidence and the judgment is illegal - the Appellate Court had thrashed all the facts and the judgment cannot be said to be illegal- appeal dismissed. (Para-6 to 21)

Cases referred:
Bhuvnesh Kumar Dwivedi versus M/s Hindalco Industries Ltd., 2014 AIR SCW 3157
Iswarlal Mohanlal Thakkar versus Paschim Gujarat Vij Company Ltd. & Anr., 2014 AIR SCW 3298

For the petitioner:	Mr. Karan Singh Kanwar, Advocate.
For the respondents:	M/s Anup Rattan and Romesh Verma, Additional Advocate Generals, with Mr. J.K. Verma, and Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this writ petition, the petitioner mainly has sought the following reliefs, on the grounds taken therein.

> *"(i) A writ of Certiorari or direction in the nature of writ of certiorari may kindly be issued quashing/setting aside order dated 17.11.2015 (Annexure P-32) passed by respondent No. 3 in Case No. 212/2014 and order dated 5.5.2011 (Annexure P-28) passed by respondent No.4 in Case no. 04/2003-04.*
>
> *(ii) A writ of Mandamus or direction in the nature of Writ of Mandamus may kindly be issued to the respondents directing the respondents to drop the proceedings of eviction initiated against the petitioner."*

2. The petitioner is in third round of litigation before this Court by the medium of this petition for the reasons to be recorded hereinafter.

3. It appears that a lease was granted on 12.11.1965 in favour of petitioner-M/s International Angora Breeding Farm (Memmingen) Bombay India vide Annexure P-1 for 100 acres of land near Mohal, District Kullu, H.P. by the then Governor of Punjab. The lease was for a

period of 30 years, commencing from the date, the lessee executed the agreement or the possession of the land was handed over to him which ever was earlier. The State/respondents in the year 1965, have handed over only 57 acres of land to the petitioner, vide Annexure P2.

4. It is stated that the petitioner had approached the respondents for renewal of the lease and vide communication dated 21.4.1997, it was decided to renew the lease only for 31 bighas 5 biswas of land vide Annexure P13, for a period of 20 years w.e.f. 18.11.1995 to 17.11.2015. The petitioner, feeling dissatisfied again approached the respondents for renewal of the lease and vide communication from The Divisional Forest Officer, Kullu dated 10.9.1998, Annexure P16, it was decided to renew the lease only for ten bighas against the proposal of 31.05 bighas, in favour of the petitioner. Thereafter vide Annexure P19 dated 12.11.2002; the renewal of lease was recommended only for six biswas in favour of the petitioner. However, the petitioner failed to get the lease renewed despite having given sufficient time.

5. Vide Annexure P22, notice under sub-Section (i) of Section 4 of the H.P. Public Premises and Land (Eviction and Rent Recovery), Act, 1971, for short "the Act", was issued to the petitioner, proceedings were initiated and eviction order was made by the Collector Forest Division, Kullu, H.P., against him.

6. The petitioner filed appeal against the said eviction order before the Commissioner, Mandi, Division-respondent No.3 herein, who vide order dated 30.6.2006, dismissed the appeal, constraining the petitioner to file CWP which was registered before this Court as CWP No. 656 of 2006. This Court, vide judgment dated 17.3.2009, quashed the order dated 30.6.2006, and disposed of the writ petition with liberty to the respondents to initiate fresh proceedings in terms of the provisions of the Act, has attained the finality. It is apt to reproduce the said judgment herein.

> *"With the consent of the parties, Annexure P.9, dated 30.11.1994 and Annexure P.11, dated 30.6.2006 are quashed and set aside. However, the liberty is reserved to the respondents to start fresh proceedings against the petitioner under the provision of Himachal Pradesh Public premises (Eviction of Unauthorized Occupants) Act, 1971, from the stage of issuance of notice by specifying the grounds as per Section 4 of the Act.*
>
> *With these observations made here-in-above, the writ petition is disposed of. No costs. Dasti Copy, on usual terms."*

7. Thereafter fresh proceedings were initiated against the petitioner and eviction order was again passed against him on 5.5.2011, by respondent No.4, Annexure P-28. The petitioner filed appeal before respondent No. 3, which met with the same fate, vide order dated 28.10.2013 Annexure P-30.

8. Feeling aggrieved, petitioner filed a writ petition before this Court being CWP No. 1810/2014 and this Court vide judgment and order dated 17.7.2014, Annexure P-30A, remanded the matter to the Divisional Commissioner, Mandi, with direction to the Commissioner to pass appropriate orders, as warranted under law, within four weeks from the date of the said judgment. It is apt to reproduce paras 7 and 8 of the said judgment herein.

> *"7. In the given circumstances, the writ petition is allowed, the impugned order is set aside and case No. 193/2011 is remanded, which shall come up for consideration before the Divisional Commissioner, Mandi on 11th August, 2014.*
>
> *8. The parties are directed to cause appearance before the Divisional Commissioner, Mandi, on 11th August, 2014. It is made clear that if the writ petitioner-appellant fails to appear on the said date, Divisional Commissioner, Mandi shall be at liberty to pass appropriate orders, as warranted under law and if the writ petitioner-appellant appears, the appeal be concluded within four weeks with effect from 11th August, 2014."*

9. The appellate Court, i.e. the Divisional Commissioner Mandi, was directed to hear the petitioner and petitioner was directed to remain present. It was also provided that in case, the petitioner fails to do so, the appellate Court shall be within its power to pass appropriate orders.

10. While going through the impugned order, it appears that the petitioner was present, was heard and thereafter Presiding Officer was transferred and his successor had taken over. Arguments were heard on 24.9.2015 and written arguments were also submitted.

11. The learned counsel for the petitioner frankly stated at the Bar that the learned counsel for the petitioner before the appellate Court had addressed the arguments but the same have not been appreciated and considered. His statement to this effect was also recorded vide order dated 10.11.2016 when arguments were heard in this petition. Thus; it is not the case of the petitioner that he was not heard.

12. The only grievance of the petitioner, as projected and argued, was that the facts, circumstances and arguments were not marshalled out and appreciated by the appellate Court.

13. While going through the order impugned, one comes to an inescapable conclusion that the appellate Court has discussed all the aspects. It is apt to reproduce second last and last paras at pages 149 and 150 of the said order herein.

> *"I have heard the arguments put forth by both the parties. The record placed in file was perused minutely. Perusal of lower Court record it reveals that the land was leased out to the appellant for 30 years on 18.11.1965 and this term expired on 17.11.1995. The appellant before lower Court as well as in this court has failed to produce any document which could show that the lease has been renewed. After the expiry of lease term on 17.11.1995, more than 17 years have elapsed and this period is more than sufficient for any party to get the lease renewed. At this belated stage, the averment with regard to making of application for renewal or any pendency thereof cannot be regarded since the appellant has taken more than 17 years for such action and he has not been successful to get the lease renewed. Since the renewal has not been made and on this score the status of appellant becomes that of an encroacher. The appellant also failed to provide any permission from the Govt. of India, department of Environment and Forest for the extension of the lease. As regards the plea taken by the appellant in the grounds of appeal that he has not been afforded opportunity to defend the case and also that no defence witnesses were allowed to be examined by the petitioner; perusal of lower court record reveals that appellant through his counsel has availed several opportunities and finally on 28.2.2011, his counsels stated without oath and closed the defense witnesses on behalf of respondent (now appellant). This makes the plea of not providing of opportunity, baseless.*
>
> *From the above discussions and keeping in view the guidelines laid down by the Hon'ble Supreme Court order dated 12.12.1996 in CWP No.202/1995, it is clear that the appellant is in an unauthorized possession of Public Premises since 18.11.1995 and the order of lower court warrants no interference. Therefore, the appeal is hereby dismissed being devoid of any substance and the order dated 5.5.2011 passed by the trial Court is hereby upheld. A copy of this order be sent to the lower court while returning its record. Case file of this court be consigned to the Record Room after due completion."*

14. The appellate Court has also discussed the guidelines rendered by the apex Court in CWP No.202/1995, decided on 12.12.1996 and determined the issue that the petitioner was un-authorizidely in possession of the premises.

15. It is also apposite to reproduce Section 2 (g) of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, herein.

"2(g) "unauthorised occupation", in relation to any public premises, means the occupation by any person of the public premises without authority for such occupation, and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever."

16. In view of the above, the lease had expired, was not renewed. Thus, the case of the petitioner falls within the definition of Section 2 (g) of the aforesaid Act, referred to hereinabove. All the authorities below have followed the mechanism contained in the Act, requires no interference.

17. The writ Court can interfere only where it is shown that the appellate Court has wrongly appreciated the facts and the evidence and the judgment/order is illegal. While going through the impugned order, it appears that the appellate Court has thrashed out all facts and it is well reasoned and legal one, cannot be said to be erroneous, perverse or misuse of powers, in any way.

18. The Apex Court in **Bhuvnesh Kumar Dwivedi versus M/s Hindalco Industries Ltd.,** reported in **2014 AIR SCW 3157,** has held that question of fact cannot be interfered with by the Writ Court unless the findings are perverse, erroneous and without application of mind. However, such findings can be questioned if it is shown that the Tribunal/Court has erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence which has influenced the impugned findings. It is apt to reproduce paras 16, 17 and 18 of the judgment rendered by the Apex Court in **Bhuvnesh Kumar Dwivedi's case (supra)** herein:

"16. .... The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points cannot be agitated before

a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised....................

17. The judgments mentioned above can be read with the judgment of this court in Harjinder Singh's case (AIR 2010 SC 1116) (supra), the relevant paragraph of which reads as under:

"21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty-bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:

> *"10. … The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State."(State of Mysore v. Workers of Gold Mines, AIR 1958 SC 923 p.928, para 10.)*

18. A careful reading of the judgments reveals that the High Court can interfere with an Order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant." [Emphasis added]

19. Our this view is also fortified by the judgment rendered by the Apex Court in **Iswarlal Mohanlal Thakkar versus Paschim Gujarat Vij Company Ltd. & Anr.,** reported in **2014 AIR SCW 3298.** It is apt to reproduce para 9 of the judgment herein:

"9. We find the judgment and award of the labour court well-reasoned and based on facts and evidence on record. The High Court has erred in its exercise of power under Article 227 of the Constitution of India to annul the findings of the labour court in its Award as it is well settled law that the High Court cannot exercise its power under Article 227 of the Constitution as an appellate court or re-appreciate evidence and record its findings on the contentious points. Only if there is a serious error of law or the findings recorded suffer from error apparent on record, can the High Court quash the order of a lower court. The Labour Court in the present case has satisfactorily exercised its original jurisdiction and properly appreciated the facts and legal evidence on record and given a well reasoned order and answered the points of dispute in favour of the appellant. The High Court had no reason to interfere with the same as the Award of the labour court was based on sound and cogent reasoning, which has served the ends of justice.

> *It is relevant to mention that in the case of Shalini Shyam Shetty & Anr. v. Rajendra Shankar Patil, (2010) 8 SCC 329, with regard to the limitations of the High Court to exercise its jurisdiction under Article 227, it was held in para 49 that-*

> *"The power of interference under Art.227 is to be kept to a minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Court."*

It was also held that-

> *"High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under Art. 227 of the Constitution, interfere with the orders of tribunals or courts inferior to it. Nor can it, in exercise of this power, act as a court of appeal over the orders of the court or tribunal subordinate to it."*
>
> *Thus it is clear, that the High Court has to exercise its power under Article 227 of the Constitution judiciously and to further the ends of justice.*

In the case of Harjinder Singh v. Punjab StateWarehousing Corporation, (2010) 3 SCC 192, this Court held that,

> *"20. ..... In view of the above discussion, we hold that the learned Single Judge of the High Court committed serious jurisdictional error and unjustifiably interfered with the award of reinstatement passed by the Labour Court with compensation of Rs.87,582 by entertaining a wholly unfounded plea that the appellant was appointed in violation of Articles 14 and 16 of the Constitution and the Regulation."*

20. This Court in series of writ petitions and LPAs has laid down the similar principles of law.

21. It is apt to record herein that the petitioner used all weapons in his armoury, in order to defeat the eviction orders passed by the authorities and remained in unauthorized possession of the premises.

22. Having said so, no interference is required. The writ petition is accordingly dismissed alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Rahul Pandey ………Petitioner

Versus

State of Himachal Pradesh and others ………Respondents

CWP No. 3595 of 2015
Reserved on: November 16, 2016
Decided on: November 23, 2016

Constitution of India, 1950- Article 226- Online item rates/bids were invited from contractor for the various work- the petitioner uploaded his bid before due date – he was found to be the lowest bidder but he was not called for negotiation- held, that the financial bid of the petitioner was opened and he was declared lowest bidder – he should have been called for negotiation before calling the second lowest bidder – however, the bid was rejected on the technical ground and the Court cannot substitute its wisdom for technical opinion of the members of the committee – petition dismissed. (Para- 8 to 17)

Cases referred:

State of Jharkhand v. M/s. CWE-SOMA Consortium, 2016 AIR SCW 3366

Bakshi Security & Personnel Services Pvt. Ltd. V. Devkishan Computed P. Ltd. , 2016 AIR SCW 3385
Central Coalfields Limited v. SLL-SML (Joint Venture Consortium), 2016 AIR SCW 3814

For the petitioner: Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate, for the petitioner.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Varun Chandel, Additional Advocate Generals and Mr. Kush Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

By way of instant writ petition filed under Article 226 of the Constitution of India, the petitioner has prayed for the following main relief:

> "That the respondents may very kindly be directed to award the work i.e. "Providing LWSS to PC Habitation UP Mahal Athah, Barthara-H, UP Mahal Bhabia in GP Manu, Tehsil Chopal, Distt. Shimla (SH: - Development of site i.e. Cutting on earth work for civil structure, c/o Raw Water Tank c/o 1 No. F/Bed, C/o 2 Nos. Sump well, c/o 2 Nos. Pump House Cum Attendant Qtr Stone Masonry, C/o 1 No. Main Storage Tank, Prov. Laying, jointing & Testing of MSERW Pipes, laying joining and testing of GMS Tubes for r/main and supply & Erection of pumping machinery with allied accessories)", to the petitioner being the lowest bidder, in the interest of law and justice."

2. Key facts, as emerge from the record are that respondent No.5 i.e. Executive Engineer, Irrigation and Public Health Division Nerwa, District Shimla, invited online item rates/ bids on or before 21.4.2015 from contractors registered with the Irrigation and Public Health Department under appropriate class. As per Notice Inviting e-Tender, contractors, who had experience in construction of work as defined in the tender notice, were competent to apply vide aforesaid e-tender. Respondent-Department invited application for following work:

Sr. No.	**Description of work:**	**Estt. Cost**	**E/Money**	**Time**	**Cost of form**
1	Providing LWSS to PC Habitation UP-Mahal Athah, Barthara-II, UP-Mahal Bhabia in GP Manu, Tehsil Chopal, Distt. Shimla (SH: - Development of site i.e. Cutting on earth work for civil structure, C/O Raw Water Tank C/o 1 No. F/Bed, C/o 2 Nos. Sumpwell, C/O 2 Nos Pump House Cum Attendant Qtr Stone Masonary, C/o 1 No. Main Storage Tank, Prov. Laying, jointing & testing of MSERW Pipes, laying joining andt testing of GMS Tubes for R/main and supply & Errection of pumping machinery with allied accessories)	38,70,682	65560/-	6 months	400/-

3. It is undisputed before us, after perusing pleadings available on record that the present petitioner being eligible, as per schedule of tender, uploaded his bid before the stipulated date i.e. 21.4.2015, strictly as per the terms and conditions of Notice Inviting e-Tender, wherein contractors/firms were required to submit their offers in two separate envelopes as below:

> "Contractors/firms shall submit their offer in two separate envelopes as below:
>
> Envelope No. 1
>
> i. Proof of Cost of Tenders form
>
> ii Proof of Earnest Money
>
> Iii Eligibility criteria proof.
>
> Iv Qualifying criteria i/c all other documents i.e. Proof of registration in proper class, registration with sales tax, clearance of sales tax & income tax required as per the conditions of Tender Notice.
>
> Envelop No. 2
>
> Financial Bid.
>
> Second envelope containing Financial bid will be opened only of those firms whose documents in first envelops is found in order. And conditions/ document as verified from the original documents to be submitted separately by the firms to the Executive Engineer, IPH Division, Nerwa as per scheduled date and time."

4. Perusal of aforesaid terms and conditions contained in tender document suggests that second envelope containing financial bid was only to be opened of those firms, whose documents in first envelope were found to be in order. However, conditions contained in tender document also suggest that tender was to be opened of those contractors only, who qualify eligibility criteria. As per petitioner, after comparison of rates having been quoted by him in tender, he was found lowest bidder (L-1) and was legitimately expecting that work would be awarded in his favour. But perusal of Annexure P-2 suggests that the Superintending Engineer, I&PH Circle, Rohru, vide communication dated 18.6.2015 informed the Chief Engineer, South Zone, I&PH Department Shimla that tender in question was scrutinized by the Circle Level Negotiation Committee during its meeting held on 10.6.2015, when it was observed that the petitioner has obtained the authorization to quote pumping machinery from M/s Hydraulic Engineering Company, Hospital Road, Solan, which is authorized dealer of KSB Pumps. Petitioner quoted KSB pumps for 1st stage and reciprocating pump WASP make for 2nd stage, which was contradictory in respect of authorization obtained by him. Contents of letter suggest that since the pump quoted for the first stage by the petitioner were not found technically suitable since it had 49% efficiency at duty point and works upto +3% on duty head, Committee decided that technical suitability of other firms may also be scrutinized. Accordingly, offer of second lowest contractor namely Ramesh Kumar was discussed and it was decided to seek approval of the higher authority in favour of second lowest firm, after negotiations. Pursuant to issuance of letter dated 18.6.2015 by Superintending Engineer, I&PH Circle, Rohru, wherein decision of Committee to accord approval in favour of second lowest firm, after negotiation was conveyed, petitioner requested the Chief Engineer, South Zone vide Annexure P-3 to call him for negotiations being the lowest bidder. Vide Annexure P-3, petitioner also clarified that for stage 1, he had quoted 'KSB' make pump set Model WKFI 40/16 with 60 HP motor which was suitable to give 3.02 LPS discharge at head-506.51 Meter, however, if the department felt that 75 HP is required with this particular pumpset, he could supply the same on already quoted rates. Similarly, petitioner claimed that life of centrifugal pumps was much higher and hassle free as compared to other pumps and if any booster pump was required, petitioner would supply an additional 3.0 HP monoblock pump in their quoted rates for better range and efficiency. Since, no heed was paid to aforesaid communication (Annexure P-3), sent by the petitioner, he approached this Court by way of instant writ petition on 11.8.2015, praying therein for the reliefs as have been reproduced herein above.

5. Mr. Sanjeev Bhushan, Senior Advocate duly assisted by Ms. Abhilasha Kaundal, Advocate, vehemently argued that decision of the respondents in not granting work pursuant to the tender notice advertised by it to the petitioner, who was admittedly lowest bidder, is totally arbitrary, discriminatory and colourable exercise of power. While referring to the documents placed on record by the respective parties, Mr. Bhushan, strenuously argued that there is no dispute that the petitioner, being lowest bidder (L-1), was entitled to be awarded work pursuant to Notice Inviting Tender in the present case. He specifically invited attention of this Court to the terms and conditions contained in Notice Inviting Tender, wherein it was specifically stated that the second envelope containing financial bid would only be opened of those firms, whose documents in the first stage were found to be in order. He stated that since petitioner was found eligible by the respondents after perusing documents contained in first envelope, financial bid submitted by him was opened, wherein he was found to be the lowest bidder. Mr. Bhushan forcefully contended that once financial bid of petitioner was opened, there was no occasion whatsoever, for the respondent authorities to reject his case on the ground of eligibility.

6. Mr. Anup Rattan, learned Additional Advocate General while inviting attention of this Court to supplementary affidavit filed by the Superintending Engineer, Irrigation and Public Health, Circle Rohru, in compliance to order dated 7.10.2015 passed by this Court, whereby direction was given to the respondents to determine the issue within four weeks, stated that a meeting of Tender Committee was held on 3.11.2015, wherein technical suitability of second lowest contractor was discussed and it was found that he has offered reciprocating pump for 1st and 2nd stages for which he has also obtained the valid authorization from authorized dealer of reciprocating pumps. He further stated that since contractor, who was second lowest bidder, failed to reduce the quoted rates, Circle Level Negotiation Committee, decided that tender be recalled. While concluding his arguments, Mr. Anup Rattan forcefully contended that since decision has already been taken to recall the tender in question, present petition deserves to be dismissed having become infructuous.

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

8. Undisputedly, petitioner, who had applied in terms of Notice Inviting Tender, was lowest bidder (L-1) but he was not called for negotiations by the respondents as far as rates quoted by him in the tender are concerned. True it is that as per terms and conditions contained in Notice Inviting Tender, financial bid of the contractors could only be opened in case documents submitted by them in the first envelope were found to be in order. It is admitted case of the parties that the financial bid of the petitioner was opened and he was declared lowest bidder in L-1 category, and in that capacity, respondents ought to have called him for negotiations at the first instance, before calling second lowest bidder i.e. Ramesh Kumar. But as is evident from Annexure P-2, communication dated 18.6.2015, pumps quoted for the first stage by the petitioner were not found technically suitable by the Circle Level Negotiation Committee in its meeting held on 10.6.2015. Committee, after perusing documents submitted by the petitioner observed that L-1 contractor has obtained authorization to quote pumping machinery from M/s Hydraulic Engineering Company, Hospital Road Solan, which was authorized dealer of KSB Pumps and petitioner has quoted KSB Pumps for 1st stage and reciprocating pump WASP make for 2nd stage, which was contradictory in respect of authorization obtained by the firm. Since technical bid contained in envelope-I was not found suitable by Circle Level Negotiation Committee, proposal was sent to the Chief Engineer, SZ, I&PH, by Superintending Engineer, I&PH Circle Rohru, seeking approval of higher authority to have negotiations with second lowest firm. Similarly, perusal of Annexure P-4, annexed to rejoinder by the petitioner, suggests that tender in question was scrutinized by Circle Level Negotiation Committee on 10.6.2015, wherein following observations were made:

> "In this context, the S.E. IPH Circle, Rohru has submitted that the tender was submitted by E.E. Nerwa which was scrutinized by the circle level Committee during its meeting held on 10-6-2015 wherein **it was observed that Shri Rahul Pandy L-1 Contractor has**

obtained the authorization to quote puping machinery from M/S Hydraulic Engineering Comp.Solan who is authorized dealer of KSB Pumps & L-1 Sh. Rahul Pandy quoted KSB pumps for 1st stage and reciprocating pump WASP make for 2nd stage which is contradictory in respect of authorization obtained by the firm.

However, pump quoted for 1st stage is not technically suitable as it has 49% efficiency at duty pointed work up to +3% on duty head. The suitable otor is 70 HP rating whereas he has quoted 60HP. Keeping In view of the above, the committee decided that technical suitability of the other fir ay also be scrutinized. The offer of second lowest fro Sh. Ramesh Kumar has been discussed and it is observed that he has sought the authorization from M/S Sai Aqua Machines & Builders, Solan who is the authorized distributor of WASP Pump, Kirloskar, KSB Pump Ltd.. Sh. Ramesh Kumar L-2 Contractor has quoted the WASP pump for both stages and both these pumps are technically suitable with 100% efficiency works up to (+) 10% of duty point and required rating of motor is 30 HP & the rates quoted by both the contractors are as under:-

The rates quoted by L-1 for Civil Work	**=Rs.36,48,520/-**
The rates quoted by L-1 for P/Machinery	**=Rs.19,57,100/-**
Total :-	**=Rs.56,05,620/-**
The rates quoted by L-2 for Civil Work	**=Rs.43,66,045/-**
The rates quoted by L-2 for P/Machinery	**=Rs.14,70,300/-**
Total :-	**=Rs.58,36,345/-**

9. After carefully perusing the Notice Inviting Tender, this Court is in agreement with the submission having been made by Mr. Bhushan that at the first instance, information contained in envelope-I was to be examined/ scrutinized by the Department before opening financial bid. But in the present case, while scrutinizing the tender of the petitioner, Executive Engineer, Nerwa pointed out certain discrepancies in tender document submitted by the petitioner and accordingly, recommended that second lowest bidder may be invited for negotiations. Though, in normal circumstance, respondents ought to have scrutinized documents contained in envelope-I, at the first instance, so that suitability /eligibility of the petitioner could be adjudged before opening of financial bid but aforesaid omission on the part of the respondents can not be a ground to nullify subsequent action of the respondents wherein they specifically, on the recommendations of the Committee, invited second lowest bidder for negotiations. Since, the tender submitted by the petitioner was not found in conformity with the parameters laid down in the Notice Inviting Tender, respondents were well within their right to have negotiations with second lowest bidder, who as per record was admittedly eligible in all respects.

10. Though this Court has no hesitation to conclude that the respondents while carrying out scrutiny of documents received by them pursuant to the Notice Inviting Tender miserably failed to adhere to the terms and conditions of Notice Inviting Tender, wherein admittedly before opening financial bid, technical competence/ eligibility of contractors was to be examined in light of documents contained in envelope-I but at the same time, this Court can not substitute its wisdom for technical opinion having been rendered by the members of Circle Level Negotiation Committee, who are admittedly technical persons. Moreover, members of the Committee comprising of technical persons are expected to know more about the standard of particular item required by the department for completion of work in question.

11. Apart from above, it clearly emerges from the reply filed by the respondents to the writ petition that the power of approval/scrutiny lies with the Superintending Engineer beyond the amount of Rs. 10.00 Lakh for non selected Executive Engineer and Rs. 30.00 Lakh for selected Executive Engineer. Relevant para of the reply is reproduced herein below:

"para No.4

> The contents of para 4 admitted to the extent that petitioner was eligible to submit his tender bid as per his registration subject to fulfillment of tender conditions . It is emphathetically denied that the petitioner was found completely eligible after opening the tender bids. It is respectfully submitted that though the tender were invited by respondent No. 5 but on behalf of the Governor of H.P. and under rules the power of approval/scrutinizing the tender lies with the Superintending Engineer beyond the amount of Rs..10.00 lakhs for non selected Executive Engineer and Rs. 30.00 lakh for selected Executive Engineers. Since the tenders in the present case was to the tune of more than Rs. 30.00 lakhs as such the tender were to be approved/ scrutinized in the office of Superintending Engineer i.e. Respondent No. 4 by a duly appointed technical committee . Therefore, respondent No. 5 opened the tender and forwarded, without technical scrutiny, to Superintending Engineer for further scrutinized and approval by circle level technical committee. It is admitted that the in opening of tender the petitioner was financially lowest ."

12. Hence, by no stretch of imagination, court can assume the role of technical expert, who in their wisdom have not found the pump quoted by the petitioner suitable and efficient as per the requirement of the project/ work. Moreover, as per latest supplementary affidavit filed by the Superintending Engineer, I&PH, a decision has been already taken to recall the tender, as a result of which relief prayed for in the present petition by the petitioner can not be granted at this stage. Since respondents have already taken a conscious decision to recall the tender, this Court sees no occasion to grant relief No.1, whereby prayer has been made to award work in question.

13. It is well settled by now that respondents can withdraw /recall tender at any time, if it is convinced that same is not in accordance with the requirements as indicated in Notice Inviting Tender. Though, in the present case, petitioner claimed himself to be lowest bidder on account of his financial bid but there is no document suggestive of the fact that pursuant to opening of his financial bid, he was successful lowest bidder, as such no right has accrued in his favour which would entitle him to claim the relief as prayed for in the petition.

14. The Apex Court in **State of Jharkhand v. M/s. CWE-SOMA Consortium** reported in 2016 AIR SCW 3366, has held that:

> 13. The appellant-state was well within its rights to reject the bid without assigning any reason thereof. This is apparent from clause 24 of NIT and clause 32.1 of SBD which reads as under:-
>
>> "Clause 24 of NIT: "Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof." Clause 32.1 of SBD: "…the Employer reserves the right to accept or reject any Bid to cancel the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action." In terms of the above clause 24 of NIT and clause 32.1 of SBD, though Government has the right to cancel the tender without assigning any reason, appellant-state did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the government to cancel the tender.
>
> 14. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, in view of lack of real competition, the state found it advisable not to proceed with the tender with only

one responsive bid available before it. When there was only one tenderer, in order to make the tender more competitive, the tender committee decided to cancel the tender and invited a fresh tender and the decision of the appellant did not suffer from any arbitrariness or unreasonableness.

15. The Apex Court in **Bakshi Security & Personnel Services Pvt. Ltd. V. Devkishan Computed P. Ltd.** reported in 2016 AIR SCW 3385, has laid down same principle.

16. The Apex Court in **Central Coalfields Limited v. SLL-SML (Joint Venture Consortium),** reported in 2016 AIR SCW 3814, has further held that:

> 44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of the NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.
>
> 55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, in so far as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.
>
> 56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of the NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever."

17. Applying the test to the instant case, the writ petition merits to be dismissed and is accordingly dismissed. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Surinder Kumar son of Shri Shesh Ram ....Petitioner

Versus

State of H.P. and another ....Non-petitioners

Cr.MMO No. 65 of 2016

Order Reserved on 18th November 2016

Date of Order 23rd November 2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 279, 337 and 338 of I.P.C – present petition was filed for quashing the FIR and consequent proceedings – held, that the fact whether injured had sustained injuries on account of her own fault or at the time of getting down the bus is a complicated issue of fact which cannot be determined during these proceedings – no findings can be given regarding the affidavit executed by the injured- the permission to compound the offence cannot be granted as the offence punishable under Section 279 of I.P.C is against the public at large- petition dismissed. (Para-5 to 10)

Cases referred:

State of Orissa vs. Debendra Nath Padhi, AIR 2005 SC 359

Ishwar Singh vs. State of M.P, AIR 2008 SCW 7865

Mohan Singh vs. State (FB) Rajasthan, 1993 Cr.L.J. 3193

Narinder Singh and others vs. State of Punjab and another, JT 2014(4) SC 573

For Petitioner:	Mr. Sanjay Jaswal, Advocate.
For Non-petitioner No.1:	Mr. R.K. Sharma Deputy Advocate General.
For Non-petitioner No.2:	Mr.Diwakar Dev Sharma, Advocate

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Cr.P.C. for quashing of FIR No.225 of 2014 dated 13.12.2014 registered against the petitioner under Sections 279, 337 and 338 IPC at P.S. Indora District Kangra H.P. and for quashing criminal proceedings pending before learned Judicial Magistrate Indora District Kangra H.P.

Brief facts of the case

2. On 12.12.2014 complainant/injured namely Shobha Devi aged 49 years was travelling in HRTC bus No. HP-38-6066. When injured was in process of boarding down from bus at Indora District Kangra H.P. bus stand at 11.30 AM then accused started bus and Shobha Devi injured sustained injuries due to rash and negligent driving of vehicle upon public road. After investigation criminal case filed in Court of Judicial Magistrate 1st Class Indora against accused under Sections 279, 337 and 338 IPC. Learned Judicial Magistrate 1st Class listed the case for consideration upon charge. Criminal case is pending before learned Judicial Magistrate 1st Class Indora as of today.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Deputy Advocate General appearing on behalf of non-petitioner No.1 and learned Advocate appearing on behalf of non-petitioner No.2 and also perused the entire record carefully.

4. Following points arises for determination in this petition:-

1. Whether petition filed under Section 482 Cr.P.C. is liable to be accepted as per grounds mentioned in petition?
2. Final Order.

Findings upon Point No.1 with reasons

5. Submission of learned Advocate appearing on behalf of petitioner that injured had sustained injuries on account of her own fault while injured was boarding down from bus at Indora bus stand and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Fact whether injured had sustained injuries on account of her own fault or not at the time of boarding down from bus is complicated issue of facts and no judicial findings relating to complicated issue of facts can be given at this stage unless opportunity is granted to prosecution and accused to prove their case in accordance with law before learned Trial Court.

6. Submission of learned Advocate appearing on behalf of petitioner that injured has given affidavit dated 14.12.2015 and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that no findings relating to affidavit filed by Shobha Devi injured can be given at this stage. Evidentiary value of affidavit filed by Shobha Devi will be perused by learned Trial Court during trial of case. It is well settled law that document filed by accused cannot be considered by Court at the initial stage of criminal case. ***See AIR 2005 SC 359 State of Orissa vs. Debendra Nath Padhi.*** Documents filed by accused can be considered by criminal Court when criminal case is listed for accused evidence as per Code of Criminal Procedure 1973

7. Submission of learned Advocate appearing on behalf of petitioner that injured and accused want to compound the offence in order to keep harmony inter se parties and on this

ground FIR registered under Sections 279, 337 and 338 IPC be compounded is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that offence under Section 279 IPC is non-compoundable offence and it is held that offence under Section 279 IPC is offence against public at large because offence under Section 279 IPC relates to rash or negligent driving upon public road. The word 'public has been specifically mentioned under Section 279 IPC. It is well settled law that when word 'public' is mentioned in criminal offence then criminal offence is committed against public at large.

8. It is well settled law that order of compounding criminal offence which are non-compoundable under statutory provision of Code of Criminal Procedure 1973 is improper. It is also well settled law that it is against public policy to compound a non-compoundable criminal offence. ***See AIR 2008 SCW 7865 Ishwar Singh vs. State of M.P. See 1993 Cr.L.J. 3193 Mohan Singh vs. State (FB) Rajasthan.***In view of the fact that offence under Section 279 IPC is offence against the public at large and in view of fact that offence under Section 279 IPC is non-compoundable offence it is not expedient in the ends of justice to allow the petition.

9. It is well settled law that criminal proceedings of following criminal cases should not be quashed. (1) Murder criminal case (2) Rape criminal case (3) Dacoity criminal case (4) Prevention of Corruption Act criminal case (5) Criminal offence under Section 307 IPC (6) Criminal offences against public at large. It is well settled law that following criminal offences should be allowed to be compounded (1) Commercial transaction criminal cases (2) Matrimonial dispute criminal cases and (3) Family dispute criminal cases. ***See JT 2014(4) SC 573 Narinder Singh and others vs. State of Punjab and another.*** It is held that criminal offence under Section 279 of Indian Penal Code 1860 is not criminal offence against private parties simplicitor but is criminal offence against public at large. In view of above stated facts and case law cited supra point No. 1 is answered in negative.

Point No. 2 (Final Order)

10. In view of findings upon point No. 1 above petition filed under Section 482 Cr.P.C. is dismissed. Parties are directed to appear before learned Trial Court on ***15.12.2016.*** Observations will not effect merits of case in any manner and will be strictly confine for disposal of present petition. File of learned Trial Court along with certify copy of order be sent back forthwith. Cr.MMO No. 65 of 2016 is disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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

Shri Khem Chand .....Appellant.

Vs.

Shri Gopal Singh .....Respondent.

RSA No.: 391 of 2006
Reserved on: 03.11.2016
Date of Decision: 24.11.2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit that the entry showing D to be gairmaurusi are incorrect – no Will was executed by D – permissive possession of D came to an end on her death – defendant pleaded that D was a tenant who became the owner on the commencement of H.P. Tenancy and Land Reforms Act- she had executed a Will – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that The Appellate Court had held that J appeared to have died in the year 1976 as mutation of inheritance was sanctioned on 11.3.1976 - the Will was executed when proprietary rights were not conferred upon D – Appellate Court had drawn the conclusion on the basis of presumption/conjecture and surmises without any ground of appeal- appeal allowed – the case remanded to the Appellate Court for a fresh decision. (Para-11 to 17)

For the appellant: Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.
For the respondent: Mr. Ashwani Pathak, Senior Advocate, with Mr. Sandeep Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this appeal, the appellant has challenged the judgment and decree passed by the Court of learned District Judge, Solan in Civil Appeal No. 77-S/13 of 2004 dated 23.05.2006, vide which, learned appellate Court while dismissing the appeal filed by the plaintiff affirmed the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Kasauli, District Solan in Civil Suit No. 332/1 of 1999/1994 dated 10.09.2004, whereby the learned trial Court had dismissed the suit for declaration and injunction filed by the plaintiff.

2. Brief facts necessary for the adjudication of the present case are that appellant/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for declaration and injunction on the grounds that land comprised in Khata No. 5 min, Khatauni No. 8, Khasra No. 129, measuring 5 bighas was recorded in the name of plaintiff as owner and defendant had been shown in possession of the said land as per entries in copy of jamabandi for the year 1992-93 for Mauza Chainthu, Pargna Nali Dharti, Tehsil Kasauli. As per the plaintiff, suit land was in possession of Smt. Durgi, who died in the year 1986 and the revenue entries showing Smt. Durgi to be tenant in possession of the suit land were wrong and illegal. Smt. Durgi was real sister of mother of Shri Harnam Singh and she and her husband were economically not well off and due to this reason, Smt. Chawali, who was Bhabi and close relative of Harnam Singh had given suit land for use and possession to late Shri Hem Ram and after the death of Hem Ram to Smt. Durgi. It was further the case of the plaintiff that possession of Smt. Durgi was permissive but in the revenue record, she was shown as *Gair Marusi* and revenue entries showing Smt. Durgi or Sh. Hem Ram as *Gair Marusi* were wrong, illegal and void. As per the plaintiff, neither Sh. Hem Ram nor Smt. Durgi were ever inducted as tenants over the suit land nor they had any right, title or interest to possess the suit land in any manner. It was further the case of the plaintiff that after the death of Smt. Durgi, defendant in connivance with revenue staff succeeded in manipulating revenue entries in his favour and in the column of possession entry as *"Gopal Singh Putar Sohandu Ram Putar Paras Ram Sakan Deh Gair Marusi Baruai Vasiyat"* was incorporated. As per the plaintiff, said revenue entry was manipulated and incorporated behind the back of late Smt. Chawali, the predecessor-in-interest of the plaintiff. It was further the case of the plaintiff that Durgi was old, weak, village simpleton and indecisive lady, who had never executed any Will in favour of the defendant. As per the plaintiff, the Will was a result of fraud, misrepresentation and manipulation and in fact Durgi was not having any right, title and interest in the suit land except to possess the same under permission and as such, Durgi could not have had executed any Will qua the suit land. It was further the case of the plaintiff that after the death of Durgi, Smt. Chawali became owner in possession of the suit land and permissive possession of Durgi came to an end. It was further the case of the plaintiff that after the death of Durgi, defendant started interfering with the ownership and possession of late Smt. Chawali over the suit land, who requested the defendant not to do so. After the death of Smt. Chawali, defendant again started interfering with the possession of the plaintiff over the suit land on the basis of wrong revenue entries existing in favour of the defendant, whereas plaintiff was owner in possession of the suit land and defendant who was stranger to the suit land has no right, title or interest over the suit land in any manner whatsoever. On these basis, plaintiff prayed for a decree in his favour to the effect that he was owner in possession of the suit land and revenue entries in favour of the defendant qua the suit land were wrong and illegal and that defendant had no right, title or interest over the same. Plaintiff also prayed that defendant be restrained from interfering with the ownership and possession of the plaintiff over the suit land in any manner whatsoever and in the alternative, decree for possession on the basis of title was prayed for.

3. In the written statement filed by the defendant, the case as was set up by the plaintiff was denied. As per the defendant, the predecessor-in-interest of defendant late Smt. Durgi was a tenant qua the suit land and she was inducted as tenant over Khasra No. 129, measuring 5 bighas on a Chaukauta of Rs. 3/- per annum and she was inducted as such by Jhathu, son of Shibu. It was further the case of the defendant that after the death of Jhathu, Smt. Chawli, his widow succeeded vide mutation No. 128 and mutation of ownership could not be attested by operation of Himachal Pradesh Tenancy and Land Reforms Act as Smt. Chawali happened to be a widow, but the confirmation of proprietary rights were automatic by virtue of H.P. Tenancy and Land Reforms Act and revenue records with regard to tenancy were in accordance with the physical possession of the defendant. It was further the case of the defendant that he succeeded to the suit property by way of Will of Smt. Durgi registered with Sub Registrar dated 17.08.1986 and the same was in the knowledge of the plaintiff. It was further the case of the defendant that Durgi of her free will and senses had executed a valid Will in favour of the defendant and the contention of the plaintiff with regard to execution of Will was wrong and hence denied. It was further the case of the defendant that Chawali was not succeeded by any one including the plaintiff and Chawali had never executed any Will in favour of defendant nor there was any question of execution of any Will as she had never intended to Will her property and in case plaintiff had obtained any Will in his favour, the same was result of fraud and misrepresentation on the part of his father. On these bases, the suit of the plaintiff was contested by the defendant.

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

> *"1. Whether the plaintiff is owner in possession of the suit land and revenue entries showing possession of the defendant is wrong and liable to be corrected and the plaintiff is entitled to the injunction as prayed? OPP*
>
> *2. Whether the defendant is causing interference in possession of the plaintiff? OPP*
>
> *3. Whether the suit is not maintainable? OPD*
>
> *4. Whether the plaintiff is estopped from filing the suit, as alleged? OPD*
>
> *5. Whether the suit is barred by limitation? OPD*
>
> *6. Whether the plaintiff has no cause of action? OPD*
>
> *7. Relief.*

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

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Issue No. 5:	*Yes.*
Relief:	*Suit of the plaintiff is dismissed as per the operative portion of the judgment.*

6. While dismissing the suit so filed by the plaintiff, it was held by the learned trial Court that it stood proved on record that predecessor-in-interest of the defendant Hem Raj was recorded as tenant on *Chokata,* i.e. *Batai* and he was succeeded by Durgi, who had legally become owner in possession qua the suit land during her life time and as such, she was competent to execute Will in favour of Gopal Singh. Learned trial Court further held that proprietary rights were not challenged and revenue record suggested ownership and possession of defendant apart from admissions made by plaintiff's witnesses PW-2 and PW-3, who admitted the

Will executed in favour of defendant and possession of defendant over the suit land. Learned trial Court further held that *Girdwari* was conducted twice in the year, which bears the official presumption and plaintiff never questioned the same. It was further held by the learned trial Court that Sub-section (4) of Section 104 of the H.P. Tenancy and Land Reforms Act provided that whenever dispute arose whether a person cultivating the land of a land owner was a tenant or not, the burden of proving that such a person was not a tenant of the land was on the land owner. It further held that there was no evidence available on record that possession of the suit land was delivered to the plaintiff. Learned trial Court further held that there was no evidence on record regarding interference being caused by defendant over the alleged possession of the plaintiff. It was held by the learned trial Court that there was rather evidence on record regarding defendant being owner in possession over the suit land and also confirmation of proprietary rights in his favour and in the absence of possession of plaintiff, it could not be alleged that defendant was interfering as claimed by the plaintiff. It was further held by the learned trial Court that since plaintiff was out of possession, hence he could not assert regarding alleged interference. Learned trial Court further held that suit of the plaintiff was not maintainable as tenancy dispute could only be entertained under the provisions of H.P. Tenancy and Land Reforms Act, which was a complete Code in itself. On these bases, the suit so filed by the plaintiff was dismissed by the learned trial Court.

7. Feeling aggrieved by the judgment and decree so passed by the learned trial Court, the plaintiff filed an appeal. Learned appellate Court vide its judgment dated 23.05.2006 dismissed the appeal so filed by the plaintiff and affirmed the judgment and decree passed by the learned trial Court. In its judgment, learned appellate Court in para-6 of the same reproduced the grounds on which the judgment and decree passed by the learned trial Court was challenged before it. Thereafter, it was held by the learned appellate Court that the claim of the plaintiff that the land was given to Durgi Devi and her husband in view of their economic position and their possession was permissive deserved outright rejection as it was somewhere in the year 1958-59 that husband of Durgi came to be recorded as non-occupancy tenant over the suit land and land remained in his continuous possession and after his death, his wife Durgi Devi came in possession of the same and after her death, land came in possession of the defendant. Learned appellate Court held that at no point of time, possession of land had gone back to Chawali after the death of Durgi Devi as was claimed by the plaintiff. It was further held by the learned appellate Court that long standing entries in the revenue record belied the claim of the plaintiff to be owner in possession of the suit land. Learned appellate Court further held that no doubt plaintiff was recorded as owner of the suit land after the death of Chawali on the basis of Will, but after conferment of proprietary rights upon the defendant rightly or wrongly, he ceased to be owner of the suit land. In the same breath, it was held by the learned appellate Court that it was true that Durgi Devi under law could not have made any Will of the land of which she was tenant, but Durgi had become entitled to acquire proprietary rights over the land in the year 1974 during the life time of Jhathu, husband of Chawali, though for the reasons best known, no such mutation was sanctioned in favour of Durgi Devi and she continued to be recorded as non-occupancy tenant. Learned appellate Court held that in reality she should have become owner of the suit land as no steps for the resumption of the land has been taken by Jhathu as provided under Section 104 of the Act. It was held by the learned appellate Court that Will executed by Durgi Devi could not be said to be against the provisions of law as she at that time was certainly owner of the suit land and name of Chawali had been wrongly shown in the column of ownership after the death of Jhathu in 1976. On these bases, learned appellate Court dismissed the appeal so filed by the plaintiff.

8. Feeling aggrieved by the judgments and decrees so passed by both the learned Courts below, the plaintiff has filed this appeal.

9. This appeal was admitted by this Court on 16.11.2006 on the following substantial questions of law:

> *"Whether the finding of the first Appellate Court that Durgi acquired proprietary rights in respect of the suit land, being a tenant, during the life time of Chawali, who (Chawali) was herself a widow and had inherited the suit property from her husband late Jhathu, is illegal?*

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

11. A perusal of the judgment passed by the learned appellate Court demonstrates that learned appellate Court returned the finding that Jhathu husband of Chawali appears to have died in the year 1976 as mutation of inheritance in favour of Chawali was sanctioned on 11.03.1976. On these bases, it was held by the learned appellate Court that by virtue of the provisions of Section 104 of the H.P. Tenancy and Reforms Act, Durgi Devi had become entitled to acquire proprietary rights of land in the year 1974 during the life time of Jhathu. However, a perusal of the judgment so passed by the learned trial Court demonstrates that it is not substantiated therein as to from where this conclusion was arrived at by the learned appellate Court that Jhathu died in the year 1976. Incidentally, in the present case, defendant was conferred proprietary rights of the suit land vide mutation dated 30.09.2000. In my considered view, if Durgi Devi had become owner of the suit land by operation of the provisions of H.P. Tenancy and Land Reforms Act, then obviously on the strength of the Will executed by her allegedly in favour of the defendant, the defendant should have had become owner of the said property on the strength of the Will so executed in his favour and there was no occasion for conferring proprietary rights of the suit land upon him vide mutation dated 30.09.2000. But, it is an undisputed fact that when the alleged Will was executed by Durgi Devi in favour of the defendant, she had not been conferred upon proprietary rights or in other words, she was not owner of the suit land. Even learned appellate Court held that Durgi Devi under law could not have made Will of the land of which she was tenant. Incidentally, the findings so returned by the learned appellate Court have not been assailed by the defendant. However, whereas on one hand, it was held by the learned appellate Court that Durgi Devi could not have made Will of the land of which she was tenant, learned appellate Court on the other hand ventured to thereafter return findings to the effect that as H.P. Tenancy and Land Reforms Act, 1972 became effective law w.e.f. 21.02.1971 after its publication in *Rajpatra* dated 21.02.1974 and after receiving assent of the President of India on 02.02.1971 and as Jhathu, husband of Chawali appeared to have died in the year 1976 as mutation of inheritance in favour of Chawali was sanctioned on 11.03.1976, therefore, by virtue of the provisions of Section 104 of the H.P. Tenancy and Land Reforms Act, Durgi Devi had become entitled for acquiring proprietary rights of the land in the year 1974 during the lifetime of Jhathu and though no mutation had been sanctioned in this regard in her favour, but Durgi Devi continued to be recorded as non-occupancy tenant, whereas in reality, she should have become owner of the land as no steps for resumption of the land has been taken by Jhathu, therefore, in this view of the matter, the Will executed by Durgi Devi could not be said to be executed against the provisions of law as she at that time was certainly owner of the suit land and name of Chawali had been wrongly shown in the column of ownership after the death of Jhathu in the year 1976

12. I am afraid that the findings so returned by the learned appellate Court cannot be upheld. This is for the reason that the findings so returned by the learned appellate Court are not substantiated from the records of the case, but rather based on conjectures and surmises. From what material on record learned appellate Court drew the above inferences is not apparent or evident from the findings so returned by the learned appellate Court.

13. Further, though the learned appellate Court in its judgment has taken note of the grounds of appeal on which the judgment and decree passed by the learned trial Court were assailed before it by the plaintiff, however, none of these grounds have been dealt with by the learned appellate Court and in fact it went on to adjudicate upon the matter as if it was trying an original suit. The reasonings given by the learned trial Court while dismissing the suit filed by the

plaintiff have also not been discussed vis-à-vis the grounds of appeal taken by the plaintiff before the learned 1st appellate Court to assail the findings so returned by the learned trial Court.

14. In my considered view, findings of fact by a Court of law cannot be based on presumptions/conjectures and surmises. It has to be on the basis of material adduced on record by the parties that the Court has to give definite findings on fact.

15. It is well settled law that the first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage and anything less than this is unjust to him. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court and first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on question of fact and law. It is settled law that while reversing a finding of fact, the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate court had discharged the duty expected of it. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons on all the issues involved in the case alongwith the contentions put forth and pressed by the parties for decision by the appellate Court.

16. In view of the above salutary principles, I am of the considered view that the learned appellate Court has failed to discharge the obligation placed on it as first appellate Court by deciding the appeal on presumptions rather than returning its findings by coming close quarters with the reasoning assigned by the learned trial Court and thereafter assigning its own reasons for arriving at a different finding. Substantial question of law is answered accordingly.

17. In view of the discussion held above, the appeal is allowed and judgment and decree dated 23.05.2006 passed by the Court of learned District Judge, Solan in Civil Appeal No. 77-S/13 of 2004 are set aside. The case is remanded back to learned appellate Court with a direction to decide the appeal afresh on merits. Parties through their counsel are directed to put in appearance before the learned appellate Court on ***19.12.2016.*** Keeping in view the fact that case pertains to the year 1994, this Court hopes and trusts that learned appellate Court shall adjudicate upon the appeal as expeditiously as possible and preferably within a period of ***six months***. No order as to costs. Miscellaneous application(s), if any, also stands disposed of. Registry is directed to return back the records of the case to learned appellate Court forthwith.

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

Sarwan Singh and others .....Petitioners.

Versus

Mohar Singh .....Respondent.

Civil Revision No.168 of 2016.
Reserved on : 11.11.2016.
Date of decision: November,24th, 2016.

Code of Civil Procedure, 1908- Section 115- A civil suit for recovery of Rs.25,000/- was decreed by the Trial Court- decree was modified in appeal and the petitioners were held entitled to Rs. 10,000/- - no second appeal is maintainable under law – held, that where the second appeal is barred by the statute, the provisions under Article 227 of the Constitution of India cannot be used to circumvent the bar of filing an appeal – however, where the judgment is totally perverse or illegal, jurisdiction under Article 227 can be exercised – the revision lies against the order and not against the decree – however, keeping in view the conflicting judgments of the High Court on the point, matter referred to a larger bench. (Para-7 to 35)

Cases referred:
K.Chockalingam versus K.R. Ramasamy Iyer and Jenbagam 2004 (4) LW 586
Shaik Abdul Haq versus Aiswarya Nilaya Chit Fund Pvt Limited 2005 (4) Bank Cas 70
Jaswinder Singh versus Parshotam Lal Sanghi, Advocate 2005 (141) Punjab Law Reporter 368
Masina Sriramulu versus Pasagadagula Pydaiah 2011 (8) RCR (Civ) 1565
Microll India versus Jai Durga Trading Company 2012 (165) Pun LR 368
Manickam Moopan versus Lakshmi 2012 (2) LW 683
Uttam Chand & Anr. versus Gulab Chand Narendra Kumar & Ors. 2013 (2) Raj LW 1298
Liaqat Ali versus State of U.P. 2014 Law Suit (All) 1130
Surya Dev Rai versus Ram Chander Rai and others (2003) 6 SCC 675
Radhey Shyam and another versus Chhabi Nath and others (2015) 5 SCC 423
Nagarpalika Thakurdwara versus Khalil Ahmed & Ors. JT 2016 (9) SC 425

For the Petitioners : Mr.Dinesh Kumar Sharma, Advocate.
For the Respondent : Mr.N.S.Chandel, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The sole question that falls for adjudication in this case is whether the judgment and decree passed by the first appellate Court can be assailed by filing civil revision under Section 115 of the Code of Civil Procedure or under Article 227 of the Constitution of India when the second appeal against the same is specifically barred under Section 102 of the Code of Civil Procedure (for short 'Code').

2. The facts are not in dispute. The petitioners filed a suit for recovery of damages of Rs. 25,000/- which was decreed by the learned trial Court, however, in appeal, the judgment and decree passed by the learned trial Court was partly modified and the petitioners were held entitled to damages of Rs. 10,000/-.

3. Learned counsel for the respondent has raised preliminary objection regarding the very maintainability of this petition in view of bar imposed by Section 102 of the Code which reads thus:-

> *"[**102. No second appeal in certain cases**:- No second appeal shall lie from any degree, when the subject matter of the original suit is for recovery of money not exceeding twenty-five thousand rupees.]"*

4. Evidently, as the subject-matter of the original suit was for recovery of money which did not exceed Rs. 25,000/-, no further appeal was maintainable in view of the bar imposed by Section 102 of the Code, the petitioners assailed the judgment and decree by invoking the revisional jurisdiction of this Court by filing instant petition under Section 115 of the Code.

5. During the course of arguments, the learned counsel for the petitioners requested that in case this Court comes to the conclusion that the petition under Section 115 of the Code is not maintainable, then the same be converted and treated as one having been filed under Article 227 of the Constitution of India and it is this prayer that has necessitated this Court to determine the question as framed above.

6. Before proceeding further, certain precedents on the issue may be noticed.

7. In ***K.Chockalingam*** *versus* ***K.R. Ramasamy Iyer and Jenbagam 2004 (4) LW 586***, the Hon'ble High Court of Madras held that though the petition under Section 115 of the Code would be barred in such cases, however, the petition under Article 227 of the Constitution is maintainable. It is apt to reproduce the following relevant observations which read thus:-

"8. The learned counsel for the revision petitioner submits, that the revision as such, is well maintainable under Section 115 C.P.C., if not, at least under Article 227 of the Constitution of India, for which there is no objection from the other side. In this view, the C.R.P. could be decided on merits. The learned counsel for the revision petitioner further submits, that the dismissal of the suit by the first appellate Court, allowing the appeal in entirety, is erroneous and at least the plaintiff is entitled to a decree, against the first defendant, who had acknowledged the debt, periodically, the further fact being, the suit is filed within three years from the last date of acknowledgment.

13. This revision is filed only under Section 115 C.P.C. The suit is one for the recovery of less than a sum of Rs.25,000/- After the suit was decreed, an appeal has been preferred, which was allowed nullifying the lower courts decree and judgment. Section 102 of Code of Civil Procedure Code says, no second appeal shall lie from any decree, when the subject matter of the original suit is for recovery of money,not exceeding Rs.25,000/-. In view of this provision, a second appeal is barred and that is why, a revision is filed under Section 115 C.P.C., which is not maintainable, according to the learned counsel for the respondents. When there is a specific bar for filing the second appeal, when the suit is for recovery of money, not exceeding Rs.25,000/-, it should be held, a revision is also not maintainable under Section 115 C.P.C. Section 115 C.P.C. empowers the High Court, to call for the record of any case which has been decided by any Court subordinate to such High Court in which no appeal lies thereto. From the wordings deployed in the above Section, it is clear, the High Court is empowered to entertain a revision, when no appeal is provided or where no appeal lies. In other words, if the code provides, an appeal provision, from the decree and judgment of the subordinate court, then ordinarily invoking Section 115 C.P.C. is not possible. In this case, against the decree and judgment passed by the District Munsif Court, in O.S.No.147/97, an appeal provision is provided, and an appeal has been preferred also. Then, considering the pecuniary jurisdiction of the suit, the second appeal is prohibited or barred. In this view, it cannot be said, no appeal is provided against the decree and judgment, thereby to invoke Section 115 C.P.C. under the guise of revisional power. If the cases of this nature are allowed to be entertained under Section 115 C.P.C., it would amount to eclipsing Section 102 C.P.C., which aims the curtailment of Second appeal, in the sense, prolonged litigation. Where the subject matter is less than Rs.25,000/-, the High Court invoking Section 115 C.P.C., if maintains the revision, it would amount to second appeal under the label of Civil Revision Petition, thereby allowing the parties, to file second appeal, indirectly, ignoring Section 102, thereby defeating the intention of the legislature, which should not be allowed. In this view of the matter, I am of the considered opinion, the revision petition under Section 115 is not maintainable.

14. The learned counsel for the petitioner realising this difficulty alone, as aforementioned, has filed a memo for the conversion of Cr.P.C. under Section 227 Cr.P.C. which is permissible. In Sadhana Lodh v. National Insurance Co. Ltd. , the Hon'ble Supreme Court has held, when alternative remedy is available, interference under Article 226/227 of the Constitution of India, is not permissible. It is observed:

> *"Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 C.P.C. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred*

by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution."

15. In this view, it is held, where a remedy for filing a revision petition under Section 115 is barred in such cases, petition under Article 227 of the Constitution of India, is maintainable. In this view, this petition could be treated, as one filed under Article 227 of the Constitution of India, and not under Section 115 C.P.C. Then, the remaining question is, whether under the power conferred upon this Court under Article 227, the orders passed by the lower court can be set aside.

16. The only question arises in this revision is whether the suit is barred by limitation or not. Under the Limitation Act, irrespective of the defence raised, on the basis of the limitation, it is the bounden duty of the court to find out, whether the suit is in time or not. Thus, a duty is cast upon the court, to go into the question of limitation and decide the same according to law. As aforementioned, even as per the endorsement, as fairly conceded by the learned counsel for the respondents, except limitation, no other dispute. Since the first appellate Court has failed in its duty, and committed in my considered view, a flagrant violation, defeating the right of the plaintiff, to grant a decree against the first defendant, the same has to be set right under Article 227 of the Constitution of India, for which there cannot be any grievance, from the respondents. In this view of the matter, the decree and judgment passed by the appellate Court is liable to be set aside and there shall be a decree as prayed for, against the first defendant alone. To the above said extent, the revision is to be allowed.

In the result, the revision is allowed to the above said extent, setting aside the decree and judgment of the appellate Court, in A.S.No.64/2001 and there shall be a decree as prayed for, against the first defendant alone, with costs, restricted to the trial Court alone, dismissing the suit against the second defendant, without costs."

8. In ***Shaik Abdul Haq*** *versus* ***Aiswarya Nilaya Chit Fund Pvt Limited 2005 (4) Bank Cas 70***, the Hon'ble High Court of Andhra Pradesh held that in view of the express language engrafted in the Code, neither civil revision nor a petition under Article 227 of the Constitution is maintainable and it was observed as under:-

"*8. The suit claim, which is the subject-matter of the appeal before the lower Appellate Court and the present civil revision petition, remains to be less than Rs.25,000/-precisely Rs.13,237/-.*

9. It may be noted that Section 102 of the Code of Civil Procedure provides that no second appeal would lay if the value of the subject-matter is less than Rs. 25,000/.

10. The first contention of the learned Counsel for the 1st defendant is that though Section 102 of the Code of Civil Procedure explicitly prohibits filing of a second appeal if the value of the subject-matter is less than Rs.25,000/-, the judgment and decree of the first Appellate Court can be canvassed by any party to the suit under Article 227 of the Constitution of India.

11. The second contention of the learned Counsel for the first defendant that having regard to the fact that in terms of the amendment made to Section 115 of the Code of Civil Procedure by Act 46 of 1999, the High Court can entertain the revision petition against the judgment and decree of the first Appellate Court, exercising its jurisdiction under Article 227 of the Constitution of India. Thus contending he relies on the decisions of the Apex Court in Yeshwant Sakhalkar v. Hirabat Kamat Mhamai, and Babhutmal v. Laxmibai, .

12. The third contention of the learned Counsel appearing on behalf of the 1st defendant that basing on the calculation memo filed by the plaintiff, the suit was decreed in part and the other evidence was not properly appreciated by the lower

Appellate Court. Therefore, this Court can invoke the supervisory jurisdiction under Article 227 of the Constitution of India and interfere with the impugned judgment and decree.

13. In other words, according to the learned Counsel for the 1st defendant since the lower Appellate Court did not exercise its jurisdiction properly, though a second appeal is explicitly barred under Section 102 of the Code of Civil Procedure, a revision petition under Article 227 of the Constitution of India is maintainable.

14. The learned Counsel appearing on behalf of the first plaintiff submits that the present civil revision petition is not maintainable inasmuch as, this Court while exercising supervisory jurisdiction cannot reappreciate the evidence or correct the errors in drawing inferences like as is permissible to be done be the Appellate Court and hence the present revision petition under Article 227 of the Constitution of India is liable to be dismissed. To buttress his submissions, he placed strong reliance upon the judgment of the Apex Court in Ranjeet Singh v. Ravi Prakash, 2004 AIR SCW 4221.

15. In Yeshwant Sakhalkar v. Hirabat Kamat Mhamai (supra), the Apex Court observed as thus:

> *The question as to whether the application of Article 227 of the Constitution of India could be maintainable or not has been answered by this Court in Surya Dev Rai v. Ram Chander Rai wherein it was held: (SCC pp.694-96, Para 38)*
>
> *38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:*
>
> *(1) Amendment by Act 46 of 1999 with effect from 1-7-2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Article 226 and 227 of the Constitution.*
>
> *(2) Interlocutory orders, passed by the Courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.*
>
> *(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate Court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.*
>
> *(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the Subordinate Courts within the bounds of their jurisdiction. When a subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which does not have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step into exercise its supervisory jurisdiction.*
>
> *(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the*

face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby;

(6) A patent error is an error which is self-evidence, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn progress of reasoning. Where two inferences are reasonably possible and the subordinate Court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court indicates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate Court and, the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a large stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a Court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English Courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate Courts but cannot substitute its own decision in pace thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate Court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate Court as the Court should have made in the facts and circumstances of the case."

16. It is also pertinent to notice the observations made by the Apex Court, at Paragraphs Nos. 7 and 8, in Babhutmal v. Laxmibai (supra), *which run thus:*

The special civil application preferred by the appellant was admittedly an application under Article 227 and it is, therefore, material only to consider the scope and ambit of the jurisdiction of the High Court under that article. Did the High Court have jurisdiction in an application under Article 227 to disturb the findings of fact reached by the District Court? It well settled by the decision of this Court in Waryam Singh v. Amarnath, that the:

".....power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in Dalmia Jain Airways Ltd. v. Sukumar Mukherjee, (S.B.) to be exercised most sparingly and only in appropriate cases in order to

keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors."

This statement of law was quoted with approval in a subsequent decision of this Court in Nagrendra Nath Bora v. The Commr. of Hills Division, and it was pointed out by Sinha, J., as he then was, speaking on behalf of the Court in that case:

> *"It is thus, clear that the powers of judicial interference under Article 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the power under Article 226 of the Constitution. Under Article 226 the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article 227 of the Constitution, the power of interference is limited to seeing that the Tribunal functions within the limits of its authority."*

It would, therefore, be seen that the High Court cannot, while exercising jurisdiction under Article 227, interfere with findings of fact recorded by the subordinate Court or Tribunal. Its function is limited to seeing that the subordinate Court or Tribunal functions within the limits of its authority. It cannot correct mere errors of fact by examining the evidence and reappreciating it. What Morris, L. J., said in Rex v. Northumberland Compensation Appeal Tribunal, 1952 (1) All.ER 122, in regard to the scope and ambit of certiorari jurisdiction must apply equally in relation to exercise of jurisdiction under Article 227. That jurisdiction cannot be exercised:

> *"as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issues raised in the proceedings."*

If an error of fact, even though apparent on the face of the record, cannot be corrected by means of a writ certiorari it should follow a fortiori that it is not subject to correction by the High Court in the exercise of its jurisdiction under Article 227. The power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a Superior Court can do in exercise of appeal. The High Court cannot in guise of exercising its jurisdiction under Article 227 convert itself into a Court of appeal when the Legislature has not conferred a right of appeal and made the decision of the subordinate Court or Tribunal final on facts.

8. Here, when we turn to the judgment of the High Court, we find that the High Court has clearly misconceived the scope and extent of its power under Article 227 and overstepped the limits of its jurisdiction under that Article. It has proceeded to reappreciate the evidence for the purpose of correcting errors of fact supposed to have been committed by the District Court. That was clearly impermissible to the High Court in the exercise of its jurisdiction under Article 227. The District Court was the final Court of fact and there being no appeal provided against the findings of fact reached by the District Court, it was not open to the High Court to question the propriety or reasonableness of the conclusions drawn from the evidence by the District Court. The High Court could not convert itself into a Court of appeal and examine the correctness of the findings of fact arrived at by the District Court. The limited power of interference which the High Court possessed under the Article 227 was to see that the District Court functions within the limits of its authority and so far as that was concerned, there was no complaint against the District Court that it

> *transgressed the limits of its authority. It is true that the High Court claimed to interfere with the findings of fact reached by the District Court on the ground that the District Court had misread a part of the evidence and ignored another part of it but that was clearly outside the jurisdiction of the High Court to do under Article 227.*

17. From a perusal of the judgments Yeshwant Sakhalkar v. Hirabat Kamat Mhamai and Babhutmal v. Laxmi Bhai (supra), relied upon by the learned Counsel appearing on behalf of the plaintiff, the consistent view of the Apex Court conspicuously appears to be - - firstly that when the Trial Court passes as interlocutory order, notwithstanding, an embargo under Section 115 of the Code of Civil Procedure, if patent error, which is self evident, is found under the following circumstances:

> *Firstly; against the interlocutory orders, passed by the Courts subordinate to the High Court, against which a remedy of revision is excluded by the Code of Civil Procedure Amendment Act 46 of 1999 are nevertheless are open to be challenged before the High Court, which has supervisory jurisdiction.*
>
> *Secondly; the object of exercising supervisory jurisdiction under Article 227 of the Constitution of India is to keep the subordinate Courts within the bounds of their jurisdiction or in cases where subordinate Courts refuse to exercise their jurisdiction or assume jurisdiction where there is no jurisdiction at all; and*
>
> *Thirdly; where a patent error is self-evident, which can be perceived or demonstrated without going into any lengthy or complicated argument or a long-drawn process of reasoning, the same can be interfered with under Article 227 of the Constitution of India and most importantly the High Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution will not convert itself into a Court of appeal and indulge in reappreciation or evaluation of evidence on record or to correct the errors, if any, in drawing inferences.*

18. The above observations of the Apex Court, noted herein, are only few in the context of the present case among many guidelines carved out by the Apex Court.

19. Sri. V.L.N.G.K. Murthy, Amicus Curiae, appointed to assist this Court, relies on the judgment of the Apex Court in Surya Dev Rai v. Ram Chander Rai and Ors., 2003 (5) ALD 36 (SC) = 2003 (5) Supreme 390.

20. The Apex Court in Yeshwant Sakhalkar v. Hirabat Kamat Mhamai (supra), referred to the observations made by it in Surya Dev Rai v. Ram Chander Rai and Ors., Since the said observations were already extracted, the same need not be extracted once again.

21. In Ranjeet Singh v. Ravi Prakash, 2004 AIR SCW 4221, the Apex Court observed as under:

> *.............. A perusal of the judgment of the High Court shows that the High Court has clearly exceeded its jurisdiction in setting aside the judgment of the Appellate Court. Though not specifically stated, the phraseology employed by the High Court in its judgment, goes to show that the High Court has exercised its certiorari jurisdiction for correcting the judgment of the Appellate Court. In Surya Devi Rai v. Ram Chander Rai and Ors., this Court has ruled that to be amenable to correction in certiorari jurisdiction, the error committed by the Court or authority on whose judgment the High Court was exercising jurisdiction, should be an error which is self-evident. An error which needs to be established by lengthy and complicated*

arguments or by indulging into a long drawn process of reasoning, cannot possibly be an error available for correction by writ of cerliorari. If it is reasonably possible to form two opinions on the same material, the finding arrived at one way or the other, cannot be called a patent error. As to the exercise of supervisory jurisdiction of the High Court under Article 227 of the Constitution also, it has been held in Surya Dev Rai (supra) that the jurisdiction was not available to be exercised for indulging into re-appreciation or evaluation of evidence or correcting the errors in drawing inferences like a Court of appeal. The High Court has itself recorded in its judgment that "considering the evidence on record carefully" it was inclined not to sustain the judgment of the Appellate Court. On its own showing, the High Court has acted like an Appellate Court which was not permissible for it do under Article 226 or Article 227 of the Constitution."

22. In the instant case, it is to be seen that the value of the subject-matter of appeal, after passing of partial decree by the lower Appellate Court, is less than Rs.25,000/-. Therefore, the present civil revision petition is attracted by Section 102 of the Code of Civil Procedure, which created a clear bar postulating that no second appeal would lay from any decree, when the subject-matter of the original suit is for recovery of money not exceeding twenty five thousand rupees. The Legislature enacted Section 102 CPC with the clear and obvious object of reducing the scope of the litigation and to give quietus to the same.

23. Furthermore, if the present civil revision petition is entertained under Article 227 of the Constitution of India, it amounts to exercising the appellate jurisdiction, which was prohibited by the Apex Court by way of guidelines in the judgments referred to supra.

24. That apart, the judgment under challenge is not an interlocutory order. Further, the judgment under challenge, as already noticed, is final and rendered by the lower Appellate Court.

25. For the foregoing reasons, without going into the merits of the case, and in view of the specific and unambiguous language contained in Section 102 of the Civil Procedure Code, I have to hold that the remedy available to the petitioner is to file a second appeal, if so advised, and the present civil revision petition filed under Article 227 of the Constitution of India is not maintainable. Therefore, this civil revision is liable to be dismissed."

9. In ***Jaswinder Singh*** *versus* ***Parshotam Lal Sanghi, Advocate 2005 (141) Punjab Law Reporter 368***, a learned Single Judge of the Punjab & Haryana High Court though entertained a petition under Section 115 of the Code, but dismissed the same on merits by observing as under:-

"*4. After hearing the learned counsel, I am of the considered view that this petition is liable to be dismissed because the jurisdiction of this Court under Section 102 of the Code of Civil Procedure 1908 (for brevity of Code) to entertain a second appeal is barred when the subject matter of the original suit is for recovery of money not exceeding Rs.24,000/-. It is for this reason that the defendant-petitioner has invoked 115 of the Code. The power of this Court for reversing the findings under Section 115 of the Code is confined only to jurisdictional error. It is required to be shown that the subordinate court has exercised jurisdiction not vested in it by law or it has failed to exercise jurisdiction so vested or has acted in the exercise of jurisdiction illegally or with material irregularity. A valid inference under Section 114 of the Evidence Act 1872 has been drawn by the learned Lower Appellate Court when the defendant-appellant failed to produce the record showing that no amount of the sale proceeds of share has been credited to his account namely the City Investment Centre which is owned by him. For that purpose, the learned lower*

appellate Court has rightly placed reliance on a judgment of the Supreme Court in the case of Biltu Ram v. Jainanadan Prasad, C.A. No. 941 of 1965, dated 15.4.1965 wherein it has been held that and adverse inference is justified even though no onus on a party to prove the document has been placed. Best evidence concerning the controversy before the courts must always be produced as has been observed by the Supreme Court in the case of Muntgesan Pillai v. Gnana Sambandha Pandora Sambandi, A.I.R. 1917 P.C. 6 and Ors. as well as Mt. Bilas Kunwar v. Desraj Ranjit Singh and Ors., A.I.R. 1951 Privy Council 96. Those who withhold the best evidence from the court expose themselves to the danger of being subjected to an adverse inference against them. The aforementioned view has also been taken in the case of Gopal; Krishanji Ketekar v. Mohd, Hazi Latif and Ors., which has been followed in the case of City Bank N.A. v. Standard Chartered Bank, . In the case of Gopal Krishanji Ketekar the Supreme Court has clarified as to how an inference under Section 114 of the Evidence Act, 1872 would arise. The following observations are apposite to refer:-

> *"Even if the burden of proof docs not lie on a party the court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly to furnish to the courts the best material of its decision. With regard to third parties, this may be right enough-they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the court the written evidence in their possession which would throw light upon the proposition."*

5. There is no material irregularity or jurisdictional error in exercise of power by the lower appellate Court under Section 96 of the Code. As a matter of fact, the first appellate Court is the final court of fact and this court cannot admit a revision petition or an appeal unless it raises a substantive question of law. No revision would be admissible unless a jurisdictional error is found. No such jurisdictional error is shown warranting admission of the petition. Therefore, there is no merit in this petition and same is liable to be dismissed."

10. In ***CMPMO No. 439 of 2010, titled as Subhadra Devi*** *versus* ***Kishori Lal***, decided on 14.12.2010, a learned Single Judge of this Court (Justice Deepak Gupta as his Lordship then was) held that the provisions of Sections 100 and 102 of the Code cannot be circumvented by filing a petition under Article 227 of the Constitution of India and it is apt to reproduce the following relevant observations which read as under:-

> *"3. Under Section 100, CPC, a second appeal lies to the High Court only on a substantial question of law. Section 102, Code of Civil Procedure specifically provides that no second appeal is maintainable in a suit, value whereof is less than Rs.25,000/-. The provisions of Section 100 and 102, Code of Civil Procedure cannot be circumvented by filing a petition under Article 227 of the Constitution of India. An appeal is the creation of a statute and the legislature in its wisdom has decided that a second appeal will not lie in a suit valuation of which is less than 25,000/-. There is no occasion to entertain a CMPMO unless it is shown that there is some illegality involved or there is some perversity in the finding of the learned Trial Court. In the present case, I have gone through the judgments of both the*

courts below. I find that both the judgments are based on appreciation of evidence and, therefore do not call for any interference in this petition."

11. Yet, again in ***CMPMO No.235 of 2006 titled as Mohan Lal*** *versus* ***Bahader Singh***, decided on 16.12.2010, the same learned Judge (Justice Deepak Gupta as his Lordship then was) reiterated that the provisions of Article 227 of the Constitution cannot be used as a means to circumvent the bar to filing of an appeal envisaged under Sections 100 and 102 of the Code. However, it was observed that the Court would be failing in its duty if it does not exercise its supervisory jurisdiction under Article 227 of the Constitution of India when the judgment and order challenged is totally illegal or perverse, as would be evident from the following observations:-

> *"2.Under Section 100, CPC, a second appeal lies to the High Court only on a substantial question of law. Section 102, Code of Civil Procedure specifically provides that no second appeal is maintainable in a suit, valuation of which is Rs.25,000/- or less. This Court has repeatedly held that the provisions of Article 227 of the Constitution of India cannot be used as a means to circumvent the bar to filing of an appeal. An appeal is only a creation of the statute and if the statute prohibits the filing of an appeal, the provisions of Article 227 of the Constitution of India cannot be invoked in normal course.*
>
> *3. Having held so, this Court would be failing in its duty if it does not exercise its supervisory jurisdiction under Article 227 of the Constitution of India where the judgment or order challenged is totally illegal or perverse."*

12. In ***Masina Sriramulu*** *versus* ***Pasagadagula Pydaiah 2011 (8) RCR (Civ) 1565***, the Hon'ble Andhra Pradesh High Court was dealing with a case where value of the suit was merely Rs. 11,500/- and while dealing with the question regarding maintainability of the petition and despite the bar under Section 102 of the Code held the revision to be maintainable by according the following reasons:-

> "*5. Section 115 Code of Civil Procedure has a long legislative history. It would appear that the Code of Civil Procedure, 1859 did not contain any provision relating to the revisional jurisdiction. When High Courts were constituted at the 3 Presidency Towns under the Charter Act, 1861, the 3 High Courts were conferred the power of superintendence over Courts subordinate thereto. The revisional jurisdiction of the 3 High Courts was confined to (a) failure to exercise jurisdiction and (b) exercising of jurisdiction, which did not vest in the subordinate Court, subjecting those questions alone to the revisional jurisdiction of the High Court. Subsequently, another clause relating to the exercise of the jurisdiction illegally or with material irregularity by the subordinate Court was included within the revisional jurisdiction by Amendment Act, 1879. When the Code of Civil Procedure, 1882 was enacted, Section 622 provided for the revisional jurisdiction which verbatim was incorporated as Section 115 of the present Code of Civil Procedure, 1908.*
>
> *6. In 1976, when extensive amendments were brought to the Code of Civil Procedure, Section 115 Code of Civil Procedure was amended bringing out an explanation and a proviso to Sub-section (1) to the original Section 115 Code of Civil Procedure. The substantial amendments undertaken by the Amendment Acts of 1999 and 2002 drastically amended the Court of Civil Procedure. So far as Section 115 is concerned, Section 12 of the Code of Civil Procedure (Amendment) Act, 1999 incorporated amendments to Section 115 Code of Civil Procedure. The proviso brought in through the amendment in 1976 was redrafted. A new Sub-section 3 of Section 115 Code of Civil Procedure was added by way of a clarification.*
>
> *7. The impugned judgment in the present case was passed on 27.07.2006 in A.S. No. 59 of 2004. The amendments have come into force with effect from 01.07.2002.*

Hence, Section 115 Code of Civil Procedure as it stands today is liable to be considered to determine whether the revision is maintainable or not.

8. The learned Counsel for the first Defendant inter alia urged that Section 115 Code of Civil Procedure would apply to the orders in interlocutory applications only and that no revision would lie from a judgment in an appeal suit.

9. The learned Counsel for the first Defendant placed reliance upon Section 115(1) proviso, which is to the effect that the High Court shall not vary or reverse any order except where the order impugned would have finally disposed of the suit or other proceedings if the order was made in favour of the revision Petitioner. The learned Counsel for the first Defendant inter alia contended that the purport of the proviso is that the revision can be against any order in a suit or proceeding and not an order disposing of the very suit itself. He also pointed out that when a suit is disposed of, it is not an order, but is a decree and that when the proviso conspicuously did not refer to a decree, Section 115 Code of Civil Procedure cannot be invoked questioning any decree whether in a suit or an appeal.

10. In proceedings other than suits, issues are not settled. The controversies between rival claims are usually framed at the time of disposal of the matter. Even otherwise, when the controversies are crystallized before both sides let in evidence, they are referred to usually as points for consideration and not issues. The learned Counsel for the Plaintiff drew my attention to reference of an issue in Section 115(1) proviso Code of Civil Procedure. For the purpose of clarity, I may extract the proviso to Section 115(1) Code of Civil Procedure. Proviso to Section 115(1) reads:

> *Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings ?.*
>
> *Referring to the word 'issue' in the proviso, it is contended that a revision arises even from the decree in a suit. I am afraid that the whole proviso and indeed the whole section shall be read as a whole and not piecemeal. Picking out a stray word 'an issue' from the proviso, it cannot be contended that a revision is maintainable from the final orders or from the orders in a suit or an appeal.*

11. A reading of the proviso points out that the Court shall examine hypothetically whether the impugned order finally disposes of the suit or proceeding. If the answer to this question is in the positive, a revision would lie and otherwise not.

12. In the present case, the Plaintiff made a monitory claim. The trial Court granted a decree for part of the monitory claim made by the Plaintiff. The appellate Court reversed the same. I may put two situations hypothetically. The order under impugnment is the judgment of the appellate Court. It was passed in favour of the first Defendant. Did it finally dispose of the suit laid by the Plaintiff? Indeed, by the judgment of the appellate Court, the suit filed by the Plaintiff was dismissed. Thus, the judgment of the appellate Court finally disposed of the suit. The other hypothetical situation is to consider as to what would happen had the appellate Court passed judgment/order in favour of the Plaintiff who laid the revision. In other words, the appellate Court must have dismissed the appeal confirming the judgment of the trial Court granting a money decree in favour of the Plaintiff. Again the judgment of the appellate Court would have finally disposed of the suit laid by the Plaintiff. Viewed either in the angle of the Plaintiff or in the angle of the first Defendant, the situation satisfies the proviso of Section 115(1) Code of Civil Procedure.

13. In view of the language deployed in the proviso that the order must have been passed in the course of a suit or other proceeding, there is no bar for a revision from the judgment passed by the appellate Court. The other embargo is provided by the beginning of Section 115(1) that where no appeal lies from the impugned order/judgment, the party can resort to revision. In view of Section 102 Code of Civil Procedure, admittedly no second appeal would lie. This part of the condition imposed by Section 115(1) Code of Civil Procedure is satisfied in the present case. So far as the other condition imposed by the proviso incorporated by 1976 amendment and modified by 1999 amendment is concerned, viz., where the impugned order finally disposed of the suit and would have disposed of the suit finally even if the order were in favour of the Plaintiff, the revision is maintainable. I, therefore, answer this question raised by Sri Ravi Kumar, learned Counsel for the first Defendant-first Respondent that this revision prima facie is maintainable in view of Section 115(1) Code of Civil Procedure including the proviso thereto.

14. The next question is whether the order of the appellate Court deserves to be revised. This question is a mixed question of fact and law. The law regarding the interference by the High Court under Section 115 Code of Civil Procedure is that the High Court is entitled to interfere with the order of a subordinate Court in the event of fulfillment of one of the three conditions mentioned in Section 115(1) Code of Civil Procedure only, viz., the Court exercised the jurisdiction not vested in it by law or b) the Court failed to exercise the jurisdiction which is vested in it or c) the Court acted illegally or with material irregularity in exercise of the jurisdiction vested in it. One of the old cases in respect of powers under Section 115 Code of Civil Procedure is Balakrishna Udayar v. Vasudeva Iyar,1947 AIR(PC) 71 It was reiterated with approval by the Prevy Council in N.S. Venkatagiri Ayyangar v. Hindu Religious Endowments Board, 1949 AIR(PC) 156. The Privy Council considered that the revisional powers are exercisable when the subordinate Courts irregularly exercise or did not exercise or illegally assumed powers to exercise jurisdiction and that a revision cannot be directed against the conclusions of law and fact in which the question of jurisdiction is not involved.

15. One of the leading authorities on the powers under Section 115 Code of Civil Procedure is Major S.S. Khanna v. Brigadier F.J. Dillon, 1964 AIR(SC) 497. In that case, Shah.J as then he was held:

> *The section consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises, i.e., there is a case decided by a subordinate Court in which no appeal lies to the High Court, the second sets out the circumstances in which the jurisdiction may be exercised.*

16. It was clarified that if there was no question of jurisdiction, the decision could not be corrected by the High Court in the exercise of the revisional powers, since a Court has jurisdiction to decide wrongly as well as rightly.

17. Way back in Keshardo Chaneria v. Radha Kissan, 1953 AIR(SC) 23, it was observed that the judges of the subordinate Courts have perfect jurisdiction to decide the case and that even if they decided the case wrongly it could not be said that the subordinate Courts exercised the jurisdiction illegally or with material irregularity. The Himachal Pradesh High Court clarified in Ramdas v. Subhash Bakshi, 1977 AIR (HP) 18 that the revisional jurisdiction is residual jurisdiction conferred so as to ensure that errors of grave nature should be corrected when they are brought to the notice of the Court.

18. I may briefly note the march of law relating to the revisional powers of the High Court at this stage.

19. In Amir Hassan Khan v. Sheo Baksh Singh,1885 11 ILR 6 the judicial committee of the Privy Council observed that where the Court has jurisdiction to

determine a question, it could not be held that the Court had acted illegally or with material irregularity in exercise of its jurisdiction by giving an erroneous decision. In Malkarjun v. Narahari,1900 27 IA 216 the Privy Council held that a Court had jurisdiction to decide wrongly as well as rightly and that if the case was wrongly decided, the wronged party could take the course prescribed by law for setting the matters right and that the jurisdiction of the High Court under Section 115 Code of Civil Procedure could not be invoked in such an event. The Privy Council's next two leading decisions are Balakrishna Udayar (supra) and N.S. Venkatagiri Iyyangar (supra), both of which were already referred to.

20. After independence, one of the first cases arising before the Supreme Court relating to the powers under Section 115 Code of Civil Procedure is Keshardeo's case (supra). In Pandurang v. Maruthi Hari, 1966 AIR(SC) 153, it was observed that it was not competent for the High Court to correct errors of fact, however patent they be under Section 115 Code of Civil Procedure and that even errors of law could not be rectified unless such errors have been in connection with the jurisdiction of the Court to try the dispute. It was clarified by Gajendragadkar, J. as he then was, in that case that an erroneous decision on a question of law reached by the subordinate Court which had no relation to questions of jurisdiction of the Court could not be corrected by the High Court under Section 115 Code of Civil Procedure. As already pointed out, the leading authority, however, is the decision in Major S.S. Khanna's case (supra).

21. In Baldevdas Shivlal v. Filmistan Ditributors (India) (P) Ltd, 1970 AIR(SC) 406, the Supreme Court explained the ambit and scope of Section 115 Code of Civil Procedure that the exercise of the power under Section 115 Code of Civil Procedure was broadly subject to three important conditions viz., i) that the decision must be of a Court subordinate to the High Court, ii) that there must be a case which has been decided by the subordinate Court, and iii) that the subordinate Court must appear to have exercised jurisdiction not vested in it by law or has failed to exercise the jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity.

22. In Managing Director (MIG) Hindustan Aeronautics Ltd. v. Ajit Prasad, AIR 73 SC 76, it was held that the High Court had no jurisdiction under Section 115 Code of Civil Procedure to interfere with the order passed by the first appellate Court whether the order of the first appellate Court is right or wrong and whether the order might be in accordance with law or not in accordance with law as long as the first appellate Court has jurisdiction to make such an order.

23. I may point out that all these decisions were passed prior to the amendment of 1999 or the amendment of 1976.

24. With reference to the powers under Section 115 Code of Civil Procedure and under Article 227 of the Indian Constitution, the Supreme Court observed in Anndai Ammal v. Sadasivan Pillai, 1987 AIR(SC) 203 that the procedure under Section 115 Code of Civil Procedure and Article 227 of the Indian Constitution are different and are not interchangeable.

25. I may, however, point out that in Hukumchand Amolikchand Longde v. Madhava Balaji Potdar,1983 AIR(SC) 504 the Supreme Court held that once a revision under Section 115 Code of Civil Procedure was admitted, it had to be disposed of on 'merits. In Masjid Kacha Tank, Nahan v. Tuff ail Mohammed,1991 AIR(SC) 445 even though there were concurrent findings from the trial Court and the appellate Court, the Supreme Court considered that the High Court in its revisional jurisdiction would be entitled to interfere with the findings of fact if the findings are perverse or there had been a non-appreciation or non-consideration of material evidence on record by the trial Court or the appellate Court. In Vinod

Kumar Arora v. Smt. Surjit Kaur, 1987 AIR(SC) 2179, the Supreme Court held that the High Court would be justified in interfering with the orders of a subordinate Court by exercise of the revisional jurisdiction where the decision of the order under impugnment was based on conjectures and surmises and that the Court which passed the impugned order lost sight of relevant evidence. Thus, although the view of the Privy Council and the Supreme Court by and large is that the scope of a revision is very limited and that a revision can be entertained only when there is incorrect exercise of the jurisdiction conferred upon the Court, the Supreme Court also expressed the view that where the order sought to be revised is perverse and is without any basis whatsoever, such an order deserves to be revised. This view of the Supreme Court indeed is in tune with the famous maxim Ubi jus ibi remedium. The revision Petitioner herein is prevented from moving a second appeal as the amount involved is less than Rs. 25,000/-. I am afraid that the Plaintiff, who is the revision Petitioner, nevertheless, cannot be shut off if the order passed by the appellate Court is wholly unjust. It is not as though the Plaintiff has no remedy even though his rightful claim is rejected. At any rate, the learned Counsel for the Plaintiff contended that the order of the appellate Court was perverse and needed to be rectified through the revision."

13. In ***Microll India*** *versus* ***Jai Durga Trading Company 2012 (165) Pun LR 368***, the Hon'ble Punjab and Haryana High Court held that the bar created under Section 102 CPC could not be bypassed by bringing the revision petition as this course was not permissible and it was observed as under:-

"5. Learned counsel for the petitioner has submitted that when filing of appeal in this matter has been barred by provisions of section 102 CPC, the remedy would be available by way of revision under Civil Revision No. 5704 of 2011 Article 227 of the Constitution of India. He has cited before me a decision of Hon'ble Supreme Court of India in Surya Dev Rai v. Ram Chander Rai and others (2003)6 Supreme Court Cases 675 to support his submission in this regard. Other decisions cited by learned counsel for the petitioner in this regard are Radhey Shyam and another v. Chhabi Nath and others 2009(2) RCR (Civil) 442, Johan Ram v. Steel Authority of India Ltd. 2005 AIR (Chhatisgarh) 17 and Mariamma Roy v. Indian Bank and others 2008(4) RCR (Civil) 910.

8. Learned counsel for the respondent has submitted, on the other hand, that after the provisions of section 102 CPC, barred the appeal in this matter, the judgment and decree passed by First Appellate Court could not be challenged by way of revision petition under section 115 CPC. In this regard, he has cited before me a decision of this court in Jaswinder Singh v. Parshotam Lal Sanghi and another 2005(3) RCR (Civil) 650 where in similar situation, revision under section 115 CPC was held not maintainable. He has also cited before me a decision of Hon'ble Rajasthan High Court in Municipal Council, Sawai Madhopur and others v. Civil Judge (SD) Sawai Modhopur and others 2004(1) LJR 301 where the suit for recovery of Rs.15,360/- was dismissed by the trial court but the appeal was allowed by the appellate court. Since the second appeal was barred, it was held that the provisions of Article 227 of the Constitution of India cannot be used to bypass the provisions of Code of Civil Procedure.

10. In Surya Dev Rai's case (supra) , the suit has been for permanent injunction. The plaintiff filed an application therein for ad- interim injunction under Order 39 Rules 1 and 2 CPC. His prayer was rejected by the trial court as also by the First Appellate Court. The plaintiff, who could not avail the remedy under section 115 CPC after its amendment filed a petition under Article 226 of the Constitution of India. The High Court dismissed the petition for the reason that the same was not maintainable as the plaintiff was seeking interim injunction against the private respondents. The decision of the High Court was reversed holding that the power

of the High Court under Articles 226 and 227 of the Constitution of India is always in addition to the revisional jurisdiction conferred on it. The curtailment of revisional Civil Revision No. 5704 of 2011 jurisdiction of the High Court under section 115 CPC by Amendment Act 46 of 1999 has been held not to take away and could not have taken away the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil court.

11. The facts of the case in hand are entirely different. The second appeal in this case is barred by the provisions of section 102 CPC. That bar created by section 102 CPC is sought to be bypassed by bringing a revision petition, which is not permissible. There was no such provision of second appeal in case of application under Order 39 Rules 1 and 2 CPC, which was taken away by any provision of CPC or by curtailment of revisional jurisdiction by the High Court under section 115 CPC. So the facts of the case before me are not similar to the facts of the case in Surya Dev Rai's case (supra) and, therefore, the decision in that case is not applicable to the present case. Similarly the other cases are also on different facts and none of them deal with the point involved in this case. Therefore, they are not applicable to the facts of this case. The point in controversy is directly dealt with by this court in Jaswinder Singh's case (supra) and Hon'ble Rajasthan High Court in Municipal Council, Sawai Madhopur and others' case (supra) and in view of the same, I hold that the petition does not lie ."

14. In ***Manickam Moopan*** *versus* ***Lakshmi 2012 (2) LW 683***, a learned Single Judge of the Madras High Court chose to follow the ratio of the earlier judgment rendered by the same Court in ***K.Chockalingam*** (supra) and observed as under:-

"*4. In the circumstances, Janab Mohamad Ihram Saibu, learned counsel for the respondent submitted that when an appeal was not maintainable in view of the pecuniary limit mentioned in Section 102 C.P.C., on that account an appeal cannot be dismissed, however, the court can grant leave to convert it as a revision.*

5. On this aspect, the learned counsel for the appellant cited the following decisions:

(i) N.BANSIDHAR Vs. DWARAKALAL [AIR 1974 KARNATAK 117].

(ii) JIWAN DASS Vs. NARAIN DASS [AIR 1981 DELHI 291].

(iii) R.S.PILLAI Vs. M.L.PERATCHI @ SELVI & OTHERS [2000 (IV) CTC 543 (DB)]

6. The learned counsel for the appellant also filed a memo that the appeals may be converted as revision petitions.

7. Since Mr.Muthukrishnan is the root cause for filing this memo, he cannot now say otherwise.

8. Now, the question arises whether in the circumstances, these Second Appeals could be converted as revisions or not?

9. As per Section 102 C.P.C. no second appeal shall lie from any decree, when the subject matter of the original suit is for recovery of money not exceeding twenty five thousand rupees.

10. So, Section 102 C.P.C. prescribes a monetary limit of Rs.25,000/- to file Second Appeal. Thus to file a second appeal, the subject matter of the suit should be above Rs.25,000/-. Admittedly, the subject matter of the suit in these appeals are below Rs.25,000/-. So, Section 102 C.P.C. is a bar to maintain these second appeals.

11. A revision is provided under Section 115 C.P.C.

12. BAN SIDHAR Vs. DWARAKALAL [AIR 1974 KARNATAKA 117] deals with a plea for conversion of a revision as an appeal and also deals with return of that

petition for presentation before proper court. That is not the situation before us. It is not applicable to the facts of our case.

13. JIWAN DASS Vs. NARAIN DASS [AIR 1981 DELHI 291] is near us. The Delhi High Court held as under:

> *"It is now a settled law that the label placed on a cause is not conclusive and does not ordinarily affect the jurisdiction of the court to allow the label to be corrected by treating an appeal on a revision or a revision as an appeal. Provided of course the cause of justice so demands. In cases where no appeal lies but an appeal has been wrongly preferred, the Court has the wide discretion to treat it as a revision where the conditions laid down under Section 115 C.P.C. are satisfied."*

14. In R.S.PILLAI Vs. PERATCHI @ SELVI & OTHERS [2000 (IV) CTC 543] in view of the peculiar facts and circumstances of the case, a Division Bench of this Court in the interest of justice converted an appeal as a revision.

15. In K.CHOCKALINGAM vs. K.R.RAMASAMY IYER AND ANOTHER [2004 (4) L.W.586] exactly similar question as before us arose. A memo was filed seeking the leave of the court to convert the second appeal as a revision. There a controversy arose whether under such circumstances, the revision could be filed under Section 115 C.P.C. or under Article 227 of the Constitution of India.

16. It is profitable here to note the following portions of the judgment in K.CHOCKALINGAM vs. K.R.RAMASAMY IYER AND ANOTHER [2004 (4) L.W.586]:

> *"13. This revision is filed only under Section 115 C.P.C. The suit is one for the recovery of less than a sum of Rs.25,000/-. After the suit was decreed, an appeal has been preferred, which was allowed nullifying the lower courts decree and judgment. Section 102 of Code of Civil Procedure Code says, no second appeal shall lie from any decree. When the subject matter of the original suit is for recovery of money, not exceeding Rs.25,000/-. In view of this provision, a second appeal is barred and that is why, a revision is filed under Section 115 C.P.C., which is not maintainable, according to the learned counsel for the respondents. When there is a specific bar for filing the second appeal, when the suit is for recovery of money, not exceeding Rs.25,000/-, it should be held, a revision is also not maintainable under Section 115 C.P.C. Section 115 C.P.C. empowers the High Court, to call for the record of any case which has been decided by any Court Subordinate to such High Court in which no appeal lies thereto. From the wordings deployed in the above Section, it is clear, the High Court is empowered to entertain a revision, when no appeal is provided or where no appeal lies. In other words, if the code provides, an appeal provision, from the decree and judgment of the subordinate court, then ordinarily invoking Section 115 C.P.C. is not possible. In this case, against the decree and judgment passed by the District Munsif Court, in O.S.No.147/97 an appeal provision is provided, and an appeal has been preferred also. Then, considering the pecuniary jurisdiction of the suit, the second appeal is prohibited or barred. In this view, it cannot be said, no appeal is provided against the decree and judgment, thereby to invoke Section 115 C.P.C. under the guise of revisional power. If the cases of this nature are allowed to be entertained under Section 115 C.P.C., it would amount to eclipsing Section 102 C.P.C., which aims the curtailment of Second appeal, in the sense, prolonged litigation. Where the subject matter is less than Rs.25,000/-, the High Court invoking Section 115 C.P.C., if maintains the revision, it would amount to second appeal under the label of Civil Revision Petition, thereby allowing the parties, to file second*

appeal, indirectly, ignoring Section 102, thereby defeating the intention of the legislature, which should not be allowed. In this view of the matter, I am of the considered opinion, the revision petition under Section 115 is not maintainable.

14.The learned counsel for the petitioner realising this difficulty alone, as aforementioned, has filed a memo for the conversion of Cr.P.C. under Section 227 Cr.P.C. which is permissible. In Sadhana Lodh v. National Insurance Co. Ltd., (2003 (3) SCC 524=2003-1-L.W.815), the Hon'ble Supreme Court has held, when alternative remedy is available, interference under Article 226/227 of the Constitution of India, is not permissible. It is observed:

> *"Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 C.P.C. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution."*

15. In this view, it is held, where a remedy for filing a revision petition under Section 115 is barred in such cases, petition under article 227 of the Constitution of India, is maintainable. In this view, this petition could be treated, as one filed under Article 227 of the Constitution of India, and not under Section 115 C.P.C.,"

17. In the circumstances, in view of the above position of law explained and described in K.CHOCKALINGAM vs. K.R.RAMASAMY IYER AND ANOTHER [2004 (4) L.W.586], I am preferred to follow CHOCKALINGAM (supra).

18. Thus, the leave now sought for could be granted to convert the second appeal as a Civil Revision Petition under Article 227 of the Constitution of India."

15. In ***Uttam Chand & Anr.*** *versus* ***Gulab Chand Narendra Kumar & Ors. 2013 (2) Raj LW 1298***, the Hon'ble Rajasthan High Court in a suit filed for recovery of Rs. 10,000/- held that the second appeal is prohibited or specifically barred under Section 102 of the Code, then it cannot be said that no appeal is provided against the judgment thereby invoking jurisdiction under Section 115 of CPC because if cases of this nature are allowed to be entertained, it would amount to eclipsing Section 102 CPC which specifically aims at ending the litigation in view of the pecuniary quantum involved in the cause and revision petition under Section 115 of Code to be not maintainable. It was held:-

"3. Learned counsel for the petitioner submits that if error of law is committed by both the Courts below and under Sec. 102 restriction is imposed upon filing second appeal in terms that no second appeal shall lie from any decree, when subject-matter of the original suit is for recovery of money not exceeding Rs. 25,000/-, therefore, the only course is left with the petitioner to challenge the judgment and decree passed by the trial Court and affirmed by the appellate Court by way of filing revision petition because illegality and perversity can be seen while exercising jurisdiction under Sec. 115, C.P.C. Therefore, this revision petition is maintainable.

4. In support of his argument, learned counsel for the petitioner invited my attention towards judgment reported in, SUNDERLAL v. PARAMSUKHDAS, 1968 AIR(SC) 366 and submits that if no appeal lay, then, revision would be competent and High Court was right in entertaining the revision if the appellate Court below

appears to have exceeded the jurisdiction vested in it or it acted with material irregularity in exercise of its jurisdiction. Learned counsel for the petitioner further invited my attention towards, Sadhna Lodh vs. National Insurance Co. Ltd., 2003 3 SCC 524 and submits that this revision petition is maintainable.

5. After hearing learned counsel for the petitioner. I have perused the pleadings of this case.

> *This revision petition has been filed under Sec. 115, C.P.C. against the judgment and decree passed by the trial Court and affirmed by the first appellate Court for recovery of Rs.10,000/-, Section 102, C.P.C., provides that no second appeal lies from any decree, when the subject-matter of the original suit is for recovery of money not exceeding Rs.25,000/-; meaning thereby, although second appeal is permissible but the legislature with open eyes put a restriction under Sec. 102, C.P.C. so that matter should come to an end, therefore, it is specifically provided that notwithstanding there being appeal provision under Sec. 100, C.P.C., when the subject-matter of the original suit is for recovery of money not exceeding Rs.10,000/-, then, such second appeal shall not lie. In the opinion of this Court, the legislature in its wisdom has curtailed the right of filing second appeal by way of putting above restriction on the point of pecuniary limit of the cause. Therefore, even if any substantial question of law is involved, no second appeal shall lie against the judgment and decree if the initial suit was filed for recovery of money less than Rs. 25,000/-, If it is the intention of the legislature, then, of course, it can be said that petitioner cannot invoke jurisdiction of this Court under Sec. 115, C.P.C. because such invocation of the revisional jurisdiction will render the specific provision of Sec. 102 to nullity which is not permissible. Under Sec. 115, C.P.C. the legality and propriety as well as perversity can be seen, so also, while exercising jurisdiction of second appeal the appeal can be admitted upon substantial question of law. Both are peri meteria, therefore, a revision petition tiled under Sec. 115, C.P.C. is not maintainable.*
>
> *Here, in this case, recovery of suit was filed by the petitioner for Rs.10.000/- and second appeal is prohibited or specifically barred under Sec. 102, C.P.C. Therefore, it cannot be said that no appeal is provided against the judgment thereby to invoke jurisdiction under Sec. 115, C.P.C. because if cases of this nature are allowed to be entertained it would amount to eclipsing Sec. 102, C.P.C. which specifically aims at ending the litigation in view of the pecuniary quantum involved in the cause. In this view of the matter, this revision petition under Sec. 115, C.P.C. is not maintainable.*
>
> *Consequently, this revision petition is hereby dismissed as not maintainable."*

16. In ***Liaqat Ali*** *versus* ***State of U.P. 2014 Law Suit (All) 1130***, the Hon'ble Allahabad High Court declined to convert a petition under Article 226 of the Constitution of India by observing that what was forbidden by law could not be permitted by invoking extraordinary remedy and that too in a petty matter involving dispute of not more than Rs. 25,000/-. The relevant observations read thus:-

"2. Petitioner filed a suit for recovery of Rs.22,685.72. The suit was dismissed vide judgment and order dated 31.8.2010. The appeal was also dismissed on 17.5.2013. The petitioner thereafter preferred second appeal and the same was dismissed as not maintainable in view of Section 102 C.P.C. Thus, the petition has invoked writ jurisdiction of this Court.

3. The right to appeal is a statutory right. Once the said right has been availed and the matter becomes conclusive between the parties, as no further appeal is provided, the same cannot be permitted to be re-opened by invoking writ jurisdiction.

4. The purpose of writ jurisdiction is to provide a remedy where there is none to undo injustice, but where the statutory remedy provided is availed and is exhausted the recourse to writ jurisdiction is limited and discretionary.

5. It is well settled that in exercise of extra ordinary jurisdiction the courts should not enter into academic issues or in realm of affairs which are petty and for correcting errors in the judgments unless it results in grave injustice.

6. It is a cardinal principle of law that there must be an end to litigation. Therefore, where a judgment of the court below has been subjected to scrutiny in appeal there may not be any further judicial review of the same. If it is so permitted, it would mean that a party has unlimited right to keep agitating the matter until and unless it is decided in his favour. This cannot be the intention of law.

7. In Mahendra Singh Vs. Haqimuddin, 2008 10 ADJ 182 in similar situation, where the second appeal was not found to be maintainable in view of Section 102 C.P.C., I have refused permission to convert it into a petition under Article 227 of the Constitution for the reason that what is forbidden in law cannot be permitted by invoking extra ordinary remedy and that too in a petty matter involving dispute of not more than Rs.25,000/-.

8. In view of the aforesaid facts and circumstances, in order to set at rest the controversy and to end the litigation between the parties, I refrain myself from exercising the writ jurisdiction under Article 226 of the Constitution of India."

17. In ***Civil Revision No.3330 of 2014 titled as Rajesh*** *versus* ***Bharat Lal Bhargava***, decided on 11.02.2016, the Hon'ble Punjab and Haryana High Court after taking into consideration the judgment rendered by the Hon'ble Madras High Court in ***K. Chockalingam*** (supra) and taking into consideration the amended provisions of Section 102 CPC held that mere filing of revision petition in lieu of filing second appeal does not make out a case for maintainability of the matter before the High Court and likewise filing of a petition under Article 227 of the Constitution is just to frustrate the very object of such a legislation and the same was not permissible. It is apt to reproduce paras 2 to 5 which read thus:-

"2. Relevant facts of the case that respondent/plaintiff had filed suit for recovery of Rs.18,897/- and the Court of learned Civil Judge (Junior Division), Rewari decreed the said suit. Present petitioner filed first appeal against the said judgment & decree and the same was dismissed by the Court below on 28.1.2014. Learned counsel for the petitioner submitted that the said findings of both the Courts below are erroneous and are liable to be set aside.

3. Learned counsel for the respondent raised objection that as per Section 102 CPC, present petition, being second appeal in a suit for recovery of an amount not exceeding Rs.25,000/-, is not maintainable.

4. While arguing on this point, learned counsel for the petitioner submitted that present case is a petition under Article 227 of the Constitution of India and not the second appeal and the same is not maintainable. In support of his arguments, learned counsel for the petitioner placed reliance upon the view taken by co-ordinate Bench of this Court in case Om Parkash v. Sardha Ram (Civil Revision No.2793 of 2012, decided on 31.8.2012). On the same point, reliance was placed upon the judgment from Madras High Court in case K.Chockalingam v. K.R.Ramasamy Iyes and Jenbagam, 2004 4 LW 586 (Madras).

5. This Court has considered the submissions made by learned counsel for the parties and also gone through the view taken by the coordinate Bench of this Court

in Om Parkash's case and also by the Madras High Court in K.Chockalingam's case and of the view that as per amended provisions of Section 102 CPC, there is a complete bar for second appeal in a suit for recovery of amount involving less than Rs.25,000/-. Merely filing of revision petition in lieu of filing of second appeal does not make out a case for maintainability of the matter before this Court. The very object of incorporating such an amendment in the Code of Civil Procedure is to bring an end to litigation involving petty matter and there being no dispute that the matter in controversy is based on a suit for recovery of money not exceeding Rs.25,000/- and legislature has already enacted the provisions while being conscious that there should be no second appeal in such like suits for recovery of money not exceeding Rs.25,000/-. Filing of petition under Article 227 of the Constitution is just to frustrate the very object of such a legislation which is not permissible."

18. Similar issue came up for consideration before a Co-ordinate Bench of this Court (Justice Dharam Chand Chaudhary, Judge) in ***Civil Revision No. 58 of 2009 titled as Managing Director H.P. State Cooperative Marketing & Consumer Federation Ltd(Him Fed), District Shimla*** *versus* ***Sh. Rajinder Singh and Civil Revision No.59 of 2009 titled as Managing Director H.P. State Cooperative Marketing & Consumer Federation Ltd(Him Fed), District Shimla*** *versus* ***Sh.Sita Ram***, decided on 30.03.2016, wherein it was held that this Court in exercise of its revisional jurisdiction can look into the correctness, legality or propriety of any decision or order impugned and it was held as under:-

"9. The defendant has assailed the judgment and decree passed by both Courts below in this petition as in view of the provisions contained under Section 102 of the Code of Civil Procedure, no second appeal lies from any decree, when the subject matter of the original suit for recovery of money not exceeds to Rs.25, 0000/-.

10. The legality and validity of the impugned judgment and decree has been questioned on the grounds inter-alia that both the Courts have erroneously ignored the provisions contained under Sections 76 of the H.P. Co-operative Societies Act and resumed the jurisdiction not vested with them while decreeing the suit. The legal objections were raised and demonstrated but the decree has been passed in complete departure to the objections so raised and, as such, has vitiated the findings recorded by the Courts below. Since a specific issue was framed for maintainability of the suit on the basis of the pleadings of the parties, the same otherwise should have been decided being legal in nature.

11. Mr. K.D.Sood, learned Senior Advocate has strenuously contended that the findings recorded by both the Courts below are vitiated on account of the failure of both Courts below to decide issue No.2 qua maintainability of the suit after taking into consideration the pleadings of the parties and also relevant provisions of law. It has therefore been urged that the suit could not have been decreed.

12. On the other hand, Mr. Y.P.Sood ,learned counsel has contended that there being no iota of evidence to show that the transaction i.e. supply of 18 bags of apple to defendant society is touching its constitution, management or the business is not proved. Both the Courts below have rightly answered the controversy on issue No.2 against the defendant.

13. According to Mr. Sood, learned counsel, the defendant had merely collected the apple crop of the food growers of Rohru area in its collection centre Hanstari for and on behalf of the State Government and as such neither was conducting any business nor the dispute in the present lis touches the constitution, management or the business of the defendant society.

14. For the sake of convenience Section 76 of the Act is being reproduced as follows:-

> ***Notice necessary in suits****:- No suit shall be instituted against a society or any of its officers in respect of any act touching the constitution, management or the business of the society, until the expiration of two months after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.*
>
> *Notwithstanding anything contained in section 72 a suit cannot be instituted against a society or any of its officers (concerning the constitution, management or business of the society) unless two months period has expired after notice in writing has been delivered to the Registrar, stating the cause of action. The object is to save the societies from unnecessary involvement in litigation and further to apprise the Registrar of the prospective disputes in which the society would be a party.*
>
> *15. Now coming to the given facts and circumstances, as per own case of the plaintiff, he has supplied his 18 bags of apple under Market Intervention Scheme for sale at Hanstari in the collection centre of defendant society. Therefore, it is amply clear that the apple bags were supplied to the defendant society in the discharge of its business activity under the market intervention scheme. In preliminary objection, the defendant society has raised a specific objection qua maintainability of the suit for want of service of notice under Section 76 of the Act, and issue was also framed in this regard. The controversy under issue No.2 is legal in nature and the same should have been answered after taking into consideration the pleadings of the parties and in view of the own case of the plaintiff, as discussed supra. No other and further evidence was required to be adduced to substantiate the same. In replication there is denial simplicitor without any explanation as to how the suit was maintainable without service of notice under Section 76 of the Act. Therefore, the only inescapable conclusion would be that both the Courts below have failed to decide issue No.2 in accordance with law which has vitiated the findings as recorded and as such, the judgment and decree being perverse deserves to be quashed and set-aside. Otherwise also on merits, there seems to be no quarrel between the parties on both sides.*
>
> *16. In the exercise of revisional jurisdiction, this Court can look into the question as to the correctness, legality or propriety of any decision or order impugned."*

19. From what has been observed above, it would be noticed that the law on the subject is not at all consistent. As regards this Court, the learned Single Judge in ***Subhadra Devi, Mohan Lal's cases (supra)*** has clearly held that Article 227 of the Constitution cannot be used as a means to circumvent the bar to filing of an appeal envisaged under Section 102 of the Code and once this is a creation of the statute and if the statue prohibits filing of an appeal, the provisions of Article 227 of the Constitution of India cannot be invoked in normal course. However, another learned Single Judge in ***Managing Director's case (supra)*** has held that this Court in exercise of its revisional jurisdiction under Section 115 of the Code can look into the correctness, legality and propriety of any decision or order impugned.

20. It would be noticed that in majority of the cases, the Courts for invoking jurisdiction under Article 227 have relied upon a decision rendered by Hon'ble two Judges' Bench in ***Surya Dev Rai*** *versus* ***Ram Chander Rai and others (2003) 6 SCC 675*** which admittedly has been partly over-ruled and diluted by the Hon'ble three Judges' Bench in ***Radhey Shyam and another*** *versus* ***Chhabi Nath and others (2015) 5 SCC 423*** wherein it has been held that all the Courts in the jurisdiction of a High Court are subordinate and subject to its control and supervision under Article 227 of Constitution. Therefore, control of working of the subordinate Courts in dealing with their judicial orders is exercised by statutory appeal and revisional powers

and power of superintendence under Article 227 and not by way of writ petition under Article 226 while the appellate or revisional jurisdiction is regulated by powers under Article 227 of the Constitution. It was further held that despite curtailment of revisional jurisdiction under Section 115 CPC, the jurisdiction of the High Court under Article 227 remains unaffected and has not resulted in expanding High Court's powers of superintendence.

21. Lastly, it was held that judicial orders of the Civil Court were not amenable to writ jurisdiction under Article 226 and challenge to judicial orders would lie by way of statutory appeal or revision or under Article 227. There can be no gainsaying that though the powers of superintendence under Article 227 are wide enough, yet they are only supervisory in nature. The powers under this Article cannot, therefore, be exercised to interfere with an order, if the order made by the subordinate Court or Tribunal is within bounds, or in conformity with law. However, the powers of superintendence can be invoked to remove a patent perversity in an order of the Court subordinate to the High Court or where there has been a gross or manifest failure of justice or the basic principles of natural justice have been flouted. Yet, still the High Court cannot interfere with mere error of law or fact because another view than the one taken by the subordinate Court too is possible.

22. The main object of Article 227 is to keep strict and judicial control by the High Court on the administration of justice within its territory and to ensure that the wheels of justice do not come to a halt and the foundation of justice remain pure and pristine in order to maintain public confidence in the functioning of the Courts subordinate to the High Court.

23. Thus, this Court has no difficulty in concurring with the view expressed by a Co-ordinate Bench of this Court in ***Subhadra Devi, Mohan Lal's cases*** (supra) whereby it has been held that the provisions under Article 227 of the Constitution of India cannot be used as a means to circumvent the bar to filing of an appeal, yet the powers under Article 227 of the Constitution of India can always be exercised where the judgment or order challenged is totally illegal or perverse. However, while exercising such powers under Article 227 of the Constitution, the High Court shall have to bear in mind the principles as laid down in ***Surya Dev Rai and Chhabi Nath cases*** (supra). However, this Court expresses its inability to concur with the ratio as laid down by a Co-ordinate Bench of this Court in ***Managing Director's case*** (supra) wherein it was observed that in exercise of revisional jurisdiction, this Court can look into the question as to the correctness, legality or propriety of any decision or order impugned.

24. A second appeal is not maintainable in the present case in view of Section 102 of the Code which has already been quoted above. Section 102 was substituted by the Code of Civil Procedure (Amendment) Act 1999 (Act 46 of 1999) wherein the amendment sought to be introduced was as follows:-

> *"102. No second appeal in certain cases:- No second appeal shall lie from any decree, when the amount or value of the subject matter of the original suit does not exceed twenty-five thousand rupees."*

25. Subsequently, by the Code of Civil Procedure (Amendment) Act 2002 (Act 22 of 2002) which came into force on 01.07.2002, the amendment proposed to be effected by Act 46 of 1999 was substituted with the present Section 102. As per the amendment of Act 1999, irrespective of the nature of the suit, no Second Appeal would lie against the decision in a suit where the value of the subject matter is below Rs. 25,000/-. By the amendment introduced by Act 22 of 2002, the bar under Section 102 is limited to suits where the subject matter is for recovery of money not exceeding twenty five thousand rupees. It was pursuant to the Law Commission 145th report that the amendment was carried out in Section 102 of the Code in order to ensure that trivial matters or petty claims where the money spent on litigation is far excess of the stakes involved do not enter the Courts which besides wasting the valuable time and energy of the parties, but also of the Court.

26. This was so observed by the Hon'ble Supreme Court in ***Nagarpalika Thakurdwara*** *versus* ***Khalil Ahmed & Ors. JT 2016 (9) SC 425,*** the relevant observations read thus:-

> *"14. The purpose behind enactment of Section 102 of the CPC is to reduce the quantum of litigation so that courts may not have to waste time where the stakes are very meagre and not of much consequence. In the instant case, though apparently the amount which was sought to be recovered was Rs.11,006.07, looking at the prayer made in the plaint, the consequences of the final outcome of the litigation would be far-reaching."*

27. A Second Appeal is maintainable only on a substantial question of law as provided under Section 100 of the Code of Civil Procedure. A Revision under Section 115 of the Code of Civil Procedure lies where the subordinate court appears to have exercised jurisdiction not vested in it by law; or to have failed to exercise jurisdiction so vested; or to have acted in the exercise of its jurisdiction illegally or with material irregularity. The question is whether the High Court would be entitled to entertain a Civil Revision Petition, in a case where a Second Appeal is barred under section 102 of the Code of Civil Procedure, on any ground which is less rigorous than that provided in Section 100 of the Code of Civil Procedure.

28. Even in matters where the valuation exceed Rs. 25,000/-, a second appeal could be entertained only on a substantial question of law. When Section 102 provides that no second appeal would lie in respect of a suit where the subject matter is for recovery of money not exceeding Rs. 25,000/-, it cannot be assumed the Parliament thought it fit to take such category of cases out of the rigour of Section 100 and to provide a less rigorous remedy in such cases. If so, it is to be taken that a revision under Section 115 cannot be entertained on a ground which is less rigorous than that provided in Section 100 of the Code of Civil Procedure.

29. The purpose of substituting Section 102 C.P.C. was to restrict entertaining Second Appeals in cases where the subject matter of the suit is for recovery of money not exceeding Rs. 25,000/-. The purpose sought to be achieved cannot be defeated by entertaining a revision under section 115 of the Code of Civil Procedure on a less rigorous test than that provided in Section 100 C.P.C.

30. Section 115 of CPC reads thus:-

> "***115. Revision.-[****(1) The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—*
>
> *(a) to have exercised a jurisdiction not vested in it by law, or*
>
> *(b) to have failed to exercise a jurisdiction so vested, or*
>
> *(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,*
>
> *the High Court may make such order in the case as it thinks fit:—*
>
> *[PROVIDED that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.]*
>
> *(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.*
>
> *(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.]*

[Explanation .- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.]"

31. In addition to the aforesaid, it would be noticed that Section 115 of the Code does not refer to a decree and further provides that revision can be invoked where no appeal lies against the impugned order/judgment. There is a marked difference as regards an order or judgment against which no appeal lies and the judgment or order against which an appeal is prohibited or restricted by the Code.

32. Under Section 115 CPC, the legality and propriety as well as perversity can be seen, so also, while exercising jurisdiction of second appeal, appeal can be admitted only on substantial questions of law. The scope of both these provisions is quite similar and, therefore, the petitioners cannot invoke jurisdiction of this Court under Section 115 CPC because such invocation of revisional jurisdiction will render the specific provision of Section 102 of the Code to be otiose which is not permissible.

33. Accordingly, with all humility at my command, I regret my inability to concur with the view expressed by a Co-ordinate Bench of this Court in ***Managing Director's case*** (supra). In view of this difference, it is necessary for me to refer the matter to a larger Bench. Even otherwise, the issue is of great importance and the views expressed by the different High Courts on the question are otherwise not consistent and it is desirable that an authoritative pronouncement be made by a larger Bench.

34. At this stage, I may observe that though I have concurred with the exposition of law as propounded by a Co-ordinate Bench of this Court in ***Subhadra Devi, Mohan Lal's cases*** (supra), however, since the matter is being referred to a larger Bench, it may also consider the desirability of going into the question of maintainability of the petition under Article 227 of the Constitution in cases where the second appeal against the judgment and decree is specifically barred under Section 102 of the Code.

35. In view of the conflict in decision, the Registry is directed to place the papers before Hon'ble the Chief Justice for constituting a larger Bench.

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

Babu Ram ...Revisionist.
Versus
State of Himachal Pradesh ...Respondent.

Cr. Revision No.: 149 of 2011.
Date of Decision: 25.11.2016

Code of Criminal Procedure, 1973- Section 482- The revisionist was convicted for the commission of offences punishable under Sections 447, 427, 504 and 506 of I.P.C – an application has been filed for seeking compensation of the offence in view of the compromise between the parties – since, the matter has been compromised, therefore, permission granted and the accused acquitted. (Para-3 to 5)

Cases referred:

Ramji Lal and another Vs. State of Haryana, 1983(1) SCC 368
Mohd. Rafi vs. State of U.P., *1998(2) R.C.R.(Criminal 455*
M.D.Balan Mian and another vs. State of Bihar and another *2001 AIR (SCW) 5190*
Khursheed and another vs. State of U.P in Appeal (Crl.) No. 1302 of 200
Dasan vs. State of Kerala and another *2014(2) ECrC 384*.

For the petitioner: Mr. N.K.Thakur, Sr. Advocate withMr. Jagdish Thakur, Advocate.
For the respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The learned Judicial Magistrate 1st Class, Court No.1, Sundernagar, District Mandi, pronounced an order of conviction upon the revisionist herein qua commission of offences punishable under Sections 447, 427, 504 and 506 IPC. In an appeal preferred therefrom by the accused before the learned Additional Sessions Judge, Mandi, sequelled the latter affirming the pronouncement recorded upon the accused by the Judicial Magistrate 1st Class, Court No.1, Sundernagar, District Mandi. The accused/convict standing aggrieved by the concurrently recorded renditions of both the Courts below proceeded to assail them by preferring a Revision herebefore.

2. During the pendency of the revision before this Court the learned counsel for the accused/convict revisionist herein, has instituted an application under Section 482 read with Section 320 Cr.P.C. whereby he seeks permission of this Court for compounding the offences committed by him under Sections 447, 427, 504 and 506 IPC and has also tendered a compromise deed bearing Ext.A-1 executed inter se the petitioner/accused and the legal heir of the complainant. The learned counsel for the revisionist submits that since the complainant in the instant case has since died yet with the provisions engrafted in Section 320 4(b) of the Cr.P.C bestowing upon his legal heir(s) whom he states at the bar to be his widow qua hers thereupon holding the statutory competence to compound the relevant offences. The relevant provisions of Section 320 4(b) of the Cr.P.C stand extracted hereinafter:-

> "4(b). When the person who would otherwise be competent to compound an offence under this Section is dead, the legal representative, as defined in the Code of Civil Procedure 1908 (5 of 1908) of such person may, with the consent of the Court compound such offence."

The statement at the bar of the counsel for the revisionist stands accepted especially when it falls within the ambit of Section 320 4(b) of the Cr.P.C.

3. The statements on oath of the legal heir of the complainant Smt. Geeta Devi besides also of the accused stand duly reduced into writing and also stand signatured/thumb marked by each of them wherein they communicate qua Ext.A-1 holding their respective signatures/thumb marking, signatures/thumb marks whereof stand testified by them to exist respectively therein in blue circles at Marks-A and B.

4. The offences qua which a concurrent order of conviction stood pronounced upon the accused/convict is compoundable yet the accused/convict and the legal heir of the complainant while endeavouring to seek composition of the offences whereupon an order of conviction stood concurrently pronounced upon the accused/convict, are enjoined to obtain the permission of this Court.

5. Be that as it may, this Court would proceed to accord the apposite permission to them only when satiation stands begotten qua the relevant principles encapsulated in the pronouncement of the Hon'ble Apex Court reported in Ramji Lal and another Vs. State of Haryana, 1983(1) SCC 368, Mohd. Rafi vs. State of U.P., *1998(2) R.C.R.(Criminal 455,* M.D.Balan Mian and another vs. State of Bihar and another *2001 AIR (SCW) 5190,* Khursheed and another vs. State of U.P in Appeal (Crl.) No. 1302 of 2007, Dasan vs. State of Kerala and another *2014(2) ECrC 384*. The aforestated pronouncements of the Hon'ble Apex Court empower Courts of law to proceed to permit the accused/convict and the informant/complainant to enter into a compromise also empower the Court concerned to grant the apposite permission to them for

compounding the offence(s) only on vivid display occurring qua its facilitating restoration of harmony in society besides its promoting goodwill and amity amongst them.

6. Since the accused/convict and the LR of the complainant in their respective statements recorded on oath reduced into writing and respectively signatured/thumb marked by them echo therein qua their apposite conjoint endeavour intending to promote goodwill and peace amongst them necessarily hence the aforesaid principle encapsulated in the aforereferred judgements of the Hon'ble Apex Court for thereupon this Court holding a facilitation to permit them to compound the offences whereupon the accused stood concurrently convicted by both the Courts below stands visibly satiated.

7. Consequently, this Court accepts their joint proposal to compound the offences committed by the accused/convict. In sequel thereto the revision petition is allowed. The conviction and sentence concurrently imposed upon the accused/convict by both the Courts below is set aside. The accused/convict is acquitted. Bail bonds are cancelled.

****

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

Dharam Prakash .....Appellant/Petitioner.
Versus
Neela Devi .....Respondent.

FAO No. 357 of 2016.
Reserved on : 17.11.2016.
Decided on: 25th November, 2016.

Hindu Marriage Act, 1955- Section 13- The marriage between the parties was solemnized in the year 1997 – the wife used to leave her matrimonial home and reside in her parental home – the wife is totally incapacitated from performing sexual intercourse due to structural defect – the petition was dismissed by the Trial Court- held in appeal that husband admitted that wife had resided with him for 8 years – the version that the husband found the medical prescription slip was also not established – the petition was rightly dismissed by the Trial Court- appeal dismissed.(Para-7 to 11)

For the Appellant: Mr. Anupinder Rohal, Advocate.
For the Respondent : Ms. Monika Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered by the learned District Judge (Forest), Shimla, H.P. on 30.04.2016 in H.M.A. Petition No. 22-S/3 of 2013/12, whereby, the petition aforesaid constituted therebefore by the petitioner/appellant herein stood dismissed.

2. The brief facts of the case are that the marriage inter se the contesting parties hereat stood solemnized in the year 1997 at Village Sandoa, PO Dharogra, Tehsil Suni, District Shimla, H.P. After the solemnization of the marriage, the parties to the petition lived as husband and wife at village Sandoa for some time, but the respondent used to leave the house of the petitioner very frequently and preferred to reside in the house of her parents. The marriage could not be consummated owing to the impotency of the respondent and no child has born from the marriage between the parties. The respondent is total incapacitated for accomplishing the act of sexual intercourse and the cause of impotency of the respondent is malformation and structural defect of her vagina. The respondent was impotent at the time of the marriage till the

institution of the present proceedings. There has been no unnecessary or improper delay in filing the petition. The mother of the petitioner died on 5.8.2011 and the petitioner came to know the fact of the impotency of the respondent recently in the first week of this month when he was doing work of cleaning etc., in his house and found a medical prescription slip of the respondent from the trunk of his mother and thereafter consulted the Doctors and obtained the opinion of the Doctor and thus filed the present petition. Hence, there is no unnecessary and improper delay in filing the present petition.

3. The petition for divorce instituted by the petitioner/appellant herein before the learned District Judge concerned stood contested by the respondent herein by hers instituting reply thereto wherein she controverted all the allegations constituted against her in the apposite petition by the appellant herein.

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

1. Whether the marriage between the parties has not been consummated owing to the imptency of the respondent?...OPP
2. Whether this petition is not maintainable? OPR
3. Whether the petition is barred by limitation? OPR
4. Whether the petitioner is estopped from filing the present petition on account of his own act, deed, conduct, acquiescence etc.?....OPR
5. Whether the petitioner has concealed the material facts? OPR
6. Relief.

5. The trite factum whereupon an adjudication stands enjoined to be pronounced is qua the petitioner by adducing cogent evidence hence succeeding in proving the relevant issue qua the respondent herein suffering from a congenital sexual deformity whereupon he stood precluded to successfully consummate his marriage with the respondent herein. In other words, evidence emphatically pronouncing upon the sexual incapacity of the respondent to hold coitus with the petitioner stands enjoined to be unearthed from the material as exists here-before. Uncontrovertedly, the marital spouses entered into wedlock in the year 1997. The petitioner/appellant herein avers besides testifies qua since thereat up to now on account of the purported apposite sexual incapacity of the respondent herein both not holding coitus. However, he canvasses qua on the dissuasive advice of his parents, his not in quick promptitude of his detecting the apposite physical deformity of the respondent herein instituting on ground aforesaid, a petition for dissolution of his marital ties with the respondent herein. The effect of the aforesaid imprompt institution of the apposite petition by the petitioner on the ground of the respondent herein not holding the befitting sexual capacity to hold coitus with him, would stand pronounced hereafter. Hereat the veracity of the relevant allegations testified by the petitioner in his examination-in-chief vis-a-vis the respondent herein, is enjoined to be tested. The veracity of the relevant allegations testified by the petitioner/appellant herein in his examination-in-chief stand eroded of their truth arising from the factum of his in his cross-examination acquiescing qua the respondent herein living with him upto eight years since theirs solemnizing marriage yet theirs living in separate rooms. Also with his acquiescing to the suggestion put to him in his cross-examination by the counsel appearing for the respondent qua the latter not standing encumbered with any physical defect rather she being fully potent besides his acquiescing to the relevant suggestion put to him in his cross-examination by the learned counsel for the respondent while holding him to cross-examination qua the reason for no child standing begotten from their wedlock arising from his omission to hold coitus with the respondent herein, ultimately, his acquiescing qua the respondent being a female omnibusly, blunts the vigour of his testification held in his examination-in-chief wherein he imputes qua the respondent qua hers suffering from a sexual deformity, whereupon, their wedlock did not beget consummation.

6. Be that as it may, the petitioner has testified qua on occurrence of demise of his mother on 5.8.2011, whereat when he while cleaning the house, he discovered a prescription slip from the trunk of his mother, whereafter, he consulted the doctor who purveyed an opinion qua

the respondent herein being unfit to hold coitus with him, whereupon, he canvasses qua his thereupon holding the apposite evidence for seeking annulment of his marital ties with the respondent herein. However, the testification of the petitioner qua his discovering the medical prescription slip on 5.8.2011, whereafter, he proceeded to consult the doctor concerned, who purveyed to him an opinion qua the unbefitting sexual capacity of the respondent herein to hold coitus with him appears to be sheer invention besides a concoction of the petitioner/appellant herein, inference whereof spurs from the factum of his echoing in his cross-examination qua his not visiting the doctor whereupon it is to be concomitantly concluded qua obviously his hence not consulting the doctor qua the manifestations occurring in the relevant purported prescription slip. The vice of falsity qua the factum aforesaid when construed in coagulation with the effect of the aforesaid acquiescence(s) made by him in his cross-examination, holding loud unveilings qua his conceding to the factum of the respondent herein not standing entailed with any physical deformity for hence hers standing precluded to perform coitus with him negates in its entirety, the entire assay of the petitioner herein comprised in his examination-in-chief wherein he in discharge of the onus qua the relevant trite issue, has testified in consonance therewith. Also the effect of his omitting to examine the doctor concerned, who purportedly purveyed him an opinion qua the manifestations held in the medical prescription slip, pronouncing upon her unbefitting sexual capacity, constrains an inference of it not holding any tenacity nor any probative sinew for thereupon this Court standing prodded to accord the relief as stands canvassed in the apposite petition.

7. Be that as it may, with the petitioner testifying in his examination-in-chief qua his detecting the relevant defect in the respondent herein in quick succession to their marriage standing solemnized, yet his on dissuasive advise of his parents his omitting to thereat institute a petition for dissolution of their marital ties when is in rife conflict with his testifying qua on his on 5.8.2011 discovering the medical prescription slip holding disclosures therein qua the respondent herein standing entailed with a physical deformity whereupon she stood purportedly forbidden to hold coitus with him factum whereof for reasons stated herein-above standing concluded to be seeped in an entrenched vice of falsity besides when it imperatively stands reared as a stratagem to purportedly explain the omission on the part of the petitioner/appellant herein to in quick promptitude of his promptly discovering the relevant defect in the respondent herein attracts qua the relevant delay besides qua the relevant omission, the statutory bar held in Section 23 of the Hindu Marriage Act (hereinafter referred to as 'the Act'), the relevant provisions whereof read as under:

> "23. (a) xxx xxx
>
> (b) xxx xxx
>
> (bb) xxx xxx
>
> (c) xxx xxx
>
> (d) there has not been any unnecessary or improper delay in instituting the proceeding; and
>
> (e) there is no other legal ground why relief should not be granted then and in such a case, but not otherwise, the court shall decree such relief accordingly."

Clause (d) to Section 23 of the Act inhibits Courts of law seized with a Hindu Marriage Petition its grant the apposite relief canvassed therein on evident upsurgings holding unravelments qua unnecessary or improper delay standing begotten in the initiation of the relevant proceedings before the Court concerned. Reiteratedly, with there is a visible apparent delay since 1997 whereat the relevant defect in the respondent herein stood evidently for reasons aforestated detected by the appellant herein upto the stage of institution of the instant petition, corollary whereof is qua the statutory bar constituted in clause (d) of Section 23 of the Act standing squarely attracted qua the petitioner/appellant herein whereupon it warrants its dismissal.

8. The learned counsel appearing for the petitioner herein has canvassed qua the disaffirmative order pronounced by the learned trial Court on his application instituted

therebefore under Section 151 of the CPC read with Section 122 and 114 of the Indian Evidence Act with a prayer held herein for constitution of a medical board for ascertaining the factum of the gender of the respondent herein besides for ascertaining the ability of respondent herein to perform coitus with the appellant herein, suffering from an inherent fallibility significantly when it would have clinched the relevant trite issue. However, the order refusing grant of the apposite relief aforesaid as stood canvassed therein by the petitioner is not imbued with any legal fallacy, inference whereof sprouts from the factum of his anvilling his relief on prescription slip mark 'X', prescription slip whereof for reasons aforestated stands seeped in an entrenched vice of falsity, reiteratedly it visibly stands stained with a vice of fictitiousness, inference of fictitiousness gripping it, is erectable for want of the appellant herein/petitioner examining its authour despite his purportedly canvassing qua his visiting him whereupon he unfolded to him qua the relevant physical defect gripping the respondent herein also when for reasons aforestated the petitioner acquiesces to the feminity of the respondent herein rather his conceding qua the reason of no child standing begotten from their wedlock standing anchored upon his not accessing his wife, the respondent herein. Crucially also when this Court has herein-above pronounced qua the statutory bar encapsulated in clause (d) of Section 23 of the Act standing squarely attracted vis-a-vis the appellant herein, the endeavour of the appellant herein/petitioner to through the aforesaid application to assert an affirmative relief thereon appears to be belated besides a premeditated assay on his part. Also assuming if he held any tenacity in getting an affirmative pronouncement thereon, tenacity thereof gets eroded in the trite factum of his acquiescing qua the respondent's espousal qua his in quick spontaneity of their entering into a wedlock his despite thereat discovering the relevant defect yet his on the purported persuasive dissuasive advice of his parents not thereat instituting the apposite petition for dissolution of his marital ties with the respondent herein ground whereof meted by him loses its veracity by his **belatedly** relying upon an engineered Ext.PX whereupon hence as aforestated the statutory bar constituted in clause (d) of Section 23 of the Act stands squarely attracted qua him also thereupon it appears qua the defect, if any, which may grip the respondent herein being not congenital.

9. For the foregoing reasons, this Court finds no merit in the instant appeal, which is accordingly dismissed. Consequently, the judgment and decree impugned before this Court is maintained and affirmed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Jagmohan Singh and another ...Appellants.

Versus

Meera Devi and others ...Respondents.

FAO No. 344 of 2012

Decided on: 25.11.2016

Motor Vehicles Act, 1988- Section 149- Offending vehicle was a JCB, which was being driven by the driver in a rash and negligent manner – JCB falls within the definition of motor vehicle – the unladen weight of JCB was 7460 kg. and falls within the definition of light motor vehicle – there is no requirement of PSV endorsement – JCB falls within the definition of non-transport vehicle – insurer had failed to plead and prove that there was violation of the terms and conditions of the policy – the insurance is admitted – therefore, insurer was wrongly absolved of the liability – appeal allowed and insurer saddled with liability. (Para-5 to 22)

Cases referred:

National Insurance Co. Ltd. versus Sharda Devi and others, I L R 2016 (I) HP 354

Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791
National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906
Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110

For the appellants: Mr. Karan Singh Kanwar, Advocate.
For the respondents: Nemo for respondents No. 1 to 4.
Mr. R.G. Thakur, Advocate, for respondent No. 5.
Mr. Deepak Bhasin, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 19th May, 2012, made by the Motor Accident Claims Tribunal-II Shimla, H.P., Camp at Rohru (for short "the Tribunal") in M.A.C. No. 35-R/2 of 2008, titled as Meera Devi and others versus Sanjeev Kumar and others, whereby compensation to the tune of ₹ 6,45,000/- with interest @ 7.5% per annum from the date of the petition till its realization alongwith costs of litigation assessed at ₹ 5,000/- came to be awarded in favour of the claimants, respondents No. 1 to 3 in the claim petition, i.e. the contractor, owner-insured and driver of the offending vehicle, were saddled with liability and insurer came to be exonerated (for short "the impugned award").

2. The claimants, contractor and the insurer of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellants/owner-insured and driver of the offending vehicle have called in question the impugned award on the grounds taken in the memo of the appeal.

4. The only question to be determined in this appeal is – whether the Tribunal has rightly exonerated the insurer from its liability? The answer is in the negative for the following reasons:

5. Admittedly, the offending vehicle was a JCB, bearing registration No. HP-16A-0365 which was being driven by its driver, namely Shri Sanjeev Kumar, rashly and negligently, at the time of the accident, i.e. on 25th October, 2007, at Shilapani-Mundidhar road, due to which deceased-Visheshar Singh sustained injuries and succumbed to the injuries.

6. This Court in **FAO (MVA) No. 247 of 2009,** titled as **National Insurance Co. Ltd. versus Sharda Devi and others,** decided on 8th January, 2016, while relying upon the various judgments rendered by the Apex Court and other High Courts, has held that JCB is a motor vehicle.

7. As per the registration certificate, Ext. RW-1/A, the unladen weight of the offending vehicle, i.e. JCB, is 7460 kilograms, thus, falls within the definition of 'light motor vehicle' in terms of Section 2 (21) of the Motor Vehicles Act, 1988, for short 'MV Act'.

8. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> *"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that*

Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-

> *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
>
> *.........................*
>
> *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*

In the given circumstances of the case PSV endorsement was not required at all."

9. The mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.*
>
> *20. ....*
>
> *21. ....*

22. ……………………

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

10. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. …………………

10. ………………

11. ………………

12. ………………

13. ………………

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. ………………………..

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

11. The Apex Court in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** has held that PSV endorsement is not required.

12. The same principle has been laid down by this Court in a series of cases.

13. I deem it proper to record herein that in the year 2000, an amendment has taken place in the Central Motor Vehicles Rules, 1989 (for short "MV Rules") and sub-clause (ca) came to be inserted in Rule 2 of the MV Rules. It is apt to reproduce Rule 2 (ca) of the MV Rules herein:

> *"2. ....*
>
> *(ca) "construction equipment vehicle" means rubber tyred, (including pneumatic tyred), rubber padded or steel drum wheel mounted, self-propelled, excavator, loader, backhoe, compactor roller, dumper, motor grader, mobile crane, dozer, fork lift truck, self-loading concrete mixer or any other construction equipment vehicle or combination thereof designed for off-highway operations in mining, industrial undertaking, irrigation and general construction but modified and manufactured with "on or off" or "on and off" highway capabilities.*
>
> *Explanation. - A construction equipment vehicle shall be a non-transport vehicle the driving on the road of which is incidental to the main off-highway function and for a short duration at a speed not exceeding 50 kms per hour, but such vehicle does not include other purely off-highway construction equipment vehicle designed and adopted for use in any enclosed premises, factory or mine other than road network, not equipped to travel on public roads on their own power."*

14. From the perusal of the said provision of law, one comes to an inescapable conclusion that the construction equipment vehicles have been declared as non-transport vehicles.

15. Having said so, the offending vehicle, i.e. JCB, being a construction equipment vehicle, is a non-transport vehicle.

16. Viewed thus, the Tribunal has fallen in an error in holding that the driver of the offending vehicle was not having a valid and effective driving licence at the relevant point of time.

17. Even otherwise, it was for the insurer to plead and prove that the offending vehicle was being driven in violation of the terms and conditions of the insurance policy and the owner-insured has committed a willful breach, has not led any evidence, thus, has failed to discharge the onus.

18. Accordingly, it is held that the driver of the offending vehicle was having a valid and effective driving licence to drive the same at the relevant point of time and the owner-insured has not committed any breach, not to speak of willful breach.

19. The factum of insurance is admitted. Thus, the insurer is saddled with liability.

20. Having said so, the impugned award is modified by holding that the insurer has to satisfy the impugned award.

21. The insurer is directed to deposit the awarded amount within eight weeks from today before the Registry. On deposit, the Registry is directed to release the same in favour of the claimants strictly in terms of conditions contained in the impugned award through payees account cheque or by depositing the same in their respective accounts.

22. The statutory amount deposited by the appellants be paid to the claimants through payees account cheque or by depositing the same in their respective accounts after proper identification.

23. The appeal is disposed of accordingly.

24. Send down the record after placing copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Manoj Kumar …..Appellant
Versus
Sh. Ghanshayam Thakur and others …..Respondents.

FAO (MVA) No. 278 of 2010.
Date of decision: 25th November, 2016.

Motor Vehicles Act, 1988- Section 166- Compensation of Rs. 87,200/- was awarded along with interest @ 7.5% per annum- a sum of Rs. 1 lac awarded in lump sum in addition to the amount already awarded by the Tribunal with the right to recovery. (Para-3 to 4)

For the appellant:	Ms. Leena Guleria, Advocate.
For the respondents:	Mr. R.L. Chaudhary, Advocate, for respondent No.1. Nemo for respondent No.2. Mr. J.S. Bagga, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 25.6.2010, passed by the Motor Accident Claims Tribunal-II, Mandi, H.P. hereinafter referred to as "the Tribunal", for short, in Claim Petition No.91 of 2001, titled *Sh. Manoj Kumar versus Sh. Ganshyam Thakur and others,* whereby compensation to the tune of Rs.87,200/- alongwith interest @ 7.5% per annum came to be awarded in favour of the claimant and insurer was directed to satisfy the award at the first instance with right of recovery from the owner-insured, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Owner, driver and insurer have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. On the last date of hearing, learned counsel for respondent No. 3 was asked to seek instructions to pay a lump sum amount of Rs. 1 lacs in addition to the amount already awarded by the Tribunal in terms of paras 23 and 24 of the impugned award. He has sought instructions and stated that the insurance company has not agreed to the said proposal. However, in the facts and circumstances of the case, I deem it proper to award Rs.1 lac, in lump sum, in addition to the amount already awarded by the Tribunal to be paid by the insurer with right of recovery in terms of the impugned award. The insurer is at liberty to move application before the Tribunal for recovery of the entire amount.

4. Let the entire amount alongwith interest, @ 7.5% per annum, as awarded by the Tribunal, be deposited by the insurer within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in his bank account, after proper verification.

5. Send down the record forthwith, after placing a copy of this judgment.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs (MVA) No. 400 and 423 of 2012.
Date of decision: 25th November, 2016.

FAO No. 400 of 2012.

Sh. Rajinder Singh …..Appellant
Versus
Kirpal Singh and others …..Respondents.

FAO No. 423 of 2012.
Kirpal Singh and another .....Appellants
Versus
Rajinder Singh and another .....Respondents.

Motor Vehicles Act, 1988- Section 149- MACT held that licence was not in the name of respondent No. 2 but renewal was in his name- therefore, respondent No. 2 did not have a valid driving licence- the owner had committed willful breach of the terms and conditions of the policy – insurer was absolved of the liability – held, that it is not the case of the insurer that owner knew the driving licence was not issued in the name of respondent No. 2 and despite this fact he had engaged respondent No. 2 as driver – the vehicle was being plied with all the requisite documents- the insurer directed to satisfy the award. (Para-7 to 14)

Motor Vehicles Act, 1988- Section 166- Claimant had suffered 100% disability – he remained admitted in the hospital from the date of accident till discharge – he had spent Rs. 2,28,176/- on medical treatment which is awarded to him- Rs. 2 lac was awarded for future treatment- Rs. 1 lac was awarded for loss of expectation and Rs. 20,000/- awarded for attendant charges- Rs. 15,000/- awarded on account of travelling allowances- the income of the claimant was assessed as Rs. 3200/- per month- injured was 29 years of age at the time of accident and multiplier of 16 is applicable- thus, claimant is entitled to Rs. 3200 x 12 x 16= Rs. 6,14,400/- - Rs. 15,000/- were rightly awarded on account of boarding and lodging at Chandigarh- Rs. 10,000/- awarded on account of physiotherapist – Rs. 50,000/- awarded on account of mental shock – Rs. 1 lac awarded under the head pain and suffering and Rs. 1 lac awarded under the head loss of amenities of life – thus, total compensation of Rs. 14,52,576/- awarded. (Para 15 to 24)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 SCC 217
Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

For the appellant(s): Mr. Jagat Singh Shyam, Advocate, for the appellant in FAO No. 400 of 2012 and Mr. Ajay Sharma, Advocate, for the appellants in FAO No. 423 of 2012

For the respondent(s): Mr.Ajay Sharma, Advocate, for respondents No. 1 and 2 in FAO No. 400 of 2012.
Mr. S.D. Gill, Advocate, for respondent No. 3 in FAO No. 400 of 2012 and for respondent No. 2 in FAO No. 423 of 2012.
Mr. Jagat Singh Shyam, Advocate, for respondent No.1 in FAO No. 423 of 2012.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

These appeals are directed against the judgment and award dated 3.7.2012, passed by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P. hereinafter

referred to as "the Tribunal", for short, in MACT No.44-S/2 of 2008, titled *Shri Rajinder Singh versus Kripal Singh and others,* whereby compensation to the tune of Rs.9,14,400/- alongwith interest @ 6% per annum came to be awarded in favour of the claimant and insured-owner was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Both these appeals are outcome of a common award thus; I deem it proper to determine both these appeals by this common judgment.

3. Owner Kripal Singh, by the medium of FAO No. 423 of 2012 has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling him with the liability and claimant Rajinder Singh, by the medium of FAO No. 400 of 2012, has questioned the impugned award on the ground of adequacy of compensation, on the grounds taken in their memo of appeals.

4. Claimant being the victim of a vehicular accident, filed claim petition before the tribunal for the grant of compensation to the tune of Rs. 30 lacs, as per the break-ups given in the claim petition on account of the injuries with permanent disability suffered by him in a motor accident which took place on 19.6.2007 due to rash and negligent driving of driver , namely Sat Pal, while driving vehicle No. HP-36-A-0218. The claim petition was resisted by the respondents and following issues came to be framed.

1. *Whether the petitioner sustained the injuries due to the rash and negligent driving of vehicle No. HP-36-A-0218 by the respondent No. 2 as alleged? OPP.*
2. *If issue No. 1 is proved in affirmative, whether the petitioner is entitled to the compensation as claimed. If so, its quantum and from whom? OPP*
3. *Whether the petitioner has a cause of action? OPP.*
4. *Whether the petition is not maintainable in the present form? OPR*
5. *Whether the respondent No. 2 was not holding and possessing a valid and effective driving licence to drive the vehicle as alleged. If so, its effect? OPR-3.*
6. *Whether the vehicle was being plied without fitness certificate and route permit etc. If so, its effect? OPR-3.*
7. *Whether the petitioner was a gratuitous passenger? OPR-3.*
8. *Whether the petitioner is estopped from filing the present petition by his act and conduct? OPR-3.*
9. *Whether the petition is bad for non-joinder and mis-joinder of the parties? OPR-3.*
10. *Relief.*

5. The Tribunal, after scanning the evidence oral as well as documentary, decided issue No. 1 in favour of the claimant and against the driver and owner. Driver has not questioned the said findings, are accordingly upheld.

6. The only dispute in these appeals is with respect to issues No. 5 and 6 and partly on issue No. 2.

Issue No.5.

7. The Tribunal in para 15 of the impugned award has held that the insurer has proved that the licence Ex.RW1/A was not in the name of respondent No. 2 but renewal was in his name and accordingly, held that respondent No. 2 was not having a valid and effective driving licence and that the owner has committed willful breach. It is apt to reproduce para 15 of the impugned award herein.

> *"15.In this case, the insurance company has successfully proved that no licence Ext. RW1/A with original number from RLA Dehradun has been issued in the name of respondent No.2. The insurance company through its investigator also inquired about the insurance of the licence and <u>it was found that the licence though validly</u>*

renewed, but the original licence never exists in the name of respondent No.2 The Tribunal is also satisfied that the driver was not having valid driving licence at the time of accident. Hence, issue No. 5 is decided in favour of respondent No. 3 and against respondent No. 1 and 2." *[emphasis added]*

8. The findings recorded by the Tribunal are factually incorrect for the reasons to be recorded hereinafter.

9. Driving licence Ext. RW1/A is on the record which does disclose that the renewal was made in the name of respondent No.2. It is not the case of the insurer that the owner was knowing that the driving licence was not issued in the name of respondent No. 2 and despite that he had engaged respondent No.2 as driver. In order to seek exoneration and discharge, the insurer has to plead and prove that the insurer has committed willful breach in terms of the judgment delivered by the apex Court in **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. ....

(i) ....

(ii) ....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).......................

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

10. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself

as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

11. There is not an iota of evidence to the effect that the owner has committed willful breach. Having said so, the findings recorded by the Tribunal on issue No. 5 are set aside and it is held that the renewal was made in the name of respondent No.2 thus, it cannot be said that he was not having a valid and effective driving licence and that the owner has committed willful breach.

Issue No.6.

12. It was for the insurer to plead and prove that the vehicle was being plied without any route permit and fitness certificate, has not led any evidence, thus failed to discharge the onus. However, I have gone through the findings recorded and the documents placed on record which do disclose that the vehicle was being plied with all requisite documents/certificates. Accordingly, findings returned by the Tribunal on issue No. 6 are set aside.

Issues No. 3,4 and 7 to 9.

13. It was for the insurer to discharge the onus, has failed to discharge. Thus, the findings returned by the Tribunal on these issues are upheld.

14. The factum of insurance is not dispute, Thus, the insurer has to satisfy the award.

FAO No. 400 of 2012.

Issue No.2.

15. The question is-whether the Tribunal has rightly assessed the compensation. The answer is in negative for the following reasons.

16. The appellant became victim of vehicular accident, has suffered 100% disability which is not in dispute. Tribunal has rightly given the details in para 18 of the impugned award how the victim has suffered the disability. But the Tribunal has not awarded compensation for treatment during which he remained admitted in the hospital. Admittedly, the injured was admitted in the hospital right from the date of accident till discharge and has placed on record medical bills Mark 1 to Mark 133 and Ext. P1 to P33 but Tribunal has not awarded any compensation under this head. The Total amount on medical treatment comes to **Rs.2,28,176/-.** The Tribunal has rightly awarded Rs.**2,00,000/-,** for future treatment, **Rs.1,00,000/-** for loss of expectation and Rs.20,000/- for attendant charges. Tribunal has also rightly awarded Rs.15,000/- on account of travelling expenses.

17. The Tribunal has assessed the income of the inured as Rs.3200/- per month. The injured was 29 years of age at the time accident and the multiplier applicable is "16" in view of the 2nd Schedule attached to the Act, read with ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma***

Kumari and others versus Madan Mohan and another, reported in ***2013 AIR SCW 3120***. Thus, the claimant is entitled to compensation to the tune of Rs.3200x12x16= **Rs.6,14,400/-.** The Tribunal has rightly assessed the income of the injured but wrongly concluded it to the tune of Rs.5,04,400/-. The Tribunal has rightly awarded **Rs.15,000/-** on account of boarding and lodging at Chandigarh **Rs.10,000/-** on account of physiotherapist charges and **Rs.50,000/-** on account of mental shock for physical sufferings but has fallen in an error in not awarding compensation under the head pain and sufferings and loss of amenities of life.

18. It is beaten law of land that the compensation is to be awarded in an injury case under pecuniary and non-pecuniary heads by making guess work.

19. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

20. This Court has also laid down the same principle in a series of cases.

21. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the entire life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
>
> …………. …………… ……………
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

22. Thus, Rs.1,00,000/- is awarded under the head "pain and sufferings" and Rs.1,00,000/- is awarded under the head "loss of amenities of life".

23. Thus, in all the claimant is held entitled to compensation to the tune of Rs.6,14,400/-+Rs.2,28,176/- +Rs.2,00,000/- +Rs.1,00,000/-, +Rs.20,000/- +Rs.15,000/- +Rs.15,000/- +Rs.10,000/- +Rs.50,000/- + Rs.1,00,000/- + Rs.1,00,000/- =**Rs. 14,52,576/-.**

24. Accordingly, the appeals are allowed, compensation is enhanced and impugned award is modified, as indicated hereinabove.

25. The insurer is directed to deposit the amount within eight weeks from today in the Registry alongwith interest @ 7.5%, payable for all heads, except for future income, from the date of the claim petition and under the head 'loss of earning/future income', it is payable from the date of impugned award.

26. The Registry, on deposit, is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in his bank account, after proper verification.

27. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Raksha Devi …Appellant
Versus
Sh. Pradeep Kumar & others ….Respondents

FAO No. 301 of 2011
Decided on : 25.11.2016

Motor Vehicles Act, 1988- Section 166- The claim petition was dismissed on the ground that claimant had failed to prove that driver was driving the vehicle in a rash and negligent manner- held, that it was specifically pleaded in the claim petition that the accident was outcome of rash and negligent driving of the driver – FIR was also registered against him- therefore, there was prima facie evidence regarding rashness and negligence – the claimant has to prima facie prove that accident was the outcome of rashness and negligence of the driver- MACT had not returned any findings on issues No. 2 to 4 - the award set aside with the direction to return findings on issues No. 2 to 4. (Para- 7 to 16)

Cases referred:

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81
Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627
Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646
Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298

For the Appellant : Ms. Jyotsna Rewal Dua, Senior Advocate with Ms. Charu Bhatnagar, Advocate.
For the Respondents: Mr. Deepak Kaushal, Advocate, for respondents No. 1 & 2.
Mr. P.S. Chandel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the judgment and award, dated 3rd May, 2011, made by the Motor Accident Claims Tribunal-I, Sirmour, District Sirmour at Nahan, H.P. (for short 'the Tribunal') in MAC Petition No. 20-MAC/2 of 2008, titled as **Smt. Raksha Devi** versus **Shri Pardeep Kumar & others**, whereby the claim petition came to be dismissed (for short 'the impugned award').

2. The claimant, being victim of the motor-vehicular accident, had filed the claim petition before the Tribunal for grant of compensation to the tune of Rs. 5,00,000/-, as per the break-ups given in the claim petition.

3. The respondents resisted and contested the claim petition by filing replies.

4. Following issues came to be framed by the Tribunal:

"1. Whether Parmod Kumar died due to rash or negligent driving of Pick-up van No. HP-18-B-0220 by respondent No. 2 Mukesh Kumar alias Happy on 28-6-2007, as alleged? ....OPP

2. In case issue No. 1 is proved in affirmative, whether the petitioner is entitled to receive compensation, if so to what amount and from whom?....OPP

3. Whether the risk of the deceased was not covered in the Insurance Policy, as alleged? OPR-3

4. Whether the vehicle in question was being plied in violation of the terms and conditions of the Insurance Policy, as alleged? OPR-3

5. Relief."

5. The claimant examined Santosh Kumari (PW-1) and Dr. Anil Aggarwal (PW-2). She herself stepped into the witness box as PW-3. Respondents examined Vikas Gupta (RW-1) and driver stepped into the witness box as RW-2.

6. The Tribunal after scanning the evidence, oral as well as documentary, held that the claimant has failed to prove that driver, namely, Mukesh Kumar had driven the offending vehicle, rashly and negligently, at the relevant point of time. The said findings are not tenable for the following reasons.

7. The claimant has specifically pleaded in the claim petition that the accident was outcome of the rash and negligent driving of the driver. FIR (Ext. PW-1/A) under Sections, 279 & 337 of the Indian Penal Code was lodged in Police Station Nahan, which stands proved. Thus, there is *prima-facie* proof on the record to hold that the accident was outcome of the rash and negligent driving of the driver.

8. It is a beaten law of the land that strict proof is not required, but the claimant has to prove *prima-facie* that the accident is outcome of rash and negligent driving of the driver.

9. My this view is fortified by the judgment of the Apex Court in the case titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354.** It is apt to reproduce relevant portion of para 3 of the judgment herein:

"3. Road accidents are one of the top killers in our country, specifically when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from

the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard." (Emphasis Added)

10. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the Motor Vehicles Act, 1988, for short 'the MV Act' is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

> *"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."*

11. It would also be profitable to reproduce relevant portion of para 12 of the judgment of the Apex Court in the case titled as **Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627,** herein:

> *"12. ....While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."*

12. The Apex Court in a case titled **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646** has laid down the same principle and held that strict proof and strict links are not required.

13. The same principle has been laid down by this Court in a series of cases.

14. A Single Judge of this Court in FAO No. 127 of 1999, titled as **Bimla Devi and others versus Himachal Road Transport Corporation and others**, decided on 22.08.2005, held that the claimants have to prove the case by leading cogent evidence and applied the mandate of CPC read with the Evidence Act, was questioned before the Apex Court by the medium of Civil Appeal No. 2538 of 2009, titled as **Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors.,** reported in **2009 AIR SCW 4298,** and the Apex Court set aside the said judgment and held that strict proof is not required. It is apt to reproduce paras 2 and 12 to 15 of the judgment herein:

"2. This appeal is directed against a judgment and order dated 22.8.2005 passed by the High Court of Himachal Pradesh, Shimla in FAO No. 127 of 1999 whereby and whereunder an appeal preferred against a judgment and award dated 28.10.1998 passed by the Motor Accident Claims Tribunal-II [MACT (I), Nahan] in MAC Petition No. 21-NL/2 of 1997, was set aside.

xxx xxx xxx

12. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a Tribunal stricto sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimants predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post mortem report vis-a-vis the averments made in a claim petition.

13. The deceased was a Constable. Death took place near a police station. The post mortem report clearly suggests that the deceased died of a brain injury. The place of accident is not far from the police station. It is, therefore, difficult to believe the story of the driver of the bus that he slept in the bus and in the morning found a dead body wrapped in a blanket. If the death of a constable has taken place earlier, it is wholly unlikely that his dead body in a small town like Dharampur would remain undetected throughout the night particularly when it was lying at a bus stand and near a police station. In such an event, the court can presume that the police officers themselves should have taken possession of the dead body.

14. The learned Tribunal, in our opinion, has rightly proceeded on the basis that apparently there was absolutely no reason to falsely implicate the respondent Nos. 2 and 3. Claimant was not at the place of occurrence. She, therefore, might not be aware of the details as to how the accident took place but the fact that the First Information Report had been lodged in relation to an accident could not have been ignored. Some discrepancies in the evidences of the claimant s witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying burden of proof in terms of the provisions of Section 106 of the Indian Evidence Act as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by the respondent Nos. 2 and 3.

15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."

15. Having said so, I am of the considered view that the claimant has *prima facie* proved that the driver of the offending vehicle had driven the same, rashly and negligently, at the relevant point of time and had caused the accident. Accordingly, the findings returned by the Tribunal on Issue No. 1 are set aside and the said issue is decided in favour of the claimant and against the respondents.

Issues No. 2 to 4.

16 The Tribunal has not returned findings on Issues No. 2 to 4. Thus, I deem it proper to remand this case, with the direction to the Tribunal to return findings on Issues No. 2 to 4, within four weeks w.e.f. 01.12.2016.

17. Parties are directed to cause appearance before the Tribunal on **01.12.2016.**

18. The impugned award is set aside and the appeal is allowed, as indicated above.

19. Registry to send the record of the case alongwith a copy of this judgment forthwith so as to reach the Tribunal below well before the date fixed.

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

Cr. Appeal No. 460 of 2007 alongwith Cr. Appeal No. 461 of 2007
Decided on : 25/11/2016

Cr. Appeal No. 460 of 2007
State of H.P. .....Appellant.
Versus
Sanjeev Kumar .....Respondent.
Cr. Appeal No. 461 of 2007
State of H.P. .....Appellant.
Versus
Ram Kumar .....Respondent.

Punjab Excise Act, 1914- Section 61(i)(a)- Accused were found in possession of 6 bags containing 4 boxes each and one box containing two boxes of country liquor each, box was containing 50 pouches each of 180 ml. liquor- accused were tried and convicted by the trial Court- an appeal was preferred, which was allowed and the accused were acquitted- held in appeal that the prosecution version was proved by the official witnesses – report of CTL proved that pouches were containing country liquor in them – simply because independent witnesses had not supported the prosecution version is not sufficient to record acquittal especially when he had admitted his signatures on the seizure memo - he was estopped from denying his signatures in view of bar contained in Sections 91 and 92 of Indian Evidence Act – Appellate Court had wrongly acquitted the accused- appeal allowed- judgment of Appellate Court set aside and that of the Trial Court restored. (Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Rajneesh Lal, Advocate Mr. C.S.Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

Both these appeals stand directed by the State of Himachal Pradesh against the impugned judgement(s) recorded by the learned Additional Sessions Judge, Fast Track Court, Solan, District Solan, whereby he recorded a verdict of acquittal upon the accused respondents.

2. The brief facts of the case are that on 12.11.1999 around 9.00 a.m at Panch Parmeshwar Mandir I.O. PW-2 S.I. Virender Kumar was present alongwith other police officials including PW-8 H.C.Ravinder Lal when he received the secret information that one maruti van No. HP-02-4951 was carrying liquor coming from Chandigarh to Shimla. It is alleged that vehicle was not having front number plate and when the vehicle was seen by I.O. it was signaled to stop but it was not stopped and said maruti van was chased by police Naka party in taxi No. HP-01-078. But aforesaid van drove away towards bye pass road. It is alleged that when the aforesaid van allegedly carrying liquor reached near HRTC workshop bifurcation then a bus No. HP-14-3696 was coming out of workshop but due to rash driving of accused Ram Kumar driver of van struck against the bus. It is also alleged that then accused Sanjiv Kumar, who was sitting in van, tried to run away, but was over powered by police party and accused Ram Kumar was apprehended by police inside the car. It is also alleged that van was searched in presence of PW-5 Darshan Singh, Karam Chand, Kapil Sahani and in the back seat of the vehicle and dickey, 7 gunny bags were found, out of which six bags were found carrying 4 boxes each and one bag was found containing 2 boxes of country liquor and each box was containing 50 pouches each of 180 ml. liquor. It is also alleged that then I.O. took out 26 pouches out of which 26 nips were taken as sample and case property was sealed in presence of witnesses at the spot vide memo Ext.PW-2/B. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the accused by the learned trial Court for theirs committing offences punishable under Sections 61(i)(a) of the Punjab Excise Act to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They did not choose to lead any evidence in defence.

7. On an appraisal of the evidence on record, the learned trial Court recorded findings of conviction against the accused whereas the learned Appellate Court returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Appellate Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record by the learned trial Court 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. At the place depicted in site plan Ext.PW-8/A occurred the relevant seizure of liquor carried in vehicle bearing No. HP-02-4951, whereon the accused were aboard. The prosecution in proof of its case depended upon the testimonies of official witnesses who therewithin rendered a version qua the prosecution case unbereft of any inter se contradictions occurring in their respective examinations in chief vis.a.vis. their respective cross-examinations besides theirs testimonies remained unblemished significantly when they deposed in harmony vis.a.vis. their respective testifications. The uneroded testifications of official witnesses though hence held probative vigour yet the learned Appellate Court on anvil of the testification of PW-5 a witness to recovery memo Ext.PW-2/B who reneged from his previous statement recorded in writing proceeded to pronounce an order of acquittal upon the accused respondent. The reports

of the CTL concerned comprised in Ext.PW-8/B to Ext.PW-8/F unveil a disclosure qua the 26 nips as stood extracted from 26 pouches held respectively in each of the 26 cartons borne in the relevant vehicle, nips whereof on standing received thereat whereupon their examination unraveling qua their holding liquor therewithin. The reports of the CTL concerned comprised in the afore referred exhibits formidably proclaim qua 26 nips extracted from amongst one of the bottles of liquor held in each of the cartons borne in the relevant vehicle wherefrom the relevant seizure occurred holding liquor wherefrom the learned Additional Sessions Judge stood enjoined to in conjunction with the untainted testimonies of the prosecution witnesses to draw a conclusion of the prosecution succeeding in proving its charge against the accused. However, as aforestated the learned Additional Sessions Judge had merely on anvil of one of the witnesses to seizure memo Ext.PW-2/B reneging from his previous statement recorded in writing proceeded to record a verdict of acquittal in favour of the accused. The aforesaid reason, which stands assigned by the learned Additional Sessions Judge for recording a verdict of acquittal upon the accused is per se ridden with a gross inherent fallacy of his remaining unbereft of the trite factum of PW-5 while standing cross-examined by the learned APP in sequel to his standing declared hostile his admitting the factum of PW-2/B wherewithin occur the apposite recitals qua the relevant charge holding his signatures whereupon the inevitable sequel is qua the existence thereon of his signatures not standing bereft of any aura of authenticity. In sequel to PW-5 conceding qua his signatures borne on Ext.PW-2/B belonging to him thereupon the mandate of Section 91 and 92 of the Indian Evidence Act whereupon he on admitting the occurrence of his signatures thereon hence stood statutorily estopped to renege from the recitals borne thereon aroused attraction, thereupon the effect of his orally deposing in variance or in detraction to the recitals which occur thereon gets statutorily belittled rather when he naturally emphatically proves the recitals comprised in the apposite memo(s), it was neither appropriate nor tenable for the learned Additional Sessions Judge to conclude qua the recorded recitals borne on Ext.PW-2/B holding no evidentiary clout nor it was legally apt for him to outweigh the creditworthiness of the testimonies of the official witnesses qua the credible effectuation of recovery of liquor under recovery memo Ext.PW-2/B whereas the factum of the uncontroverted occurrence thereon of signatures of PW-5 wherewithin the apposite recitals are held enjoined imputation of credence thereon dehors his reneging from his previous statement recorded in writing. Reiteratedly, the ensuing sequel thereof is of with the statutory estoppel constituted in Section 91 and 92 of the Indian Evidence Act barring PW-5 to resile from the contents of Ext.PW-2/B especially when he admits the occurrence of his signatures thereon renders unworthwhile besides insignificant the factum of his orally deposing in variance of the recorded recitals occurring therein contrarily per se an inference stands enhanced qua dehors his reneging from his previous statement recorded in writing, a deduction standing capitalized qua thereupon his proving the genesis of the prosecution case.

10. The learned counsel for the accused respondent has contended with vigour qua with PW-5 in his cross-examination acquiescing to the factum of the relevant vehicle striking a bus whereupon it was incumbent upon the Investigating Officer concerned to lodge an apposite report with the police station concerned whereas his omitting to do so erodes the genesis of the occurrence depicted in F.I.R. borne on Ext.PW1/A. However, the aforesaid submission warrants its standing rejected outrightly as the prosecution was enjoined to only prove the factum of the relevant seizure displayed in Ext.PW-2/B standing efficaciously proven. Consequently with this Court recording an inference qua the contents of Ext.PW-2/B standing efficaciously proven dehors PW-5 resiling from his previous statement recorded in writing rendered unnecessary the omission if any of the Investigating Officer in reporting the factum of the relevant vehicle striking a bus.

11. Also the learned counsel for the accused has contended qua with the deposition of PW-6 a purported witness to Ext.PW-2/B not lending probative vigour significantly when evidently he uncontrovertedly was not present at the time contemporaneous to the relevant seizure standing made from the relevant vehicle by the Investigating Officer concerned rather his standing added as a witness subsequent to the completion of the relevant proceedings. However,

even if PW-6 stood added as an independent witness to the relevant seizure memo after completion of the relevant proceedings yet when for reasons aforestated the deposition of one of the witnesses to Ext.PW-2/B solitarily holds formidable sinew thereupon the factum of subsequent addition of PW-6 as a witness to Ext.PW-2/B does not either erode the testification of PW-5 nor hence the relevant recitals borne therewithin loose their efficacy.

12. The learned counsel for the accused has contended with vigour qua the Investigating Officer concerned not collecting samples from each of the liquor bottles carried in all the cartons borne on the relevant vehicle nor his dispatching for examination to the CTL concerned samples collected from each of the liquor bottles carried in all the cartons borne on the relevant vehicle, whereas the CTL affirmatively opining only qua the samples of liquor extracted from 26 pouches from amongst the entire cache of liquor carried in all the cartons borne on the relevant vehicle entails a sequel of the prosecution succeeding in proving only the opinion recorded by the CTL, contrarily he contends qua the prosecution not succeeding in proving the factum qua all the bottles carried in all the cartons borne in the relevant vehicle holding therewithin liquor. However, the aforesaid submission warrants its standing discountenanced. A thorough circumspect reading of the evidence on record unravels qua both the accused respondents in their defence embodied in their respective statements recorded under Section 313 Cr.P.C. not unravelling therein the factum of except 26 bottles carried in each of the cartons amongst others carried thereon wherefrom amongst 26 samples stood collected by the Investigating Officer qua the other bottles carried in all the cartons borne in the relevant vehicle not holding liquor therewithin also they while holding the prosecution witnesses to cross-examination omitted to qua the facet aforesaid purvey apposite suggestions to them. The effect of the aforesaid omissions is qua both the accused acquiescing to the factum of all the bottles held in all the cartons borne in the relevant vehicle holding liquor dehors the factum of the Investigating Officer concerned extracting from amongst them 26 samples from only 26 pouches/bottles of liquor.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned Additional Sessions Judge has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Sessions Judge suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record. In sequel thereto, I find merit in these appeals, which are accordingly allowed and the judgement of acquittal rendered by the learned Additional Sessions Judge, Solan is quashed and set-aside. Accordingly, the accused are held guilty for theirs committing offences punishable under Sections 16(i)(a) of the Punjab Excise Act as applicable to the State of Himachal Pradesh. The judgement of conviction & sentence pronounced by the learned Chief Judicial Magistrate, Solan, is affirmed and upheld. In aftermath, the pronouncement recorded by the learned Chief Judicial Magistrate in Case No. 130/3 of 2000 be forthwith put to execution.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Co. Ltd. .....Appellant
Versus
Smt. Sita Devi and others .....Respondents

FAO (MVA) No. 118 of 2012.
Date of decision: 25th November, 2016.

Motor Vehicles Act, 1988- Section 149- Insurer was directed to satisfy the award with the right to recovery- held, that insurer has to satisfy the award with the right to recovery from the owner/insured – appeal dismissed. (Para-4 to 6)

For the appellant:	Mr. Lalit K. Sharma, Advocate.
For the respondents:	Nemo.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 10.1.2012, passed by the Motor Accident Claims Tribunal, Kullu, H.P. hereinafter referred to as "the Tribunal", for short, in Claim Petition No.11 of 2011, titled *Smt. Sita Devi and others versus Shri Amar Nath and others,* whereby compensation to the tune of Rs.10,82,400/- alongwith interest @ 9% per annum came to be awarded in favour of the claimants and insurer was directed to satisfy the award at the first instance with right of recovery from the owner-insured, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Owner, driver and claimants have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them. The factum of insurance is also not in dispute.

3. I have gone through the impugned award.

4. I wonder why the insurer has questioned the impugned award as the insurer was to satisfy the award at the first instance with right of recovery from the owner-insured. Owner-insured has not chosen to question the impugned award, has attained the finality.

5. Having said so, there is no force in the appeal, the same is accordingly dismissed and the impugned award is upheld.

6. Insurer is directed to deposit the amount alongwith interest, as awarded by the Tribunal, within eight weeks from today in the Registry, if not deposited. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

7. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Company Ltd. ….Appellant
Versus
Sh. Lal Chand & others ….Respondents

FAO No. 115 of 2012
Decided on : 25.11.2016

Motor Vehicles Act, 1988- Section 168- A claim petition was filed, which was allowed subject to the production of disability certificate, which he failed to do – claimant filed an execution petition, which was also dismissed – he filed a fresh claim petition, which was allowed – held, that second claim petition is not maintainable in view of bar of res-judicata – however with the consent of the parties compensation of Rs. 2 lacs awarded in favour of the claimant. (Para-3 to 7)

For the Appellant :	Mr. Ashwani K. Sharma, Senior Advocate with Mr. Jeewan Kumar, Advocate.
For the Respondents:	Mr. Tek Chand Sharma, Advocate, for respondent No. 1. Mr. B.C. Verma, Advocate, for respondent No. 2. Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Learned Counsel for the appellant-insurer argued that Claim Petition No. 133-S/2 of 2001/2003 was filed by the claimant in the year 2001 before the Motor Accident Claims Tribunal, Shimla (for short 'the Tribunal') whereby compensation to the tune of Rs. 1,25,000/- came to be awarded in his favour, subject to the production of disability certificate by the claimant, which he failed to do so. Then, the claimant filed an execution petition**,** which was also dismissed. Thereafter, the claimant filed fresh claim petition i.e. M.A.C. Petition No. 31-S/2 of 2009, whereby compensation to the tune of Rs. 2,55,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition was granted in favour of the claimant. The said claim petition has given birth to the instant appeal. In view of the above, learned Counsel for the appellant-insurer argued that the claimant is caught by the Principles of Res judicata. He also stated that the amount of compensation has not been paid to the claimant.

2. Perused.

3. The second claim petition is not maintainable in view of the doctrine of Res judicata. However, grant of compensation is a social legislation and for the benefit of claimants-sufferers and in order to save them from social evils, compensation is to be awarded in their favour.

4. In the given circumstances, with the consent of the learned Counsel for the parties, I deem it proper to award compensation to the tune of Rs. 2,00,000/- in lump sum, in favour of the claimant.

5. The impugned award is modified, as indicated above.

6. Learned Counsel for the appellant-insurer stated at the Bar that the award amount stands deposited before the Registry.

7. Registry is directed to release the amount of Rs. 2,00,000/- in favour of the claimant through payees' account cheque or by depositing the same in his account.

8. The excess amount, if any, and interest accrued, be refunded in favour of the appellant-insurer through payees' account cheque.

9. Accordingly, the appeal is disposed of.

10. Send down the record after placing a copy of the judgment on Tribunal's file.

****

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

Kamla Devi …Appellant.
Versus
Union of India and others. …Respondents.

RSA No. 557/2006
Reserved on : 23.11.2016
Decided on: 28.11. 2016

Hindu Marriage Act, 1955- Section 5- Plaintiff filed a civil suit pleading that she was entitled to family pension being the legally wedded wife of the deceased- deceased had taken customary divorce from his first wife and had performed the Gandharav marriage and had thereafter solemnized Brahm marriage – the defendants denied the marriage between the plaintiff and the deceased – the suit was dismissed by the Trial Court – an appeal was preferred, which was dismissed – held in second appeal that it was admitted that the deceased had a spouse living at

the time of marriage with the plaintiff – any marriage performed during the subsistence of valid marriage is void and will not confer any right upon the second wife – custom was neither pleaded nor proved – hence, the plea of customary divorce is not acceptable - nomination will not alter the succession- appeal dismissed. (Para-7 to 28)

Cases referred:

Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav and another, (1988) 1 SCC 530
Bakulabai and another vs. Gangaram and another 1988 (1) SCC 537
Rameshwari Devi vs State of Bihar and others, 2000 (2) SCC 431
Laxmibai (Dead) through LRs and another vs. Bhagwantbua (dead) through LRs, (2013) 4 SCC 97
Rameshchandra Rampratapji Daga vs. Rameshwari Rameshchandra Daga, (2005) 2 SCC 33
G.L. Bhatia vs Union of India, 1999 (5) SCC 237
Sarbati Devi and another vs. Smt. Usha Devi, (1984) 1 SCC 424
Neena and others vs Smt. Sunehru Devi and others, 2015 (6) ILR (HP) 20
Vishin N. Khanchandani and another vs. Vidya Lachmandas Khanchandani and another (2000) 6 SCC 724
Ram Chander Talwar and another vs. Devender Kumar Talwar and others (2010) 10 SCC 671

For the Appellant: Mr. Adarsh K. Vashishta, Advocate.
For the Respondents: Mr. Ashok Sharma, ASGI with Ms. Sukarma Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

The plaintiff is the appellant, who aggrieved by the judgments and decrees passed by both the learned courts below, has filed the instant appeal.

2. The plaintiff has filed a suit claiming therein that she was entitled to family pension being legally wedded wife of deceased Havaldar Sohan Singh. It is averred that since the first wife of deceased Sohan Singh did not bear any male child, she persuaded her husband to take ***Fargati*** (customary divorce), and thereafter, the plaintiff solemnized ***Gandharav*** marriage on 16.1.1974 as per the will of his first wife. The first wife of Sohan Singh died on 6.11.1989 and after ***Sudhikaran***, the plaintiff solemnized ***Brahm*** marriage on 15.2.1990 and the necessary ***Bhoj*** was given to the ***Biradri*** as per the prevailing customs. Out of the wedlock three children were born. The plaintiff being legally wedded wife of Sohan Singh made protracted correspondence with the defendants to release family pension in her favour, but to no avail. Hence, the suit.

3. The defendants filed written statement wherein preliminary objections regarding maintainability, valuation, cause of action, locus standi etc. were taken. On merit, it was averred that deceased Sohan Singh had retired on 4.2.1970 and was getting pension. As per record, he had married one Parwati Devi in the year 1936 and she was the only wife of deceased Sohan Singh. Defendants denied the factum of marriage between the plaintiff and deceased Sohan Singh and on such basis denied her entitlement for family pension.

4. The learned trial court on 20.8.2002 framed the following issues:

1. Whether the plaintiff is legally wedded wife of deceased Hav. Sohan Singh, as alleged?OPP
2. Whether the marriage of the plaintiff with Hav. Sohan Singh was solemnized during the life time of his previous wife Parwati Devi? If so, its effect? OPD
3. Whether the plaintiff is entitled to the relief of declaration, as prayed for?OPD

4. Whether the order No.G4/V/Misc/AMC/2001 dated 15th Feb. 2001 passed by CCDA (P) Allahabad is illegal, as alleged? OPP
5. Whether the plaintiff is entitled to the relief of mandatory injunction, as prayed for? OPP
6. Whether the suit in the present form is not maintainable, as alleged? OPD
7. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction, as alleged? OPD
8. Whether the suit is bad for non-joinder and mis-joinder of necessary parties, as alleged? OPD
9. Whether no proper notice under section 80 C.P.C. has been served on the defendants, as alleged? OPD
10. Whether the plaintiff has no locus standi to file the present suit, as alleged? OPD
11. Whether the plaintiff has no cause of action to file the present suit, as alleged? OPD
12. Relief.

5. After recording the evidence and evaluating the same, the suit was dismissed and the appeal preferred against the judgment and decree also met with the same fate constraining the plaintiff to file the instant appeal.

6. The appeal came to be heard on 30.10.2007 and the following substantial questions of law were framed:

1. Whether the married couple can have a divorce as per the customs in the Birdari?
2. Whether the plaintiff not able to prove the relationship of legally wedded wife of Sohan Singh?
3. Whether the learned courts below have misread and misappreciated the oral and documentary evidence ion record and findings recorded are perverse and liable to be set aside?
4. Whether the findings are based on mere conjectures and surmises and are liable to be set aside?

Substantial Questions of Law No. 1 to 4:

7. Since all the substantial questions of law are intrinsically interlinked and interconnected, therefore, they are taken up together for consideration and are being disposed of by a common reasoning.

8. At the outset, it may be observed that the very premise on which the suit of the plaintiff proceeds is that Sohan Singh was already having a living spouse at the time when he allegedly performed ***Gandharav*** marriage with the plaintiff.

9. Admittedly, on the date of performance of so-called ***Gandharav*** marriage, the Hindu Marriage Act, 1955 (for short 'Act') had already come into force on 18.5.1955. The Act codified all the laws relating to marriage amongst the Hindus and has over riding effect, as would be evident from section 4, which reads thus:

> **"4. Overriding effect of Act:**
>
> Save as otherwise expressly provided in this Act.-
>
> (a) Any text rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) Any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act."

10. Now, what would be the status of the marriage of Hindu male with Hindu female when he has already a living spouse, has been taken care of in section 5, which clearly provides that a marriage may be solemnized between any two Hindus, if neither already has spouse living at the time of marriage. Section 5 reads thus:

5. Conditions for a Hindu marriage:

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely-.

(i) Neither party has a spouse living at the time of the marriage,

[(ii) at the time of the marriage, neither party-

(a) Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) Has been subject to recurrent attacks of insanity

(iii) The bridegroom has completed the age of [twenty-one years] and the bride, the age of [eighteen years] at the time of the marriage;

(iv) The parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) The parties are not Sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

11. Section 11 provides for void marriage and reads thus as follows:

11. Void marriages.

Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto [1][against the other party], be so declared by a decree of nullity if it contrivances any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

12. Thus, as per the scheme of the Act, marriage between two Hindus solemnized, one of whom had a living spouse at the time of marriage, after the commencement of the Act would be void and nullity in the eyes of law. Meaning thereby that second wife would have no right of claiming herself to be a legally wedded wife.

13. Once the marriage is nullity, the same would also not be protected under Pension Rules. Therefore, the wife, as referred to under Pension Rules, would only include the first wife and the second wife would only be included in case the marriage is permissible under the personal law. But in the cases of Hindu, second wife has no right whatsoever as the law prohibits second marriage if the spouse is alive.

14. In ***Yamunabai Anantrao Adhav*** vs. ***Anantrao Shivram Adhav and another***, (1988) 1 SCC 530, the Hon'ble Supreme Court held that the marriage of a woman in accordance with the Hindu rites with a man having living spouse is a complete nullity in the eyes of law and she is not entitled to the benefit of section 125 of the Code of Criminal Procedure.

15. In ***Bakulabai and another*** vs. ***Gangaram and another*** 1988 (1) SCC 537, the Hon'ble Supreme Court held that marriage of a Hindu woman with a Hindu male having living spouse solemnized after coming into force of the Hindu Marriage Act, 1955 is null and void and

the woman is, therefore, not entitled to maintenance under section 125 of the Code of Criminal Procedure.

16. In ***Rameshwari Devi*** vs ***State of Bihar and others***, 2000 (2) SCC 431, the Hon'ble Supreme Court held that where the Government servant being a Hindu having two living wives died, the second marriage was void under the Hindu law and hence the second wife did not have the status of widow and would not be entitled to family pension. The children from the second wife would equally share the benefit of gratuity and family pension as per law.

17. It is vehemently contended by Mr. Adarsh Vashishta that as there was a customary divorce between the first wife and deceased Sohan Singh, therefore, it was the plaintiff only who was the legally wedded wife and therefore entitled to family pension.

18. There is no gainsaying that before a customary divorce is acted upon, the same must be pleaded and thereafter proved in accordance with law.

19. What is custom and how it is required to be proved had been subject matter of decision of the Hon'ble Supreme Court in ***Laxmibai (Dead) through LRs and another*** vs. ***Bhagwantbua (dead) through LRs***, (2013) 4 SCC 97, wherein it was held as under:

> 12. Custom is an established practice at variance with the general law. A custom varying general law may be a general, local, tribal or family custom. A general custom includes a custom common to any considerable class of persons. A custom which is applicable to a locality, tribe, sect or a family is called a special custom.
>
> Custom is a rule, which in a particular family, a particular class, community, or in a particular district, has owing to prolonged use, obtained the force of law. Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it.
>
> Such custom must be ancient, uniform, certain, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy. He who relies upon custom varying general law, must plead and prove it. Custom must be established by clear and unambiguous evidence.
>
> [13] In Dr. Surajmani Stella Kujur v. Durga Charan Hansdah, 2001 AIR(SC) 938, this Court held that custom, being in derogation of a general rule, is required to be construed strictly. A party relying upon a custom, is obliged to establish it by way of clear and unambiguous evidence. (Vide: Salekh Chand (Dead) thr. Lrs. v. Satya Gupta & Ors., 2008 13 SCC 119.
>
> [14] A custom must be proved to be ancient, certain and reasonable. The evidence adduced on behalf of the party concerned must prove the alleged custom and the proof must not be unsatisfactory and conflicting. A custom cannot be extended by analogy or logical process and it also cannot be established by a priori method. Nothing that the Courts can take judicial notice of needs to be proved. When a custom has been judicially recognised by the Court, it passes into the law of the land and proof of it becomes unnecessary under Section 57(1) of the Evidence Act, 1872. Material customs must be proved properly and satisfactorily, until the time that such custom has, by way of frequent proof in the Court become so notorious, that the Courts take judicial notice of it. (See also:Effuah Amissah v. Effuah Krabah, 1936 AIR(PC) 147; T. Saraswati Ammal v. Jagadambal & Anr., 1953 AIR(SC) 201; Ujagar Singh v. Mst. Jeo, 1959 AIR(SC) 1041; and Siromani v. Hemkumar & Ors., 1968 AIR(SC) 1299).
>
> [15] In Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya, 1872 14 MooIndApp 570, it was held: "It is essential that special usage, which modifies the ordinary law of succession is ancient and invariable; and it is further

essential that such special usage is established to be so, by way of clear and unambiguous evidence. It is only by means of such evidence, that courts can be assured of their existence, and itis also essential that they possess the conditions of antiquity and certainty on the basis of which alone, their legal title to recognition depends."

[16] In Salekh Chand , this Court held as under:

"Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them.

All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy."

[17] In Bhimashya & Ors. v. Smt. Janabi @ Janawwa, 2006 13 SCC 627,this Court held:

"A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.

xx xx xx xx

Custom is authoritative, it stands in the place of law, and regulates the conduct of men in the most important concerns of life; fashion is arbitrary and capricious, it decides in matters of trifling import; manners are rational, they are the expressions of moral feelings. Customs have more force in a simple state of society. Both practice and custom are general or particular but the former is absolute, the latter relative; a practice may be adopted by a number of persons without reference to each other; but a custom is always followed either by limitation or prescription; the practice of gaming has always been followed by the vicious part of society, but it is to be hoped for the honour of man that it will never become a custom."

20. Adverting to the pleadings as also the evidence led, it would be noticed that neither so-called custom has been pleaded nor proved in accordance with law.

21. In ***Rameshchandra Rampratapji Daga*** vs. ***Rameshwari Rameshchandra Daga***, (2005) 2 SCC 33, the Hon'ble Supreme Court held that the customary divorce of *choor chithhi* has to be established in accordance with law and it was observed as under:

[12] So far as the appeal preferred by the wife is concerned, on reconsideration of the evidence on record, we find no ground to take a view different from the one taken by the High Court and upset the conclusion that the second marriage was null and void. The wife did not deny the fact that her marriage was arranged with Girdhari Lai Lakhotia in the year 1973 and after marriage she lived with the members of the family of her previous husband. It is also an admitted fact that she instituted proceedings for obtaining decree of divorce being Divorce Petition No. 76 of 1978 in the Family Court at Amravati. It is also not denied that no decree of divorce was obtained from the Court and she only obtained a registered document of chhor chithhi from her previous husband on 15-5-1979. Existence of such customary divorce in Vaish community of Maheshwaris has not been established. A Hindu marriage can be dissolved in

accordance with the provisions of the Act by obtaining a decree of divorce from the Court. In the absence of any decree of dissolution of marriage from the Court, it has to be held that in law first marriage of the wife subsisted when she went through the second marriage on 11-7-1981 with the present husband. The appeal preferred by the wife, therefore, against grant of decree of declaration of her second marriage as void, has to be rejected whatever may be the circumstances which existed and the hardships that the wife had to undergo, as alleged, at the hands of her second husband.

22. Mr. Adarsh Vashishta, learned counsel for the appellant, would then argue that once the appellant is admittedly, nominee of the deceased, then the respondents had no jurisdiction or authority to deny her the family pension. Even this contention is equally without merit as it is more than settled that if the nomination is made contrary to the statutory provisions, it would be inoperative.

23. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***G.L. Bhatia*** vs ***Union of India***, 1999 (5) SCC 237, wherein the husband of the deceased employee claimed family pension while nomination was not in his favour. The authorities had rejected the claim of the husband for the reason that he was staying separately from the wife and thus was not entitled to family pension. The Hon'ble Supreme Court held that the husband was entitled to family pension, where the rights of the parties are governed by statutory provisions and the individual nomination contrary to the statute will not operate.

24. Earlier to this, the Hon'ble Supreme Court in ***Smt. Sarbati Devi and another vs. Smt. Usha Devi, (1984) 1 SCC 424*** held that mere nomination made in the insurance policy does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the policy on the death of the assured. The nomination only indicates the hand which is authorized to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them.

25. This Court in ***Smt. Neena and others* vs Smt. *Sunehru Devi and others,*** 2015 (6) ILR (HP) 20 has elaborately discussed the various pronouncements of the Hon'ble Supreme Court, including the one rendered in *Sarbati Devi's* case (supra), and it was observed as under:

> "11. Insofar as the legal status of nominee is concerned, the same is no longer *res integra*. The Hon'ble Supreme Court for the first time clarified the issue in case ***Smt. Sarbati Devi and another vs. Smt. Usha Devi, (1984) 1 SCC 424*** and held that in context of Section 39 of the Life Insurance Act, 1938 (in short LIC Act), a mere nomination under Section 39 of the Act did not confer "beneficial interest" in the nominee qua the amount payable under the policy on the death of the assured. The nomination was indicative only of the authority or the person who was to receive the amount, pursuant to which the insurer would get a valid discharge of its liability under the policy. This however, would not belie the claim of the heirs of the asssured made in accordance with law of succession. It is apt to reproduce para 4 of the judgment which reads thus:
>
> > *"4. At the out set it should be mentioned that except the decision of the Allahabad High Court in Kesari Devi v. Dharma Devi, AIR 1962 All 355, on which reliance was placed by the High Court in dismissing the appeal before it and the two decisions of the Delhi High Court in S. Fauza Singh v. Kuldip Singh & Ors., AIR 1978 Del 276 and Mrs. Uma Sehgal & Anr. v. Dwarka Dass Sehgal & Ors AIR 1982 Del 36 in all other decisions cited before us the view taken is that the nominee under section 39 of the Act is nothing more than an agent to receive the money due under a life insurance policy in the circumstances similar to those in the present case and that the money remains the property of the assured during his lifetime and on his death forms part of his estate subject to the law of succession*

applicable to him. The cases which have taken the above view are Ramballav DhanJhania v. Gangadhar Nathmall AIR 1956 Cal 275, Life Insurance Corporation of India v. United Bank of India Ltd. & Anr., AIR 1970 Cal 513, D. Mohanavelu Muldaliar & Anr. v. Indian Insurance and Banking Corporation Ltd. Salem & Anr.,AIR 1957 Mad 115, Sarojini Amma v. Neelakanta Pillai AIR 1961 Ker 126, Atmaram Mohanlal Panchal v. Gunavantiben & Ors.,AIR 1977 Guj 134, Malli Dei vs. Kanchan Prava Dei, AIR 1973 Ori 83 and Lakshmi Amma v. Sagnna Bhagath & Ors.,ILR 1973 Kant 827 Since there is a conflict of judicial opinion on the question involved in this case it is necessary to examine the above cases at some length. The law in force in England on the above question is summarised in Halsbury's Laws of England (Fourth Edition), Vol. 25, Para 579 thus :

"579. Position of third party. - The policy money payable on the death of the assured may be expressed to be payable to a third party and the third party is then prima facie merely the agent for the time being of the legal owner and has his authority to receive the policy money and to give a good discharge; but he generally has no right to sue the insurers in his own name. The question has been raised whether the third party's authority to receive the policy money is terminated by the death of the assured; it seems, however, that unless and until they are otherwise directed by the assured's personal representatives the insurers may pay the money to the third party and get a good discharge from him."

12. In ***Vishin N. Khanchandani and another vs. Vidya Lachmandas Khanchandani and another (2000) 6 SCC 724,*** the legal position was reiterated and it was held:

"10.....The nomination only indicated the hand which was authorized to receive the amount on the payment of which the insurer got a valid discharge of its liability under the policy. The policy holder continued to have interest in the policy during his lifetime and the nominee acquired no sort of interest in the policy during the lifetime of the policy holder. On the death of the policy holder, the amount payable under the policy became part of his estate which was governed by the law of succession applicable to him. Such succession may be testamentary or intestate. Section 39 did not operate as a third kind of succession which could be styled as a statutory testament. A nominee could not be treated as being equivalent to an heir or legatee. The amount of interest under the policy could, therefore, be claimed by the heirs of the assured in accordance with law of succession governing them."

13. In ***Ram Chander Talwar and another vs. Devender Kumar Talwar and others (2010) 10 SCC 671,*** it was held that nomination merely gives right of depositor to receive money lying in the account, but it does not make nominee owner of money lying in the account and it was held as under:

"3. *Mr. Swetank Shantanu, counsel appearing for the appellants, strenuously argued that by virtue of sub-section 2 of section 45 ZA, the nominee of the depositor, after the death of the depositor acquires all his/her rights to the express exclusion of all other persons and, therefore, the respondent can not lay any claim to the money in the account or in regard to the articles that might be lying in the bank locker held by their deceased mother. The submission is quite fallacious and is based on a complete misconception of the provision of the Act.*

4. Sub-section 2 of the 45-ZA, reads as follows:-

"45-ZA xxx xxx xxx xxx

(2) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in

respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount to deposit from the banking company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner." (emphasis added)

5. Section 45-ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession. All the monies receivable by the nominee by virtue of section 45-ZA(2) would, therefore, form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed.

6. We find that the High Court has rightly rejected the appellant's claim relying upon the decision of this Court in V.N. Khanchandani & Anr. v. V.L. Khanchandani & Anr., (2000) 6 SCC 724. The provision under Section 6(1) of the Government Saving Certificate Act, 1959 is materially and substantially the same as the provision of Section 45-ZA(2) of the Banking Regulation Act, 1949, and the decision in V.N. Khanchandani applies with full force to the facts of this case."

14. In view of the aforesaid exposition of law, it is absolutely clear that a mere nomination in itself does not confer any 'beneficial interest' in the nominee and the retiral benefits of the deceased would become part of his estate and would be governed by the law of succession. Since the plaintiff is admittedly class-I heir, her entitlement would be $1/4^{th}$ share, whereas the defendants No. 3 to 5 who alone otherwise were the nominees would be entitled to the remaining $3/4^{th}$ share, that too, not on account of their being the nominees, but because of their being the class-I heirs of the deceased. This is exactly what has been held by the learned lower Appellate Court while reversing the judgment and decree passed by the learned trial Court."

26. The net result of the aforesaid discussion is that the appellant has failed to plead and thereafter prove the custom regarding marriage and divorce, therefore, no fault can be found with the findings as rendered by the learned courts below, who have correctly appreciated not only the pleadings but evidence also.

27. Having said so, all the substantial questions of law are answered accordingly.

28. In view of aforesaid discussion, there is no merit in the appeal and the same is dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.

Sh.Kuldeep son of late Sh. Ram Lal ...Petitioner/Co-accused.
Vs.
State of HP and others. ...Non-petitioners.

Cr.MMO No. 113 of 2014.
Order reserved on: 21.11.2016.
Date of Order: November 28, 2016

Code of Criminal Procedure, 1973- Section 482- Present petition has been filed for quashing the FIR registered for the commission of offences punishable under Sections 336, 337, 427 read with Section 34 of I.P.C- held, that the complicated questions of facts cannot be determined in the proceedings relating to quashing of FIR – the document and the evidence show that there are sufficient grounds to proceed for the commission of offences punishable under Sections 336, 337, 427 read with Section 34 of I.P.C- petition dismissed. (Para-6 to 13)

Cases referred:

Supdt. & Remembrance of Legal Affairs West Bengal Vs. Anil Kumar, AIR 1980 SC 52
State of Bihar Vs. Ramesh Singh, AIR 1977 SC 2018
State of Delhi Vs. Gyan Devi, AIR 2001 SC 40
State of M.P. Vs. S.B. Johari and others AIR 2000 SC 665
Mohd Akbar Dar Vs. State of J&K, AIR 1981 SC 1548
Yash Pal Mittal Vs. State of Punjab, AIR 1977 SC 2433
C.B.I Vs. K.M.Sharan, 2008 (4) SCC 471
State of Delhi Vs. Gyandevi, 2008 (8) SCC 329
Ajay Kumar Parmar Vs. State of Rajasthan, AIR 2013 SC 633

For the petitioner: Mr. B.S.Attri, Advocate.
For non-petitioners: Mr. M.L.Chauhan, Addl. Advocate General and Mr. R.K. Sharma, Deputy Advocate General.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 of the Code of Criminal Procedure 1973 for quashing FIR No.9 of 2012 dated 24.5.2012 registered under sections 336,337, 427 read with section 34 IPC and for quashing consequential criminal proceedings pending before learned Chief Judicial Magistrate Kinnaur at Reckong Peo District Kinnaur HP.

BRIEF FACTS OF THE CASE:

2. It is alleged that on 24.5.2012 at about 1.30 PM at place Thophan within jurisdiction of police station Pooh accused persons being contractor and labour in furtherance of common intention of each others acted rashly and negligently and endangered human life and personal safety of others. It is alleged that accused persons committed blasting operation on Thopan Jangi road and caused hurt to Dara Singh, Amreek Singh and Raj Kumar by way of their negligent act. It is further alleged that accused persons also committed mischief by way of causing wrongful loss and damage to vehicle No. HP-06-2161 and totally damaged the vehicle by way of blasting operation.

3. Investigation conducted and criminal case filed against accused persons before learned Chief Judicial Magistrate Kinnaur at Reckong Peo. Learned Chief Judicial Magistrate summoned accused persons under Sections 336, 337 and 427 IPC read with section 34 IPC. Learned Trial Court after hearing learned Public Prosecutor and learned Advocate appearing on behalf of accused persons framed charge against accused persons under section 336, 337, 427 read with section 34 IPC on dated 8.10.2014. Thereafter learned Chief Judicial Magistrate Kinnaur at Reckong Peo listed the case for prosecution evidence. Thereafter present petition filed by co-accused Kuldeep under section 482 code of criminal procedure.

4. Court heard learned Advocate appearing on behalf of petitioner and learned Additional Advocate General appearing on behalf of non-petitioners and also perused entire record carefully.

5. Following points arises for determination in present petition:

1. Whether petition filed under Section 482 Cr.PC is liable to be accepted as mentioned in memorandum of grounds of petition?

2. Final order.

Findings upon point No.1 with reasons.

6. Submission of learned Advocate appearing on behalf of petitioner that tender of blasting operation was given to M/s Amit Singla by Chief Engineer Deepak Project vide order dated 23.4.2010 and project operation was not allotted to accused person and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is held that judicial finding relating to allotment of project by Chief Engineer Deepak Project to M/s Amit Singla cannot be given at this stage of case being complicated issue of fact and judicial finding would be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case in the trial of case. It is held that it is not expedient in the ends of justice to give judicial finding at this stage of case relating to complicated issue of fact.

7. Submission of learned Advocate appearing on behalf of petitioner that there was no nexus between petitioner and execution of blasting work and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is held that judicial finding relating to the fact whether there was no nexus between petitioner and execution of blasting work cannot be given at this stage of case being complicated fact unless opportunity is granted to both parties to lead evidence in support of their case. It is held that judicial finding relating to complicated issue of fact will be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case in the trial of case.

8. Submission of learned Advocate appearing on behalf of petitioner that investigating officer with malafide intention exonerated contractor Mr. Amit Singla and his general attorney Sh Ashok Kumar Kataria and entire investigation is illegal, unwarranted and based upon malafide intention just to fasten entire liability upon petitioner and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is held that judicial finding relating to the fact that investigation was conducted by investigating officer with malafide intention just to exonerate original contractor Mr. Amit Singla and his general attorney Sh Ashok Kumar Kataria can not be given at this stage of case being complicated issue of fact. It is held that judicial finding relating to complicated issues of facts will be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case during trial of case.

9. Submission of learned Advocate appearing on behalf of petitioner that petitioner has been falsely implicated in present case which has caused grave miscarriage of justice to petitioner and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Judicial finding relating to the fact that petitioner has been implicated falsely in present case cannot be given at this stage of case unless opportunity is granted to both parties to adduce evidence in support of their case during trial of case.

10. Submission of learned Advocate appearing on behalf of petitioner that there is no material on record which prima facie established that petitioner was connected with alleged offence and oral statement of witnesses namely Dara Singh, Shiv Kumar, Vinod Kumar, Sanjay Sharma, Ashok Kumar, Ravinder Negi, Amrik Singh, Arjun Singh and Sharab Negi were incorrectly recorded by investigating officer in order to exonerate Sh Amit Singla real contractor and Sh Ashok Kataria general attorney of Sh Amit Singla and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Judicial finding to the fact that investigating officer did not record the statement correctly cannot be given at this stage of case. Judicial finding would be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case during trial of case.

11. Submission of learned Advocate appearing on behalf of petitioner that after perusal of entire FIR and after perusal of report submitted under section 173 Cr.PC at their face value there are no grounds for proceeding against co-accused Kuldeep and on this ground

petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court has carefully perused statements of Dara Singh, Arjun Singh, Nemi, Shiv Kumar, Amrik Singh, Vinod Kumar, Ravinder Negi, Sanjay Sharma, Narayan Prasad, S.G.Narender, Vijay, Ashok Kumar, Lucky, ASI Jeet Ram, ASI Bhim Singh, ASI Kamal Dev, SHO Bihari Lal and M.C. police post and court has also perused documentaries evidence placed on record such as site plan, seizure memo, medical certificates of Raj Kumar, Ashok Singh and Dara Singh carefully. After perusal of statements of above stated prosecution witnesses placed on record and after perusal of above stated documentaries evidence placed on record it is held that there are sufficient grounds to proceed against petitioner under sections 336,337, 427 read with section 34 IPC.

12. It is well settled law that at the stage of framing of charge meticulous consideration of evidence and other material is not required. See AIR 1980 SC 52 Supdt. & Remembrance of Legal Affairs West Bengal Vs. Anil Kumar. See AIR 1977 SC 2018 State of Bihar Vs. Ramesh Singh. See AIR 2001 SC 40 State of Delhi Vs. Gyan Devi. See AIR 2000 SC 665 State of M.P. Vs. S.B. Johari and others. See AIR 1981 SC 1548 Mohd Akbar Dar Vs. State of J&K. See AIR 1977 SC 2433 Yash Pal Mittal Vs. State of Punjab. It is held that it is the duty of learned Trial Court to appreciate oral testimonies and documents annexed with report during trial of criminal case. It is well settled law that controversial facts should not be decided by High Court before trial of criminal case. See 2008 (4) SCC 471 C.B.I Vs. K.M.Sharan. See 2008 (8) SCC 329 State of Delhi Vs. Gyandevi . See AIR 2013 SC 633 Ajay Kumar Parmar Vs. State of Rajasthan. In view of above stated facts and case law cited supra point No.1 is answered in negative.

Point No.2 (Final order).

13. In view of findings upon point No.1 petition filed under section 482 Cr.PC is dismissed. Parties are directed to appear before learned Trial Court on 19.12.2016. Observations will not effect merits of the case in any manner. File of learned Trial Court along with certify copy of order be sent back forthwith. Cr.MMO No. 113 of 2014 is disposed of. All pending application(s) if any also disposed of.

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

Rishi Kumar Kapila ..Appellant/defendant.

Versus

Surinder Kumar Sharda (since died) through his LRs and another .. Respondents/plaintiff.

RFA No.342 of 2004.
Reserved on : 21/11/2016
Date of decision: 28/11/2016

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 118- An agreement for sale was executed between plaintiff and defendant No.1 through defendant No.2 – plaintiff is a non-agriculturist and cannot purchase the land without prior permission of the State Government – defendants promised to get the permission but failed to do so- plaintiff sought the refund of the earnest money, which was not provided – hence, the suit was filed – the suit was decreed by the trial Court – held in appeal that it is not disputed that sale deed was not executed – plaintiff is a non-agriculturist and permission under Section 118 of the Act was not granted in favour of the plaintiff- the vendor had failed to provide the documents for getting the permission under Section 118 of the Act- the suit was rightly decreed by the trial Court- appeal dismissed.(Para-6 to 10)

For the appellant: Mr. Ramakant Sharma, Sr. Advocate with Mr. Vasant Paul Thakur, Advocate.

For the respondent 1(a): Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

This appeal stands directed against the impugned judgement and decree of the learned Additional District Judge, Presiding Officer, Fast Track Court, Solan, District Solan, Himachal Pradesh, whereby it decreed the suit of the plaintiff.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiff agreed to purchase suit land. An agreement to sell was entered into between the plaintiff on one side and defendant No.1 on the other side. The agreement was executed through defendant No.2 the attorney of defendant No.1. The plaintiff is a non agriculturist and in view of the bar created under Section 118 of the H.P.Tenancy and Land Reforms Act could not purchase land without prior permission of the State Government. It is alleged that defendants had promised that they would get such permission in favour of the plaintiff. Despite such assurance the defendants did not take any steps to obtain permission. The plaintiff then requested the defendants to execute and provide the necessary documents so that permission could be obtained by him but the defendants did not provide such documents. Notice dated 27.12.2000 was issued by him through his counsel. The notice was replied to by the defendants on 8.1.2001 through their counsel Rajeev Garg. The counsel for the plaintiff again sent a notice to the defendants through their counsel to supply him the documents required for the purpose of obtaining the permission. But again no documents were furnished. As per terms of the agreement of sale the sale was to be effected on or before 31.3.2001 . Due to acts of the defendants the agreement was frustrated and the plaintiff got a legal notice dated 19.3.2001 sent to the defendants. The defendants sent reply on 21.3.2001 intimating the plaintiff that they were ready to extend the period of three months but such offer was not acceptable to the plaintiff. The contract has thus been frustrated due to negligence of the defendants. Even otherwise the defendants misguided and misrepresented the facts to the plaintiff. The plaintiff therefore is entitled to refund of earnest money. The plaintiff requested the defendants to refund the amount but they did not. Hence this suit.

3. The defendants filed written statement and thereby resisted and contested the suit of the plaintiff by taking preliminary objection qua maintainability, locus standi, want of cause of action and estoppel etc. On merits it was admitted that the land was agreed to be sold and that earnest money of Rs.3,15,000/- was received. It was also denied that the defendants were under any obligation to supply the plaintiff the documents. However, they were ready to assist him and were ready to furnish the documents but the plaintiff himself failed to turn up and to collect the same. The defendants had even offered to extend the time for execution and registration of sale deed for a period of three months but the offer was not accepted by the plaintiff intentionally. The defendants prayed for dismissal of the suit as plaintiff himself was responsible for not getting the sanction and as per the terms of the agreement the earnest money was liable to be forfeited.

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

1. Whether the plaintiff is entitled for recovery of Rs.3,15,000/- and interest as alleged? OPP.
2. Whether the present suit is not maintainable, as alleged? OPD.
3. Whether the plaintiff is etopped by his acts, conduct and acquiescence, to file the present suit as alleged? OPD.
4. Whether present suit is without cause of action, as alleged? OPD.
5. Whether plaintiff has no locus standi to file the present suit, as alleged? OPD.
6. Relief.

5. The learned trial Court on an appraisal of evidence, adduced by the parties at contest decreed the suit of the plaintiff. Now the defendant No.1 has therefrom instituted the instant Regular First Appeal before this Court, whereby he assails the findings recorded in its impugned judgment and decree by the learned trial Court.

6. The factum of execution of Ext.PW-1/B inter se the litigating parties hereat remains uncontroverted. In paragraph 3 of Ext.PW-1/B, which stands extracted hereinafter

> "That the sale deed shall be executed on or before 31.3.2001 in case the purchaser fails to perform his part of contract the amount of earnest money shall stand forfeited and in case seller backout from his promise he shall be liable to pay double the amount of earnest money."

a peremptory mandate stood cast upon the parties thereto to execute a sale deed qua the suit property on or before 31.3.2001 also it holds embodiments qua the failure or refusal of the vendee to perform his part of the obligation constituted therein entailing the sequel of the apposite tender of a sum of Rs.3,15,000/- as earnest money to the vendor standing forfeited vis-à-vis the vendor also it holds unfoldments qua on the vendor reneging from his promise recorded therein his being amenable to pay the double of the earnest money to the vendee.

7. Uncontestedly, the sale deed remained unexecuted on or before 31.3.2001. Since 31.3.2001 stood constituted in Ext.PW-1/B to be precisely delineated date whereon it was mandated to be executed inter se the vendor and the vendee, it is imperative to adjudicate whether its non execution ensued on the vendee or the vendor evidently refusing to perform their part of the obligation(s) constituted upon them in Ext.PW-1/B whereupon the ensuing sequel qua the consequence(s) thereof spelt in paragraph 3 would sprout.

8. Be that as it may, the vendee is a non agriculturist whereupon he stood enjoined to preceeding the execution of a valid registered deed of conveyance qua the suit property with the vendor obtain the apposite statutory permission under Section 118 of the H.P. Tenancy and Land Reforms Act from the appropriate Government. The aforesaid permission stood unobtained whereupon the deadline delineated in Ex. PW-1/B for execution qua the suit property a registered deed of conveyance lapsed whereupon the sequelling effect of its non execution cast in paragraph 3 of Ext.PW-1/B erupts. Hereat the respective unreadiness or unwillingness of the vendor or the vendee to perform their respective contractual obligation(s) is enjoined to be determined. The vendee though stands enjoined with a contractual obligation(s) to obtain the requisite permission from the appropriate Government for the relevant purpose yet the vendee is to facilitate the vendor in accomplishing his obtaining the relevant permission for the relevant purpose from the appropriate Government. Evidence in personification qua the vendor rendering the apt facilitation(s) to the vendee for his obtaining the relevant permission from the appropriate Government stood embedded upon his promptly purveying the relevant documents to the vendee especially when evident absence of transmission thereof by him to the vendee would preclude the latter to obtain the relevant permission. Consequently it is to be determined whether the vendor(s) efficaciously facilitated the vendee to obtain the requisite permission from the appropriate Government comprised in his on the apposite requisitions/elicitations standing made upon him by the vendee his begetting prompt compliance therewith. Contrarily if evidently the vendor omitted to promptly transmit the relevant documents to the vendee for his holding the requisite facilitation besides empowerment to obtain the requisite permission, the imminent sequel thereof would be qua the vendor showing palpable unreadiness or unwillingness to perform his part of the obligation constituted in Clause 3 of Ex.PW-1/B whereupon he would stand encumbered with the concomitant contractual sequel.

9. Be that as it may, Ext.PW-1/B stood executed on 29th November, 2000. Under Ext.PW-1/C the counsel for the plaintiff issued a notice to the defendants calling upon them to provide the documents recited in paragraph 4 thereof. In response thereto under Ext.PW-1/D issued on 8.1.2001 the counsel for the defendants intimated qua the readiness and willingness of the defendants to purvey them the requisitioned documents also it contains a recital calling upon

the plaintiff to collect the documents from the office of Rajeev Garg, Advocate, on any working day between 9 a.m to 10 a.m or between 5 a.m to 8 p.m. However, as apparent on a reading of Ext.PW-1/E the relevant documents remained uncollected by the plaintiff from the office of Mr. Rajeev Garg, Advocate. Also, it is apparent on a reading of Ext.PW-1/G qua the defendants upto 19.3.2001 whereat Ext.PW-1/G stood issued upon the defendant(s) theirs thereupto not complying with the request of the plaintiff to purvey him the relevant documents for facilitating him to obtain the relevant permission from the Government. Through Ext.PW-1/L the defendants endeavour to contend qua with the recitals borne on Ext.PW-1/D remaining uncomplied with by the plaintiff whereon they contend qua hence with the plaintiff omitting to obtain the requisite affirmative facilitation from the defendant(s) for empowering him to obtain the relevant permission from the appropriate Government wherefrom they espouse qua his evidently showing unreadiness or unwillingness in obtaining it whereupon they canvass qua the sequel of clause 3 of Ext.PW-1/B encumbering the plaintiff. Hereat the veracity of the portrayals existing in Ext.PW-1/D wherewithin recitals occur qua the counsel for the defendant(s) through the counsel for the plaintiff requesting the latter to collect the relevant documents from the office of Mr. Rajeev Garg, Advocte, is enjoined to be determined. Initially, Mr. Rajeev Garg counsel for the defendants remained unexamined for unveiling an inference therefrom whether the plaintiff had complied with the request encapsulated therein. Consequently, for his non examination an inference stands erect qua the defendants standing disabled to contend qua the plaintiff not visiting his office for the relevant purpose enunciated in Ext.PW-1/D also it warrants the erection of a deduction qua the factum of his holding the relevant documents for their onward transmission to the plaintiff being wholly contrived or engineered. It is enigmatic qua though Mr. Rajeev Garg under Ext.PW-1/D thereunder requested the counsel for the plaintiff to beseech the plaintiff to visit his office for the relevant purpose yet he remained unexamined whereas on his examination, he would have purveyed the best evidence qua the factum whether the plaintiff visiting or not visiting his office also it is enigmatic that despite the counsel for the plaintiff since his making the initial request on 27.12.2000 upon the defendant(s) for the relevant purpose, request whereof stood succeeded by a subsequent request made on 25.2.2001 and on 19.3.2001 wherewithin recitals occur beseeching the defendant(s) to directly dispatch the relevant documents to the plaintiff at his residence, yet the defendants omitted to beget strict compliance therewith rather their counsel enigmatically insisted qua the relevant collection being made by the plaintiff from him. The omission of the defendants to directly transmit the relevant documents to the plaintiff triggers an inference qua theirs contriving the factum of the relevant documents standing held by Mr. Rajeev Garg especially when Mr. Garg remained unexamined whereupon alone the efficacy of the aforesaid inference would stand blunted. With PW-1 in his cross-examination acquiescing to the suggestion put to him in his cross examination by the learned counsel for the defendants while holding him to cross-examination qua his alongwith his father never visiting the office of Rajeev Garg fillips an inference qua the request purveyed by the counsel for the defendants comprised in Ext.PW-1/D qua the plaintiff visiting his office for collecting the relevant documents from him remaining unacceded. However, even if the aforesaid request remained unacceded, it would not relieve the defendants to directly transmit the relevant documents to the plaintiff without insisting upon him to visit the chambers of Mr. Rajeev Garg especially when under Ext.PW-1/E of 25.2.2001 a request was made upon Mr. Rajeev Garg, Advocate, to make a direct transmission of the relevant documents to the plaintiff at his address at Chandigarh. Also if under Ext.PW-1/D of 08/01/2001 the relevant request made thereunder remained uncomplied with by the plaintiff yet with evidently the plaintiff not visiting the chambers of Mr. Rajeev Garg since 08.01.2001 upto 25.2.2001, did enjoin the defendants to since thereat hence affirmatively facilitate the plaintiff to obtain the relevant permission from the Government, conspicuously with a hiatus occurring since 8.1.2001 upto the date of issuance of Ext.PW-1/E on 25.2.2001 whereat the relevant documents remained unsupplied by the defendants to the plaintiff nor also even if the plaintiff did not visit the office of Mr. Rajeev Garg at Solan they were yet enjoined to directly transmit the relevant documents to the plaintiff especially when they were aware of his address. Consequently, theirs omitting to directly dispatch the relevant documents at the residential address of the plaintiff renders theirs insisting upon the

plaintiff to comply with the mandate of Ext.PW-1/D to beget an inference of the defendants tacitly by deploying a stratagem besides a ploy of the relevant documents being available with Rajeev Garg, Advocate, concerting to consummate Clause 3 of Ext.PW-1/B qua them. In aftermath, obviously they are to be construed to be engineering the frustration of Ext.PW-1/B hence they are to be construed to be evincing unreadiness and unwillingness to perform their part of the contractual obligation rather theirs concerting to given the deadline fixed for the execution of sale deed avail the benefit of Clause 3 thereof. Also theirs in the garb of the consequences of failure of its execution occurring on 31.3.2001 spurring a consequence of theirs holding a right to secure the forfeiture of earnest money theirs hence engineering to secure the relevant benefit. Their concert has to be disapprobated as tenably done by the learned Court below.

10. Accordingly, I find no merit in the appeal, which is accordingly dismissed and the impugned judgement of the learned Additional District Judge, (Presiding Officer) Fast Track Court, Solan, is upheld. Decree sheet be prepared accordingly. Pending application(s), if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE P. S. RANA, J.

Sh. Bhag Singh s/o Sh. Mahantu Ram .....Petitioner

Versus

Smt. Lalita Devi w/o Sh. Bhag Singh and another ......Non-petitioners

Cr.MMO No. 144/2014
Order reserved on : 03.11.2016
Date of order: 29.11.2016

Code of Criminal Procedure, 1973- Section 125- L and her son filed petition seeking maintenance pleading that husband of L started harassing and abusing her – he also demanded Rs. 30,000/- as dowry - L and her son were turned out of the house- the Trial Court granted maintenance of Rs. 1200/- per month to each of the petitioner- a revision was filed, which was dismissed- held, that husband did not appear in the witness box and an adverse inference has to be drawn – L specifically stated that income of the husband is Rs. 12,000/- per month- no evidence was led in rebuttal – the maintenance of Rs. 1200/- per month each cannot be said to be excessive – evidence of the petitioner proved the ill-treatment and that wife is unable to maintain herself - petition dismissed.(Para-11 to 15)

Cases referred:

Vidyadhar Vs. Mankikrao & Another, AIR 1999 Apex Court 1441
Ishwarbhai C. Patel alias Bachu Bhai Patel Vs. Harihar Behera and another, AIR 1994 Apex Court 1341
Rajathi Vs. C.Ganesan, AIR 1999 (6) SCC 326
Bimal Vs. Sukumar Anna Patil and another, 1981 Criminal Law Journal 210
Dwarika Prasad Satpathy Vs. Bidyut Prava Dixit, AIR 1989 SC 3348

For petitioner : Mr. N. S. Chandel, Advocate
For non-petitioners : Mr. Arun Sehgal, Advocate

The following order of the Court was delivered:

P. S. Rana, J. (Oral)

Present petition is filed under Article 227 of Constitution of India read with section 482 Code of Criminal Procedure against order dated 24.10.2013 passed by learned

Additional Sessions Judge Ghumarwin Distt. Bilaspur (H.P.) whereby learned Additional Sessions Judge Ghumarwin Distt. Bilaspur (H.P.) affirmed the order of learned Trial Court passed under section 125 Code of Criminal Procedure 1973.

Brief facts of case:

2. Smt. Lalita Devi and her minor son namely Punit alias Akshu aged 2 years filed maintenance allowance petition under section 125 Code of Criminal Procedure 1973 pleaded therein that Smt. Lalita Devi is legally wedded wife of Sh. Bhag Singh. It is pleaded that marriage was solemnized on dated 06.03.2006 as per Hindu rites and customs. It is further pleaded that minor Punit alias Akshu was born out of the wedlock on dated 11.01.2007. It is further pleaded that relations inter se parties remained cordial for one year and thereafter Sh. Bhag Singh started ill-treating Smt. Lalita Devi and also beaten Smt. Lalita Devi and also abused her. It is further pleaded that relatives of Sh. Bhag Singh also beaten Smt. Lalita Devi. It is further pleaded that Sh. Bhag Singh also demanded Rs.30,000/- as dowry and when Smt. Lalita Devi told that she was not able to fulfill his demand then Sh. Bhag Singh started maltreating and beating Smt. Lalita Devi. It is further pleaded that on 16.07.2008 Sh. Bhag Singh refused to maintain Smt. Lalita Devi and her minor son and thrown out Smt. Lalita Devi and her minor son from matrimonial house. It is further pleaded that Sh. Bhag Singh did not provide any food and clothes to Smt. Lalita Devi and her minor son Punit alias Akshu. It is further pleaded that relatives of Smt. Lalita Devi requested Sh. Bhag Singh to provide food and clothing to Smt. Lalita Devi and her minor son but Sh. Bhag Singh abused the relatives of Smt. Lalita Devi. It is further pleaded that matter was compromised at the intervention of Gram Panchayat. It is further pleaded that on dated 14.01.2008 Sh. Bhag Singh again beaten Smt. Lalita Devi and matter was reported in police station. It is further pleaded that matter was again compromised before the police officials but again Smt. Lalita Devi was forced to leave her matrimonial house on dated 16.08.2008. It is further pleaded that Smt. Lalita Devi and her minor son have no sufficient source of income to maintain themselves. It is further pleaded that Sh. Bhag Singh is posted as Postman in post office and earning Rs.12,000/- per month from all sources. Maintenance allowance to the tune of Rs.5,000/- per month sought.

3. Per contra response filed on behalf of Sh. Bhag Singh pleaded therein that present application is not maintainable. It is denied that Smt. Lalita Devi has left her matrimonial house alongwith her minor son voluntarily without any reasonable cause. It is pleaded that Sh. Bhag Singh did not demand any dowry as alleged. It is pleaded that Smt. Lalita Devi left her matrimonial house without consent of Sh. Bhag Singh. It is further pleaded that Sh. Bhag Singh requested Smt. Lalita Devi to go to her matrimonial house but Smt. Lalita Devi refused to live in her matrimonial house. It is further pleaded that Smt. Lalita Devi and her minor son are not entitled for any maintenance allowance. Prayer for dismissal of maintenance petition sought. Smt. Lalita Devi filed rejoinder and reasserted the allegations mentioned in maintenance petition.

4. Learned Trial Court granted maintenance allowance to the tune of Rs.1200/- per month to each of the petitioner w.e.f. 31.01.2012. Feeling aggrieved against the order of learned Trial Court Sh. Bhag Singh filed revision petition under section 397 Cr.PC before learned Additional Sessions Judge Ghumarwin Distt. Bilaspur (H.P.). Learned Additional Sessions Judge Ghumarwin Distt. Bilaspur (H.P.) dismissed the revision petition and affirmed the order of learned Trial Court. Feeling aggrieved against the order of learned Additional Sessions Judge Ghumarwin Distt. Bilaspur (H.P.) Sh. Bhag Singh filed present petition under Article 227 of Constitution of India read with section 482 Code of Criminal Procedure.

5. Court heard learned Advocates appearing on behalf of parties and Court also perused the entire records carefully.

6. Following points arises for determination in the present petition:

1) Whether petition filed under Article 227 of Constitution of India read with section 482 Code of Criminal Procedure is liable to be accepted as mentioned in memorandum of grounds of petition?

2) Final Order.

Findings upon point No.1 with reasons:

7. PW-1 Smt. Lalita Devi has stated that Sh.Bhag Singh is her husband. She has stated that marriage was solemnized inter se parties on 06.03.2006 as per Hindu rites and customs. She has stated that minor Punit alias Akshu was born on 11.01.2007. She has stated that she was kept properly for one year and thereafter Sh. Bhag Singh started abusing her and also started beating her. She has stated that relatives of Sh. Bhag Singh also abused her. She has stated that on dated 16.07.2008 she was beaten by Sh. Bhag Singh and her sister. She has further stated that Sh. Bhag Singh refused to give maintenance allowance to her and her minor son. She has further stated that matter was also reported in Panchayat and matter was also reported in police. She has further stated that there is no source of income to maintain herself and her minor son. She has further stated that Sh. Bhag Singh is posted in post and telegraph department. She has further stated that monthly income of Sh. Bhag Singh is Rs.12,000/-. She has further stated that Rs.5,000/- per month as maintenance allowance be granted to her and her minor son. She has denied suggestion that Sh. Bhag Singh did not beat her. She has denied suggestion that Sh. Bhag Singh did not refuse to maintain her and her minor son.

8. PW-2 Smt. Suman Kumari has stated that parties are known to her. She has stated that she is Pradhan of Gram Panchayat. She has stated that in Panchayat brother of Sh. Bhag Singh became angry and started abusing. She has further stated that Sh. Bhag Singh also telephoned her husband and used abusive language. She has further stated that Smt. Lalita Devi and her minor son have no source of income to maintain themselves. She has denied suggestion that she is deposing falsely.

9. PW-3 Sh. Jai Singh has stated that he is posted as Chowkidar in Panchayat. He has stated that parties are known to him. He has stated that quarrel took place inter se parties after one year of marriage. He has stated that it came to his knowledge that Sh. Bhag Singh used to beat his wife after consuming liquor. He has stated that Smt. Lalita Devi is residing in her parents house. He has stated that Smt. Lalita Devi has no source of income to maintain herself and her minor son. He has stated that Smt. Lalita Devi was also beaten in his presence.

10. Sh. Bhag Singh petitioner did not appear in witness box for the purpose of cross-examination and did not adduce any rebuttal evidence.

11. Submission of learned Advocate appearing on behalf of petitioner that Smt. Lalita Devi left her matrimonial house at her own without consent of petitioner and on this ground present petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Sh. Bhag Singh petitioner did not appear in witness box for the purpose of cross-examination. Hence adverse inference under Section 114(g) of Indian Evidence Act 1872 is drawn against petitioner. Plea of petitioner that Smt. Lalita Devi has left her matrimonial house without any reasonable cause is defeated on the concept of ipse dixit (An assertion made without proof). See AIR 1999 Apex Court 1441 ***Vidyadhar*** Vs. ***Mankikrao & Another.*** Also see AIR 1994 Apex Court 1341 **Ishwarbhai C. Patel alias Bachu Bhai Patel** Vs. **Harihar Behera and another.**

12. Submission of learned Advocate appearing on behalf of petitioner that principle of natural justice violated by learned Additional Sessions Judge in the present case and reasonable opportunity was not granted to Sh. Bhag Singh to lead evidence in the present case is rejected being devoid of any force for reasons hereinafter mentioned. Learned Trial Court listed the case for evidence of Sh.Bhag Singh on 7.5.2011. On 7.5.2011 Sh.Bhag Singh did not produce any evidence. Thereafter learned Trial Court listed the case for evidence of Sh.Bhag Singh on 1.7.2011, 9.8.2011 and 26.11.2011. On 26.11.2011 Sh.Bhag Singh did not appear in the Court and he was proceeded ex-parte by learned Trial Court. It is held that sufficient opportunities were granted by learned Trial Court to Sh.Bhag Singh to lead evidence in rebuttal. It is held that despite sufficient opportunities granted by learned Trial Court Sh. Bhag Singh did not lead any rebuttal evidence.

13. Submission of learned Advocate appearing on behalf of petitioner that learned Trial Court did not consider actual income of petitioner and on this ground present petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that Sh. Bhag Singh is posted in post and telegraph department. Smt. Lalita Devi has specifically stated when she appeared in witness box that monthly income of Sh. Bhag Singh is Rs.12,000/- per month. Sh. Bhag Singh did not adduce rebuttal evidence. Even Sh. Bhag Singh did not appear in witness box for the purpose of cross-examination in the present case. Testimony of Smt. Lalita Devi relating to income of Sh. Bhag Singh remains unrebutted on record. Hence it is held that learned Trial Court did not commit any illegality by way of assessing income of Sh. Bhag Singh in the present case.

14. Submission of learned Advocate appearing on behalf of petitioner that willful neglect on the part of husband is not proved in the present case and on this ground present petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. As per testimonies of PW-1 Smt. Lalita Devi, PW-2 Smt. Suman Kumari Pradhan Gram Panchayat and PW-3 Sh. Jai Singh it is proved on record that Sh. Bhag Singh beaten Smt. Lalita Devi in her matrimonial house and also used abusive language. Testimonies of PW-1, PW-2 and PW-3 are trustworthy, reliable and inspire confidence of the Court. There is no reason to disbelieve the testimonies of PW-1, PW-2 and PW-3. There is no evidence on record in order to prove that PW-2 and PW-3 have hostile animus against Sh. Bhag Singh at any point of time. Sh. Bhag Singh petitioner did not appear in witness box personally for the purpose of cross-examination despite opportunities granted by learned Trial Court and Sh. Bhag Singh did not lead any rebuttal evidence. Testimonies of PW-1 Smt. Lalita Devi, PW-2 Smt. Suman Kumari PW-3 Sh. Jai Singh remain unrebutted on record. It is well settled law that statement of wife that she is unable to maintain herself unless rebutted would be enough to grant maintenance allowance. It is well settled law that onus is upon husband to prove otherwise. It is also well settled law that maintenance cannot be denied to wife on the ground that she is able bodied person. It is also well settled law that minor son is legally entitled for maintenance from his father. **See AIR 1999 (6) SCC 326 Rajathi Vs. C.Ganesan. See 1981 Criminal Law Journal 210 Bimal Vs. Sukumar Anna Patil and another.** Object of section 125 Code of Criminal Procedure 1973 is to protect women and children from vagrancy and destitution. See **AIR 1989 SC 3348 Dwarika Prasad Satpathy Vs. Bidyut Prava Dixit.** In view of the above stated facts and case law cited supra point No.1 is answered in negative.

Point No.2 (Final Order).

15. In view of findings upon point No.1 present petition filed under Article 227 of Constitution of India read with section 482 Code of Criminal Procedure is dismissed. File(s) of learned Trial Court and learned Additional Sessions Judge alongwith certified copy of the order be sent back forthwith. Cr.MMO No. 144/2014 is disposed of. Pending application(s) if any also disposed of.

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

State of Himachal Pradesh. ....Appellant.
Versus
Firoj Khan and another ....Respondents.

Cr. Appeal No 258 of 2013.
Reserved on: 01.11.2016.
Decided on: 29.11.2016.

Indian Penal Code, 1860- Section 498-A and 307- The marriage between the deceased and accused No. 1 was solemnized in the year 2007 –accused used to harass her for not bringing

sufficient dowry – accused No. 1 pushed her in the well – the accused were tried and acquitted by the Trial Court- held in appeal that the testimonies of prosecution witnesses are contradicting each other – PW-1 to PW-4 are closely related to each other - the Trial Court had recorded the finding of the acquittal after taking into consideration all the facts- the view taken by the Trial Court was a reasonable view- appeal dismissed. (Para-7 to 19)

Cases referred:

Mohammed Ankoos and Others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94

State of Himachal Pradesh Vs. Kahan Chand, 2016 (1) Drugs Cases (Narcotics) 576

For the appellant : Mr. V.S. Chauhan, Addl. A.G. with Mr. Vikram Thakur Dy. A.G.

For the respondents : Mr. Manoj Thakur, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, the appellant/State has challenged the judgment passed by the Court of learned Additional Sessions Judge, Sirmaur at Nahan, in Sessions Trial No. 44-N/7 of 2007, dated 22.02.2013, vide which, learned Trial Court has acquitted the respondents (hereinafter referred to as 'accused') of commission of offences punishable under Sections 498-A and 307 of Indian Penal Code (hereinafter referred to as 'IPC).

2. The case of the prosecution was that Smt. Praveena Begum was married to accused No. 1 Firoj Khan on 25.03.2007. From the date of marriage, accused No. 2, mother in law of Praveena Begum used to harass her on the ground that she had not brought car, gold rings whereas accused No. 1 tortured her for not bringing cash, motorcycle and sufficient dowry. It was further the case of the prosecution that Praveena Begum was mentally harassed by accused and she narrated these facts to her mother Smt. Mukhtiyari. It was further the case of the prosecution that on 25.04.2007, when PW1 Praveena Begum was sleeping with accused No. 1 in their house situated at village Sainwala, then at about 12:30 a.m., accused No. 1 woke her and asked her to accompany him to a place near the well on the pretext that treatment of witchcraft had to be done. As accused No. 1 used to act as Exorcist, he took her to a place near the well of village Sainwala where he forced her to sit over the wall of the well and poured water 2-3 times on her. Thereafter, accused No. 1 pushed her (Praveena Begum), as a result, she fell down in the well and raised hue and cry. On hearing her cries, many people reached the spot and pulled her out of the well. PW1 Praveena Begum suffered injuries on her head, face, abdomen and other parts of the body. Thereafter she was taken to Vohra Hospital and first aid was given to her. On 26.04.2006, her parents were informed about the incident and thereafter, on 27.04.2007, report was lodged at police station Poanta Sahib. On the basis of said report, FIR was lodged and investigation was carried out. During the course of investigation, site plan was prepared and photographs of the well were also taken. Medical examination report of Praveena Begum was collected which disclosed injuries on her person. Statements of other witnesses were also recorded under Section 161 of the Code of Criminal Procedure (for short 'Cr.P.C'). After the completion of investigation, challan was filed in the Court and as a prima-facie case was found against the accused, accordingly, accused No. 1 was charged for commission of offences punishable under Sections 498-A and 307 of IPC and accused No. 2 was charged for offence punishable under Section 498-A of IPC, to which they pleaded not guilty and claimed trial.

3. On the basis of evidence produced on record by the prosecution, learned trial Court concluded that in its opinion, prosecution had not been able to establish charges against the accused beyond reasonable doubt that accused No. 1 and 2 had subjected PW1 Praveena Begum to cruelty with a view to make unlawful demand of dowry or accused No. 1 had attempted to murder her. Accordingly, learned trial Court acquitted the accused.

4. Mr. V.S. Chauhan, learned Additional Advocate General argued that the judgment passed by the learned trial Court vide which it acquitted the accused was not sustainable in law as the learned trial Court erred in not appreciating that the prosecution had proved its case against the accused beyond reasonable doubt. He argued that the reasoning of the learned trial Court was manifestly untenable and it was wrongly held by the learned trial Court that testimony of PW1, PW2 and PW4 did not inspire confidence. It was further argued by Mr. Chuahan that learned trial Court erred in coming to the conclusion that no demand of dowry was made by the accused and, in fact, statements of PW2 Gulsher Ali and PW4 Akhtar Ali were not appreciated by the learned trial Court in the correct perspective. Mr. Chauhan further argued that guilt of the accused was duly proved by PW1 and it was duly corroborated by the statements of PW2 and PW4 and despite this, learned trial Court erred in acquitting the accused without appreciating that prosecution, on the basis of evidence led on record, had proved the guilt of the accused beyond reasonable doubt. On these bases, it was urged by Mr. Chauhan that the findings of acquittal returned in favour of accused by the learned trial Court be quashed and set aside and they (accused) be convicted for the offence with which they have been charged.

5. Mr. Manoj Thakur, learned counsel for the accused, on the other hand, argued that there was no merit in the present appeal as learned trial Court had rightly acquitted the accused for the offences for which they were charged as the prosecution has miserably failed to prove its case against the accused. It was further argued by Mr. Thakur that from the evidence produced on record prosecution was not able to prove the guilt of the accused. He further argued that there were contradictions and inconsistencies in the statements of PW1, PW2 and PW4 which categorically belied the veracity of the case of the prosecution. It was further argued by Mr. Thakur that the statement of PW1 that as to how the incident took place and how she came out of the well was totally in contradiction to the testimony of PW4. As per him, even the version of PW4 was self contradictory as well as totally contrary to the deposition of PW1. He further argued that there was no material placed on record by the prosecution from which it could be inferred that accused had either demanded dowry from the complainant (PW1) or she was subjected to any cruelty by them. On these bases, it was urged by Mr. Thakur that as the judgment of learned trial Court was based on correct appreciation of material placed on record it did not warrant any interference.

6. We have heard the learned Additional Advocate General as well as learned counsel appearing for the respondents/accused. We have also gone through the records of the case as well as the judgment passed by the learned trial Court.

7. Praveen Begum, who entered the witness box as PW1, stated that she was married to accused Firoj Khan on 25.03.2007. It has come in her deposition that her mother-in-law started harassing her for not bringing dowry after 3-4 days of the marriage. She further deposed that accused used to demand golden ornaments as well as motorcycle from her. She also deposed that she had disclosed the factum of dowry being demanded by the accused to her parents. She also deposed that her mother had assured her that she would take up the matter with her (complainant's) in-laws. This witness further stated that on 25.04.2007, during night, when she was sleeping in her room, her husband came to her and asked her to accompany him to the well for the treatment of witchcraft. She stated that she refused to accompany him but accused No. 1 took her to the village well. She disclosed that thereafter accused No. 1 compelled her to sit over the wall of the well and thereafter poured water 2-3 times on her and pushed her, as a result of which, she fell into the well. She further stated that she made efforts to save herself and came out of the well with the help of wooden stairs. She also deposed that she had suffered injuries on various parts of body and that accused No. 1 ran away after pushing her into the well. She also deposed that when she came out of the well, nobody was there and she raised hue and cry and thereafter she became unconscious. She further stated that when she gained her conscious, she was in her in-law's house. She also stated that accused No. 2 threatened her not to disclose this fact to anyone else. PW1 further stated that with the help of a neighbour, she got in contact with her parents in the morning and through her parents reached her in-law's house. She stated that when her parents reached her in-law's house, both the accused had gone away.

She also stated that her father also brought the Pradhan of the area who called upon the accused to enter into a compromise with her but they (accused) refused to do so. She further stated that on 26.04.2007, they reported the matter at police station Poanta Sahib and she was taken to hospital at Poanta Sahib where she was medically examined. In her cross examination, this witness deposed that as she fell unconscious immediately after coming out of the well, she could not tell as to who brought her from the well to home. She further stated that as soon as she reached the house of her husband, she gained consciousness. She also stated that on the same night, brother of her husband had taken her to Vohra Hospital at Poanta Sahib and she was brought back to her husband's house after treatment on the same night. It has further come in her cross examination that it was in the morning, at around 7:00 a.m. when she asked one of her neighbour to inform her parents about the incident. She stated that she did not remember as to when her parents came to her husband's house.

8. Gulsher Ali, father of complainant, entered the witness box as PW2 and he stated that at the time of marriage of his daughter (complainant) with accused No. 1, he had given dowry as per his capacity. He also stated that PW1 had informed him about the demand of dowry which was being raised by the accused and he had expressed his helplessness in this regard. This witness also deposed that on 26.04.2007, they came to know that in the night of 25.04.2007, accused No. 1 had attempted to kill PW1 by pushing her in the well. He also stated that he went to the house of accused and took PW1 to police station Poanta Sahib where the matter was reported. In his cross examination, he stated that on 26.04.2007, Anwar Ali had not come to him nor he had informed him about the incident. He also stated that his daughter came to his house only once after the marriage and she had disclosed the demands of dowry only once. He also stated that at time of marriage of PW1 with accused No. 1, no demand of dowry was raised. He also stated that he and his wife went to the house of accused No. 1 on 26.04.2007 at around 5:00 p.m. He also stated that after he reached the house of accused, he did not talk with anyone but he caught hold of arm of his daughter and took her to police station Poanta Sahib.

9. PW4 Akhtar Ali deposed that PW1 was his niece and was married with accused No. 1 in the year 2007. He further deposed that in the night of 25.04.2007, at around 12:30 a.m. when he was at his home, he heard cries of "bachao-bachao" from the side of well which was near to his house. He further stated that he and other villagers ran towards the spot and saw that PW1 was making efforts to come out of the well. She had caught hold of a wooden plank. He further stated that they assisted her to get out of the well and that though she was saved but she had sustained many injuries. He further deposed that thereafter PW1 disclosed that accused No. 1 allured her to accompany him to the well on the pretext of her treatment from witchcraft and thereafter accused No. 1 poured water 2-3 times on her and thereafter, pushed her in the well. In the cross examination, this witness deposed that his house was at a distance of about 50 metres from the house of accused. He deposed that Praveena never came to his house after her marriage. He further stated that when they went to well, they saw that Praveena had caught hold of a wooden plank which was on the lower point of the well. He further stated that there was water in the well which was at a distance of 35 feet from the mouth of the well. He further stated that when they reached the spot on hearing the cries, accused, his parents and brother were already present there. He also stated that except his family members no other person of the village was present on the spot. He further stated that after pulling PW1 from the well, he (PW4) took her (PW1) to Vohra Hospital Poanta Sahib and thereafter he took PW1 from hospital to house of accused. This witness stated that after pulling Parveena from the well they asked Parveena as to how she fell in the well but she did not tell anything and remain silent. He further stated that he pulled PW1 out of well with the help of a rope which he had brought from his house. He deposed that he took PW1 to Vohra hospital on his motorcycle. He also stated that he did not disclose the incident to the parent of PW1 or the fact that she was pushed into the well by accused No. 1 and he had saved her by pulling her out of the well. He further stated that it was around 4:00 p.m. that Parveena told him that PW1 had pushed her in the well and thereafter he informed her (complainant's) parents. He further stated that parents of PW1 came to house of the accused in his absence as he had gone to the school and when he returned from the school, he found many

people gathered in the house of Pradhan of Gram Panchayat and accused Firoj Khan was refuting that he had pushed PW1 in the well. Investigating Officer Gurbakash Singh entered the witness box as PW9 and corroborated the case of the prosecution. In his cross examination, he stated that there were no stairs in the well with the help of which one could get out of same.

10. These are the main witnesses on whose testimony prosecution had relied upon to prove the guilt of the accused.

11. A perusal of the statements of PW1, PW2 and PW4 demonstrates that there are lot of inconsistencies and contradictions in their version. Both PW2 and PW4 are closely related to PW1 and because they are interested witnesses, their testimony is required to be appreciated with caution. In her statement made in the Court, it was stated by complainant that her harassment by the accused on the pretext of dowry commenced about 3-4 days after her marriage with accused No 1. It was further mentioned by the complainant in her statement that on 25.04.2007, accused No. 1 had asked her to proceed towards the well for treatment by witchcraft and she initially refused but thereafter she was taken to the said well and was forced to sit on the wall of the well and water was poured on her 2-3 times and thereafter she was pushed into the well. It has also come in her deposition that after she was pushed into the well, she saved herself by getting hold of a plank and further that she came out of well with the help of wooden stairs. She further deposed that she suffered injuries on account of this and that accused No. 1 had in fact ran away after pushing her in the well and when she came out of the well, no one was there and she raised hue and cry and became unconscious. It has further come in her deposition that she gained consciousness in the house of her in-laws. This version as given by the complainant is totally contrary to the deposition of PW4 Akhtar Ali. As per PW4 Akhtar Ali, on hearing the hues and cries of the complainant, he alongwith other villagers reached the spot and saw that the complainant was making efforts to get out of the well and as per this witness, they pulled out the complainant from the well and thereafter, complainant disclosed to him the mode and manner in which she was allured to come to well by accused No. 1 and the factum of accused No. 1 pushing her into the well.

12. Besides this, PW1 deposed in her statement in the Court that after she gained consciousness in the house of her in-laws, she was threatened not to disclose the incident to any one by accused No. 2 and in the morning she conveyed the occurrence of the incident to her parents with the help of one neighbour. Now, in her entire deposition, PW1 has not disclosed as to who was this neighbour, whose assistance was taken by her to inform her parents about her being pushed in to the well by her husband. In her cross examination, she stated that she informed her parents through the said neighbour at around 7:00 a.m. in the morning. However, a perusal of the statement of PW4 Akhtar Ali demonstrates that in his cross examination he has stated that after the occurrence of the incident, at around 4:00 p.m. Praveena i.e. complainant told him that Firoj Khan pushed her into the well and thereafter he forwarded this information to her parents. Another major contradiction in the testimony of PW1 and PW4 is that as per PW1 when she came out of the well, no one was present there and after raising hue and cry, she became unconscious and gained conscious in the house of her in-laws. However, PW4 deposed that complainant disclosed to him that she was pushed into the well by accused No. 1 and thereafter, he took her to Vohra Hospital from where she was taken to house of her in-laws. These major contradictions and inconsistencies in the testimony of PW1 and PW4 create grave suspicion over the veracity of the version of prosecution story. No cogent explanation has come forth from the prosecution as to why there were these major contradictions and inconsistencies in the statement of complainant (PW1) and PW4. Incidentally, a perusal of statement of complainant made in the Court demonstrates that same is inconsistent with the contents of complaint/FIR etc. which was initially registered with the police. Ext. PW1/A which is the copy of rapat rojnamcha demonstrates that it is recorded in the same that on 25.04.2007 when she was sleeping, her husband took her to the well and he started beating her there and thereafter under the guise of witchcraft he pushed her into the well. However, in her statement as recorded in the court, there is no mention in the same that she was given beatings by accused No. 1 after reaching at the well. Not only this, there is not even a whisper about demand of dowry etc. in the

rapat rojnamcha, however, in the FIR which was thereafter registered on 27.04.2007, copy of which is on record as Ext. PW1/B, the factum of demand of dowry from the complainant by the accused has been introduced. Strangely, in the FIR, there is no mention that when the complainant was taken to the well by the accused on the night of 25.04.2007, she was beaten near the well by accused No. 1. Though PW1 in the Court stated that after accused No. 1 took her to the well he poured water on her 2-3 times before pushing her in the well, however, these facts are not so recorded either in rojnamcha Ext. PW1/A or FIR Ext. PW1/B. Whereas it has come in the testimony of PW4 that after the complainant was rescued from the well he took her to the Vohra hospital, however, PW1, the complainant has stated that she was taken to the said hospital by the brother of the accused.

13. Now incidentally, though it has come in the statement of PW4 Akhtar Ali that on the fateful night he alongwith other villagers rescued the complainant from the well, however, no independent witness has been examined by the prosecution to corroborate this version of PW4. It is a matter of record that PW4 is closely related to complainant and further it is also a matter of record that there is no consistency in the statement of PW1 and PW4 so as to believe the case of prosecution.

14. Another relevant point to be taken into consideration is that though complainant has stated that she saved herself by holding a wooden plank after she was pushed into the well and came out of the well with the help of wooden stairs, however, it has come in the statement of PW9, the Investigating Officer that there did not exist any stair case in the well.

15. Even the statement of PW2, father of the complainant, does not inspire confidence and seems not to be reliable. He has denied that the factum of PW4 having informed him about the alleged incident of the complainant being pushed into the well by accused No. 1 whereas PW4 has deposed that this information was conveyed to the parents of the complainant by him.

16. Therefore, in our considered view, on the basis of evidence produced on record by the prosecution both documentary as well as ocular, it cannot be said that prosecution was able to prove its case against the accused beyond reasonable doubt.

17. Besides this, learned trial Court after taking into consideration all aspects of the matter has returned the findings of acquittal in favour of accused. It has been held by Hon'ble Supreme Court in ***Mohammed Ankoos and Others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94***

> *"12. This Court has, time and again, dealt with the scope of exercise of power by the Appellate Court against judgment of acquittal under Sections 378 and 386, Cr.P.C. It has been repeatedly held that if two views are possible, the Appellate Court should not ordinarily interfere with the judgment of acquittal. This Court has laid down that Appellate Court shall not reverse a judgment of acquittal because another view is possible to be taken. It is not necessary to multiply the decisions on the subject and reference to a later decision of this Court in Ghurey Lal v. State Of Uttar Pradesh1 shall suffice wherein this Court considered a long line of cases and held thus : (SCC p.477, paras 69 -70)*
>
> *"69. The following principles emerge from the cases above:*
>
> *1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.*
>
> *2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when (2008) 10 SCC 450 he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.*

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached--one that leads to acquittal, the other to conviction--the High Courts/appellate courts must rule in favour of the accused."

18. In ***State of Himachal Pradesh Vs. Kahan Chand, 2016 (1) Drugs Cases (Narcotics) 576***, a Coordinate Bench of this Court has held as under

"19. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in Mohamed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged."

19. We have also gone through the judgment so passed by the learned trial Court and, in our considered view, the findings so returned by the learned trial Court are neither perverse nor it can be said that the findings so returned by the learned trial Court are not borne out from the records of the case and the same do not call for any interference.

20. Accordingly, while concurring with the findings of acquittal returned by the learned trial Court, we dismiss the present appeal being devoid of any merit, so also pending miscellaneous application(s), if any.

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

Vikesh Kumar ....Petitioner

Versus

State of Himachal Pradesh and others ....Respondents

CWP No. 356 of 2016.
Date of decision: 29.11.2016

Constitution of India, 1950- Article 226- Petitioner applied for fair price shop – however, the shop was allotted to respondent No. 4- the allotment was challenged – held, that the petitioner had not annexed any documents with the application while the respondent No. 4 had annexed the requisite documents – a person has to approach the Court with clean hands – a person making false statement or suppressing material facts is not entitled to any relief- the petition dismissed with the cost of Rs. 25,000/-. (Para- 2 to 14)

For the Petitioner :	Mr. Ravinder Singh Jaswal, Advocate.
For the Respondents:	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondent s No. 1 to 3. Mr. Dheeraj K. Vashisht, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge *(Oral)*

The brief facts as pleaded in the petition are that the respondent-department had invited applications for allotment of fair price shop for three wards of Gram Panchayat Dhagoli namely Gyari, Mangyari and Jhanjhvani. It is averred that the petitioner being fully eligible, applied for the fair price shop, Mangyari and alongwith the application submitted all the requisite documents for the grant of fair price shop i.e. 10th, +2 certificates, medical certificate and also BPL card/certificate. Whereas, the respondent No.4 in whose favour the fair price shop has now been allotted, had though submitted an application, but the same was without any supporting documents and it is on these basis that the petitioner has filed the instant petition claiming therein the following substantive reliefs:

> *"(i) That the impugned Annexure P-5 i.e. allotment of Fair Price Shop in favour of respondent No.4 may kindly be quashed and set-aside.*
>
> *(ii) That the respondent department may further be directed to sanction the Fair Price Shop in the name of the petitioner being his eligibility for the same in accordance with law and after following procedure and permit him to open the Fair Price Shop."*

2. Respondents No. 1 to 3 have filed the reply wherein it was specifically averred that three applications uptil 9.10.2015 were received for the allotment of fair price shop in question and were accordingly placed before the Public Distribution Committee in the meeting held on 23.11.2015. It was found that the petitioner had not enclosed any document with the application so as to enable the Committee to ascertain his merit and left with no option the Committee evaluated the two other applicants and thereafter recommended the name of respondent No.4, who was the first in merit.

3. When the matter came up before this Court on 28.11.2016, learned counsel for the petitioner was specifically confronted with the reply of the respondents wherein it had been alleged that the petitioner had not annexed any documents alongwith his application and also to

seek instructions in this regard. However, he would insist and maintain that he had full instructions to inform this Court that the petitioner in fact had submitted all the documents as mentioned in para-4 of the petition i.e. 10th, +2 certificates, Medical Certificate and BPL card alongwith his application. Not only this, he would further maintain that it was the respondent No.4, who though has been allotted the shop had in fact not submitted any documents with his application.

4. We accordingly adjourned the case for 29.11.2016 and the respondents were directed to make available the records.

5. Today, the respondents have produced the reords and we have gone through the same and find that though the application of the petitioner is available therein, but there is no document accompanying the same. Whereas, on the other hand, the application of respondent No.4 is also available on record and is accompanied by the following documents:

(i) Matriculation Certificate;

(ii) Unemployment Certificate;

(iii) BPL certificate; and

(iv) Permanent Resident Certificate.

6. Thus, on the basis of the record, it is proved that the averments made by the petitioner in the writ petition are false to his very knowledge.

7. It is settled law that one has to approach the Court with clean hands, clean mind, clean heart and clean objective. A prerogative remedy is not a matter of course. While exercising extraordinary power, writ Court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court. If the applicant makes a false statement or suppresses material facts or attempts to mislead the Court, the Court may dismiss the application on that ground alone and may refuse to enter into the merits of the case.

8. In order to sustain and maintain the sanctity and solemnity of the proceedings in law Courts, it is necessary that parties should not make false or knowingly, inaccurate statements or misrepresentation and/or should not conceal material facts with a design to gain some advantage or benefit at the hands of the Court, when a Court is considered as a place where truth and justice are the solemn pursuits. If any party attempts to pollute such a place by adopting recourse to make misrepresentation and is concealing material facts it does so at its risk and cost. Such party must be ready to take the consequences that follow on account of its own making.

9. The Court proceedings are not a game of chess. At no cost can the stream of justice be permitted to be polluted by unscrupulous litigants. The writ Court while exercising the writ jurisdiction exercises equitable jurisdiction. The estoppel stems from equitable doctrine and it requires that he who seeks equity must do equity. Not only this, a person who seeks equity, must act in a fair and equitable manner. The equitable jurisdiction cannot be exercised in case of a person who himself has acted unfairly. Even compassion cannot be shown in such cases. The compassion cannot be allowed to bend the arms of justice in a case where an individual(s) has tried to acquire any right by unscrupulous or forcible methods.

10. Equally, the judicial process should never become an instrument of oppression or abuse or a means in the process of the Court to subvert justice. The legal maxim "*Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem*", means that it is a law of nature that one should not be enriched by the loss or injury to another.

11. The law on the subject is well settled and on the basis of various pronouncements of the Hon'ble Supreme court, the following principles can conveniently be culled out:

"1. A writ remedy is an equitable one. While exercising extraordinary power a Writ Court certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court.

2. Litigant before the Writ Court must come with clean hands, clean heart, clean mind and clean objective. He should disclose all facts without suppressing anything. Litigant cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back)/ conceal other facts.

3. Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or mis representation which has no place in equitable and prerogative jurisdiction.

4. If litigant does not disclose all the material facts fairly and truly or states them in a distorted manner and misleads the Court, the Court has inherent power to refuse to proceed further with the examination of the case on merits. If Court does not reject the petition on that ground, the Court would be failing in its duty.

5. Such a litigant requires to be dealt with for Contempt of Court for abusing the process of the Court.

6. There is a compelling need to take a serious view in such matters to ensure purity and grace in the administration of justice.

7. The litigation in the Court of law is not a game of chess. The Court is bound to see the conduct of party who is invoking such jurisdiction."

12. In view of the aforesaid discussion, this petition is sans merit and the same is otherwise liable to be dismissed with heavy costs, more particularly, when the petitioner by misleading this Court has obtained ad-interim orders on 16.02.2016 and thereby deprived the residents of village Mangyari, P.O. Kanthali, Tehsil Chirgaon, District Shimla, H.P. of the fair price shop. Though, it is represented by the petitioner that he is extremely poor and unemployed person and suffering physical disability of 45%. However, these fact in themselves, do not give licence to the petitioner to adopt unscrupulous methods while approaching the temple of justice, that too, claiming therein equitable and discretionary relief.

13. Accordingly, the petition is dismissed with costs assessed at Rs. 25,000/- (Twenty Five Thousand) to be paid to respondent No.2 within a period of four weeks from today, failing which, respondent No.2 shall be free to have this order executed by filing execution petition.

14. The petition stands disposed of in the aforesaid terms, so also the pending application(s) if any. Interim order granted by this Court on 16.02.2016 is vacated.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Aadesh Kumar s/o Sh. Rambir Singh ….Petitioner/Co-accused
Versus
State of H.P. ….Non-petitioner

Cr.MP(M) No. 1401 of 2016
Order Reserved on 25.11.2016
Date of Order: 30.11.2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 341, 323, 324, 307 read with Section 34 of I.P.C – petitioner has filed the present petition for bail- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances

peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- the petitioner is a student and is not required for investigation – hence, the petition allowed and the petitioner ordered to be released on bail subject to conditions. (Para-5 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 Apex Court 179

The State Vs. Captain Jagjit Singh, AIR 1962 Apex Court 253

Sanjay Chandra Vs. CBI, 2012 Criminal Law Journal 702 Apex Court

For petitioner/Co-accused : Mr. Sanjeev Bhushan, Sr.Advocate with Mr. Rakesh Chauhan, Advocate

For Non-petitioner : Mr. Pankaj Negi, Dy. A.G.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 Cr.PC for grant of bail relating to FIR No.274 of 2016 dated 20.10.2016 registered under Sections 341, 323, 324, 307 read with section 34 IPC in Police Station Hamirpur Distt. Hamirpur (H.P.).

Brief facts of case:

2. On dated 20.10.2016 injured Vishal reported to the investigating agency that on 20.10.2016 he visited Govt. Degree College Hamirpur to appear in a paper and after examination at about 4.15 P.M. he was returning home alongwith Neeraj Sharma on his motorcycle. It is alleged that when injured Vishal came out of the gate of the college then accused persons namely Santosh Kumar, Saurav and Aadesh were standing. It is alleged that accused persons asked the injured to alight from his motorcycle. It is further alleged that as soon as injured alighted from the motorcycle all the accused persons started beating injured with fist and leg blows. It is further alleged that co-accused caught hold the injured from his arms and legs and co-accused Santosh Kumar gave a blow of 'Khukhri' (Sharp edged weapon) on the head of injured. It is further alleged that accused persons also proclaimed that they would kill injured namely Vishal. It is further alleged that after receiving blows of 'Khukhri' (Sharp edged weapon) injured Vishal became unconscious and fell down. It is further alleged that injured was saved by Neeraj Sharma, Pankaj Kumar and Tain Singh who brought the injured to hospital for his medical treatment. It is further alleged that 'Khukhri' (Sharp edged weapon) recovered. It is further alleged that Medical Officer has given opinion that injury upon the body of injured was dangerous to life.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Deputy Advocate General appearing on behalf of State and Court also perused the entire record carefully.

4. Following points arises for determination:

(1) Whether bail application filed by co-accused Aadesh Kumar is liable to be accepted as mentioned in memorandum of grounds of bail application?

(2) Final Order.

Findings upon Point No.1 with reasons.

5. Submission of learned Advocate appearing on behalf of co-accused Aadesh Kumar that Aadesh Kumar did not commit any offence as alleged by the investigating agency

cannot be decided at this stage of the case. Same fact will be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

6. Submission of learned Advocate appearing on behalf of co-accused Aadesh Kumar that investigation is completed in the present case and petitioner is not required for investigation purpose and petitioner is a student of BSc-IIIrd year and he has to appear in coming examination and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered (1) Nature and seriousness of offence. (2) Character of evidence. (3) Reasonable possibility of the presence of accused in trial or investigation. (4) Reasonable apprehension of witnesses being tampered with. (5) Larger interest of the public or State. See AIR 1978 Apex Court 179 ***Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see AIR 1962 Apex Court 253 ***The State Vs. Captain Jagjit Singh.*** It is well settled law that grant of bail is rule and committal to jail is an exception. It is also well settled law that refusal of bail is restriction on the personal liberty of individual guaranteed under Article 21 of the Constitution of India. It is well settled law that it is not in the interest of justice that accused should be kept in jail for an indefinite period. See **2012 Criminal Law Journal 702 Apex Court Sanjay Chandra Vs. CBI.** In the present case accused is in judicial custody and accused is not required for investigation purpose. In the present case weapon is also recovered by the investigating agency. There is no report of investigating agency that injured namely Vishal is admitted in the hospital as in-door patient as of today. In view of the fact that petitioner is a student and in view of the fact that petitioner is not required for investigation purpose by the investigating agency and in view of the fact that trial will be concluded in due course of time Court is of the opinion that it is expedient in the ends of justice to release the petitioner on bail.

7. Submission of learned Deputy Advocate General appearing on behalf of the State that if petitioner is released on bail at this stage then petitioner will induce and threat prosecution witnesses and on this ground bail application be declined is rejected being devoid of merits for reasons hereinafter mentioned. Co-accused Aadesh Kumar has given undertaking that he would not induce or threat prosecution witnesses. It is held that conditional bail will be granted to co-accused Aadesh Kumar. It is held that if co-accused Aadesh Kumar will flout terms and conditions of conditional bail then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail as provided under section 439(2) Code of Criminal Procedure 1973. In view of the above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order).

8. In view of my findings on point No.1 above bail application filed by co-accused Aadesh Kumar under Section 439 of Code of Criminal Procedure 1973 is allowed on furnishing personal bond in the sum of Rupees One lac with two sureties in the like amount to the satisfaction of learned Trial Court on following terms and conditions. (1) That co-accused Aadesh Kumar will join investigation whenever and wherever directed by investigating officer in accordance with law. (2) That co-accused Aadesh Kumar will regularly attend proceedings of learned Trial Court till conclusion of trial. (3) That co-accused Aadesh Kumar shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing facts to the investigating officer or to the Court. (4) That co-accused Aadesh Kumar will not leave India without prior permission of the Court. (5) That co-accused Aadesh Kumar will not commit similar offence qua which he is accused. Observations made hereinabove will not effect merits of the case in any manner and will be strictly confined for disposal of present bail application. Cr.MP(M) No.1401/2016 is disposed of.

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

All Himachal Micro Hydel (100 KW) NGOS and Societies Association through its President Sh. Varinder Thakur .....Petitioner.

Vs.

State of H.P. through Principal Secretary, Non-Conventional Energy Sources-cum-Secretary Power, Government of H.P. and others .....Respondents.

CWP No.: 5213 of 2012
Reserved on : 24.10.2016
Date of Decision: 30.11.2016

Constitution of India, 1950- Article 226- Petitioner had identified project site and completed the work in furtherance of a scheme floated by Government of India – however, a new notification was issued bringing the work to "big zero causing them lot of financial loss of energy and time spent as the entire work would be utilized by some other persons"- held, that the plea of the petitioner that because of its members had applied for allotment of project pursuant to the scheme notified by Government of India, State had no authority to come with the amended policy and the projects have to be allotted to its members as a matter of right is without any merit- no material was placed on record to show that sites were got inspected with the consent of Government of Himachal Pradesh- issuance of policy was the domain of the State Government and Union of India has no role in this process- scheme floated by Government of India did not confer any indefeasible right upon the members of association for allotment of the project – no holding out was made that the site selected by the members of the association would be allotted to the applicant- simply because a pre-feasibility report has been prepared will not confer any right upon the person to get the project – public largesses should be disputed in a transparent manner by providing an opportunity to all eligible members to participate in the process- mere disappointment of expectation cannot be a ground for interfering with the policy of the State – the legal status of the association was not established – directions issued. (Para-11 to 21)

Cases referred:

Confederation of Ex-Servicemen Associations and others Vs. Union of India and others (2006) 8 Supreme Court Cases 399
Sethi Auto Service Station and another Vs. Delhi Development Authority and others (2009) 1 Supreme Court Case 180
Jasbir Singh Chhabra and others Vs. State of Punjab and others (2010) 4 SCC 192
Monnet Ispat and Energy Limited Vs. Union of India and others (2012) 11 SCC 1
State of Kerala and others Vs. Kerala Rare Earth and Minerals Limited and others (2016) 6 Supreme Court Cases 323

For the petitioner: Mr. Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate.

For the respondents: Mr. V.S. Chauhan, Additional Advocate General, with Mr. Vikram Thakur, Dy. Advocate General, for respondent No. 1.
Mr. Vijay Arora, Advocate, for respondents No. 2 and 3.
Mr. Ashok Sharma, Assistant Solicitor General of India for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

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

"(i) That a writ in the nature of certiorari may be issued and notification Annexure P-6 dated 12.03.2012 may be quashed and set aside.

(ii) That a writ in the nature of mandamus may be issued directing the respondents that all the NGOS/Co-operative Societies who, in furtherance of the publicity made by HIMURJA and their Project Officers have submitted their Pre Feasibility Reports and the inspections have been conducted by the HIMURJA, in their cases, they may be issued allotment letters on the same elevations as submitted by them, in the interest of justice.

(iii) That a writ in the nature of certiorari may be issued and Annexure P-7 and Annexure P-8 may be quashed and set aside whereby the applications of the NGOS/Co-operative Societies have been rejected.

(iv) To produce the entire record pertaining to the case before this Hon'ble Court for its kind perusal.

(v) Any other relief as may be deemed just and proper keeping in view the facts and circumstances of the case may also be granted in favour of the petitioners."

2. Petitioner claims itself to be an association of NGOs./Co-operative Societies, who had identified the project sites (self identified) in furtherance of a Scheme floated by the Government of India, Ministry of New and Renewable Energy (Annexure P-2). As per the petitioner, its members identified the sites and completed entire work on asking of respondent No. 3, but vide a new notification dated 12.03.2012, entire work done by the members of the petitioner-Association was brought to a "big zero causing them lot of financial losses, loss of energy and time spent on this, as entire work done by the members of the petitioner-association would be utilized by some other persons."

3. Case put forth by the petitioner is that Ministry of New and Renewable Energy, Small Hydro Power Division (respondent No. 4) issued a Scheme, i.e. Scheme for Development/Up-gradation of Watermills and setting up Micro Hydel Projects (upto 100 KW capacity) to encourage and accelerate the development of Watermills and Micro Hydel Projects in the remote and hilly areas by providing Central Financial Assistance (hereinafter referred to as "CFA"). Respondent No. 3 HIMURJA was made Nodal Agency of the said Scheme which was to further advertise and propagate the same through its website. The Scheme was accordingly propagated by respondent No. 3 through its website as well as through its District Level Officers. In the backdrop of the Scheme, members of petitioner-association identified the sites as per the Scheme and after identification, various developers started further work and Pre-feasibility Reports qua their self identified sites were prepared and the same were submitted to respondent No. 3. It is further the case of the petitioner-association that after preparation of Pre-feasibility reports, sites were inspected by the field staff of HIMURJA and suitability reports of such self identified sites were submitted by the inspection team to HIMURJA. It is further the case of the petitioner-association that for the identification of sites, NGOs. and Co-operative Societies engaged services of experts and spent huge amounts for the activities so undertaken by them including for joint inspections. It is further the case of the petitioner-association that after clearances were given post inspection, each developer obtained NOC after spending lot of money and time and all the self identified projects were in an advance stage and only execution of the work remained to be commenced. It is further the case of the petitioner-association that these self identified sites fall within Intellectual Property Rights of the developers and respondents were now estopped from cancelling such applications and allocating these projects on the basis of advertisement to others. It is further the case of the petitioner-association that its members had requested for issuance of allotment letters of the projects in their favour as they had completed all other formalities in this regard, however, rather than acting on the Scheme which was so formulated by the Government of India and ignoring the fact that a lot of work had been done at so many sites by the members of the petitioner-association, respondent-State came up with a Draft Policy for setting up Micro Hydel Projects up to 100 KW capacity in Himachal Pradesh. As per the petitioner-association, the members of the petitioner-association were surprised at the Draft Policy which was so circulated by the State, since after completing the entire work in

anticipation of allotment letters, its members which included NGOs./Co-operative Societies were taken back with shock. Further, as per the petitioner-association, detailed objections were filed to the said Draft Policy vide Annexure P-5, however, without taking into consideration the objections so filed by its members, respondent-State notified a Policy, i.e. "Policy for setting up of Micro Hydel Projects up to 100 KW" vide Notification dated 12.03.2012 (Annexure P-6). As per Clause 6.1 of this Policy, the applications of the NGOs/Co-operative Societies were rejected vide Annexure P-7 dated 29.05.2012. It is further the case of the petitioner-association that thereafter all the Projects were also cancelled vide Annexure P-8. In this background, the petitioner-association has filed the present petition praying for quashing of notification dated 12.03.2012 (Annexure P-6) on the ground that the impugned act of the State is arbitrary, discriminatory, illegal and defeats the legitimate expectation of members of petitioner-association and further for issuance of direction to the respondent-State to issue allotment letters in favour of NGOs/Co-operative Societies, who in furtherance of publicity made by HIMURJA and their Project Officers, submitted their Pre-feasibility reports and inspection qua which was carried out by HIMURJA.

4. In their reply, respondents No. 1 to 3 have challenged the maintainability of the writ petition and stated that in fact the Scheme of the Government of India was displayed on HIMURJA website only for the purpose of knowledge of public and the proposals which were submitted by the applicants were without any invitation by HIMURJA. As per respondents No. 1 to 3, no applications were invited by HIMURJA on the basis of Government of India Scheme and 90 aspirants who submitted 207 applications to HIMURJA, had submitted the same out of their own volition. It is further mentioned in the reply filed by the said respondents that these proposals were submitted by the applicants on subsidy format of MNRE, which was meant for availing only capital subsidy from MNRE, Government of India, but were not fulfilling the criteria required for allotment of Project by the respondent-State and said incomplete proposals were not comparable in any meaningful evaluation to draw a merit list. It is further mentioned in the reply that as Government of India had made State Nodal Agency responsible for proper utilization of subsidy (CFA) part, which was comparatively much higher than any other hydro project subsidy being provided by MNRE Government of India, the State Governments were within their right to frame such Rules and Regulations which ensured proper utilization of CFA by way of a policy. Accordingly, as per the said respondents, it was in this background that policy dated 12.03.2012 was notified and it was mentioned in Clause 6.1 of the same that "No preference will be given to the applicants who have already submitted their proposals in HIMURJA. All the applicants will have to submit fresh application for each project with requisite fee on the standard application format (Annexure R-3) and complete other formalities mentioned in the policy." It is further submitted by the said respondents that that the applications submitted pursuant to the Government of India Scheme were not fulfilling the requirements as per the policy which was approved by the Government of Himachal Pradesh and lacked Gram Sabha NOC for setting up of the project, commitment of funds to meet the balance project cost, proof of land availability required for the project, audited balance sheets of the applicant for last three years, certified copy of the registration certificate, memorandum of articles of association or bye laws, proof of bonafide Himachali and proof of financial capability. It is mentioned in the reply that as all the proposals submitted by the applicants had one deficiency or the other, the proposals were accordingly rejected. As far as the issue of maintainability of the writ petition is concerned, it is mentioned in the reply that though 90 applicants had applied under the Scheme notified by the Government of India, but Annexure P-3, which was letter written by the petitioner-association to Secretary (Power) was just signed by 7 Societies/NGOs. It is further mentioned in the reply that with regard to 90 applicants who had submitted 207 applications suo moto, 48 applicants had submitted 115 applications directly to HIMURJA at its Headquarter, whereas 42 applicants had submitted 92 applications through field offices of HIMURJA for setting up projects up to 100 KW. It is further mentioned in the reply that joint inspections, if any, carried out by HIMURJA field staff of these suo moto applications did not study available potential for higher capacity projects available upstream or downstream the water head. It is further mentioned in the reply that whereas projects upto 100 KW had fragmented 154 streams in 8 Districts, it was possible to come up with a single project of higher capacity on a stream which could avoid wastage of land. It is

further mentioned in the reply that majority of applications had been received from the soft areas where power requirement was already met by the Himachal Pradesh State Electricity Board Limited and very few applications were received from tribal and remote areas. It is also mentioned in the reply that even otherwise, the Department could not have had restricted any individual from carrying out any investigation at their own cost and time and that these investigations were carried out by the individual/applicants at their own risk and cost, therefore, such like applicants could not take benefit by pleading that they had made huge investments for identification of the projects, which in fact was far away from true facts. It is further mentioned in the reply that the contention of the petitioner-association that the applicants had spent considerable labour, amount and time was a deliberate attempt made by the petitioner to capture sites without advertisement/notice inviting applications for allotment of projects as per the Scheme issued by the Government of Himachal Pradesh, and if the plea of the petitioner was accepted, then it will create unhealthy competition vis-à-vis petitioner and other applicants who want to apply for 100 KW capacity. It is denied by the State that issuance of policy by the State Government was a surprise and it is submitted in the reply that the persons who submitted their applications earlier suo moto were free to complete all codal formalities as per the State policy and resubmit fresh applications to the Government as and when the applications were so invited. It is further mentioned in the reply that the respondents could not even otherwise have had permitted the applicants to go ahead with the sites without appropriate study and guidelines only because 90% subsidy was available for these projects. It is further mentioned in the reply that in Himachal Pradesh 100% census villages and 98% consumers had been provided electricity through grid connections and these projects were meant for areas where grid connectivity was not available. It is further mentioned in the reply that only 20 applications had been received from remote areas and even in the said remote areas grid availability was available, and in view of less requirement of such projects, 100 KW projects were not a necessity in the State of Himachal Pradesh much less a priority for the State. The claim of Intellectual Property Rights of the applicants as claimed by the petitioner over natural resources is also denied in the reply and on these bases, respondents No. 1 to 3 disputed the claim of the petitioner-association.

5. In its reply filed by respondent No. 4, the stand taken by the said respondent is that the petitioner had sought relief against the Government of Himachal Pradesh and further as the decision of setting up SHP/MHP projects or its allocation was taken by the State Government, respondent No. 4 had no role in this process. Said respondent in its reply has given details of Central Financial Assistance for Watermills and Micro Hydel Projects being granted by the Union and also mentioned the procedure for availing CFA Micro Hydel Projects, which are quoted hereinbelow:

> *"IV Procedure for Availing CFA Micro Hydel Projects:*
>
> *The State Government Departments/State nodal Agencies, Local Bodies, Co-operatives, NGOs. etc. intending to avail CFA are required to submit the application as per enclosed format alongwith the following documets:*
>
> *(i) Two copies of Project report covering various aspects of project implementation, completion schedule, O & M and cost estimates.*
>
> *(ii) State Government approval for the implementation of the project.*
>
> *(iii) Commitment of funds to meet the balance project cost.*
>
> *(iv) Proof of land availability required for the project."*

6. The stand taken in para-4 of the reply affidavit filed by respondent No. 4 to the writ petition is quoted hereinbelow:

> *"4. That further the decision of setting up SHP/MHP projects or its allotment is taken by the State Government. The replying Deponent has "N" role in this process. The expression of interests/proposals/bids from developers are invited by the State Government/HIMURJA. However, it is respectfully submitted here that the deponent i.e. (MNRE) is responsible for the development of small*

hydro projects up to 25 MW station capacity as per Government of India's Allocation of Business Rules. Electricity and electricity generated from hydro projects is concurrent subject of Central and State Governments. Water being State subject, the SHP/MHP projects is governed by the State policies. The decision of setting up SHP/MHP projects or its allotment is taken by the State Government. The Ministry of New and Renewable Energy has no role in this process. The expression of interests/proposals/bids from private developers are invited by the State Government. The MNRE do not set up or allocate any small hydro project. It only provides Central Financial Assistance (CFA) for setting up MHP/SHP projects in the States. For the State of Himachal Pradesh the expression of interests/proposals/bids from MHP/SHP developers are invited by the HIMURJA. However, Central Financial Assistance (CFA)/subsidy to SHP/MHP projects is provided to the developer based on the approval of the project and on the fulfilling the all conditions of eligibility for the same as per applicable MNRE Scheme for SHP programme."

7. No rejoinders were filed to these replies neither any rejoinder was intended to be filed by the petitioners.

8. During the pendency of this writ petition, on 01.03.2016, this Court had passed the following order:

"Shri Vijay Arora, learned counsel appearing for respondents No. 2 and 3 while inviting our attention to notification dated 12th March, 2012, issued by Principal Secretary (NES), State of Himachal Pradesh and communication dated 18th February, 2009, issued by the Ministry of New & Renewable Energy, Government of India, contends that the present petition has become infructuous, inasmuch as the plan period has come to an end w.e.f. 31st March, 2012. Let this fact be ascertained both by the State as also the Central Government. Affidavit in that regard be filed positively within a period of two weeks from today, failing which, respondent No. 1 shall personally remain present in the Court.

List after two weeks."

9. In obedience to the abovementioned order passed by this Court, an affidavit was filed by Additional Chief Secretary (NES) to the Government of Himachal Pradesh, relevant portion of which is quoted hereinbelow:

"7. Now Ministry of New and Renewable Energy vide notification dated 2nd July, 2014, Annexure R-2/A notified Scheme for the financial year 2014-15 & the remaining period of 12th Plan i.e. upto 31st March, 2017, unless further modified and supersedes earlier Scheme in this regard under Small Hydro Project programme of the Ministry of New and Renewable Energy, Government of India. Under this Scheme certain changes has been made prior to the old notification. Comparison of Notification issued by Ministry of New and Renewable Energy dated 18.02.2009 viz a viz notification of Ministry of New and Renewable Energy dated 2.7.2014 is as under:

Notification of Ministry of New and Renewable Energy dated 18.02.2009.	Notification of Ministry of New and Renewable Energy on dated 2nd July, 2014.
Scheme was Notified by Ministry of New and Renewable Energy dated 18.02.2009 which was valid up to 11th five year plan i.e. 31-March 2012, unless further modified and supersedes earlier scheme in this regard under Small Hydro Project	New notification for the scheme was notified by Ministry of New and Renewable Energy on dated 2nd July, 2014, the scheme will be effective for the financial year 2014-15 & the remaining period of 12th Plan i.e. upto 31st March, 2017, unless further

programme of the Ministry of New and Renewable Energy Government of India.	modified and supersedes earlier scheme in this regard under Small Hydro Project programme of the Ministry of New and Renewable Energy, Government of India.
As per the Scheme, the amount of Central Financial Assistance is Rs.80,000/- per KW for North Eastern & Special Category states and Rs.1,00,000/- per KW for international Borders Distts.	As per the scheme the amount of Central Financial Assistance is Rs.1,25,000/- per KW for all States of India.
The Central Financial Assistance is applicable for the projects to be implemented by State Government Deptt/State Nodal Agencies/Local Bodies/Co-operative/NGOs	The Central Financial Assistance is applicable for the projects to be implemented by State Govt. Deptt/State Nodal Agencies/Local Bodies/Co-operative NGOs./Tea Garden & Individual Entrepreneurs.

8. That it is further submitted that now Ministry of New and Renewable Energy has made certain changes in their new notification dated 2.7.2014 for 100 KW projects i.e. the Central financial assistance was changed from Rs. 80,000/- per KW to Rs. 1,25,000/- per KW. Ministry of New and Renewable Energy has also modified eligibility criteria. As per new eligibility criteria, the Central Finanncial Assistance is applicable for the projects to be implemented by State Govt. Deptt/State Nodal Agencies/Local Bodies/Co-operative/NGOs/Tea Garden & Individual Entrepreneurs. The chance to the Tea Garden & Individual Entrepreneurs was also given by the Ministry in its new notification dated 2.7.2014. Therefore, to provide fair chance to more interested parties the notification dated 12th March, 2012 will be revised as per the new policy scheme of Ministry of New and Renewable Energy dated 2.7.2014 after final decision of Hon'ble High Court. It is submitted that the application of the petitioner would be considered as per new policy. In the meantime, Govt. may be permitted to notify the policy issued by Ministry of New and Renewable Energy vide dated 2.7.2014 with state amendments. It is therefore, respectfully prayed that in view of the facts and circumstances narrated here in above the present petition may kindly be dismissed in the interest of justice."

10. We have heard the learned counsel for the parties and also gone through the pleadings of the parties.

11. In our considered view, the contention of the petitioner-association that because its members had applied for allotment of projects pursuant to the Scheme notified by Government of India vide Annexure P-2, the State had no authority to come with the amended policy and the projects have to be allotted to its members as a matter of right as they legitimately expected these projects to be allotted to them is without any merit. No material has been placed on record by the petitioner-Society from which it can be inferred that any holding out was made by the respondent-State or HIMURJA on the basis of the Scheme floated by Government of India by inviting applications thereupon. Not only this, no material has been placed on record by the petitioner-association from which it can be inferred that the proposed self identified sites of members of the petitioner-association were got inspected with the consent of the Government of Himachal Pradesh. Not only this, no material has been placed on record by the petitioner from which it can be inferred that the Government of Himachal Pradesh was not having any authority in law to issue notification dated 12.03.2012 which has been challenged by way of this writ petition. On the other hand, it is apparent and evident from the reply which has been filed by

respondent No. 4, i.e. Union of India that issuance of the policy for allotment of SHP/MHP projects or its allotment was the domain of State Government and Union of Indian has no role in this process. It is further evident from the reply of respondent No. 4 that expression of interests/proposals/bids from private developers are invited by the State Governments or the nodal agency of the State Government. Therefore, the contention of the learned counsel for the petitioner that the issuance of the policy by the Government of Himachal Pradesh is without any authority in law has no force. Even otherwise, in our considered view, the Scheme floated by the Government of India did not confer any indefeasible right upon the members of the petitioner-association, who purportedly applied for allotment of the projects on the basis of the Scheme so floated by the Government of India. In view of the reply filed by respondent No. 4, no such indefeasible right could have been created by a Scheme issued by the Government of India by supplanting the powers of respective State Governments in this regard. In this background, there is no question of any legitimate expectation having accrued in favour of the members of the petitioner-association of being allotted projects/sites qua which they submitted their applications pursuant to the Scheme floated by the Government of India. Not only this, there is a specific stand even otherwise taken by the respondent-State in its reply that the applications which were submitted by the applicants in response to the Scheme floated by the Government of India were incomplete applications and there was one discrepancy or the other in these applications. The stand so taken in its reply by respondents No. 1 to 3 has not been contradicted by the petitioner by way of any rejoinder.

12. The contention of the petitioner-association that its members were entitled to be allotted the sites qua which they had submitted their applications pursuant to Scheme floated in this regard by respondent No. 4 and that respondent-State had no authority to issue policy vide notification dated 12.03.2012 has not even been supported by respondent No. 4. On the other hand, it is apparent from the stand taken by respondent No. 4 in its reply in general and in para-4 of its reply in particular that the State had the right to issue a policy for the purpose of laying down a uniform criteria to distribute Government largesse.

13. In our considered view, as far as the facts of the present case are concerned, there was no holding out made at any stage to any of the applicants who applied for a site in response to the Scheme formulated by the Government of India that once the applicant had applied for a particular site, then the applicant shall be granted that site in all eventualities. This kind of a holding out is neither there on behalf of respondent No. 4 nor the petitioner could draw the attention of this Court to any document on record from which it could be inferred that on the basis of the said Scheme, any such holding out was made either by HIMURJA or by the respondent-State. There is no material on record from which it could be inferred that there was either any implied or express consent given to the Societies/NGOs. by either of the respondents to incur expenses for the purpose of identifying the proposed sites and preparing Pre-feasibility reports etc. Even otherwise, every interested party which intends to set up a project has to carry out a Pre-feasibility report to satisfy itself as to whether the project will be viable or not. However, simply because a particular party prepares a Pre-feasibility report or incurs some expenses in this regard, this does not mean that all this confers an indefeasible right over that party to be allotted that site. Even otherwise, after come into force of the policy formulated by the State Government vide notification dated 12.03.2012 it is not as if the Society/NGOs. who had earlier submitted their applications have been barred from participating in the process of allotment of the sites. They are all free to participate in the allotment of the projects subject to their fulfilling the eligibility criteria which has been laid down in the policy by the respondent-State. In this view of the matter, there is no merit in the contention of the learned counsel for the petitioner that any legitimate expectation of all the members of the petitioner-association has been defeated or the respondents were estopped from issuing policy notification dated 12.03.2012 or rejecting the applications earlier filed by Societies/NGOs. in response to the Scheme floated by the Government of India.

14. It is well settled law that public largesses should be distributed in a transparent manner by providing an opportunity to all eligible members to participate in the process. This not

only ensures a healthy competition but also meets the prime object of fair play and transparency in the matter of distribution of public largesses.

15. A five Judges Bench of the Hon'ble Supreme Court **in Confederation of Ex-Servicemen Associations and others** Vs**. Union of India and others** (2006) 8 Supreme Court Cases 399 has held:

> *"34. The expression "legitimate expectation" appears to have been originated by Lord Denning, M.R. in the leading decision Schmidt Vs. Secy. of State. In Attorney General of Hong Kong V. Ng Yuen Shiu, Lord Fraser referring to Schmidr stated: (All ER P. 350 h-j)*
>
> *"The expectations may be based on some statement or undertaking by, or on behalf of , the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry."*
>
> *35. In such cases, therefore, the Court may not insist an administrative authority to act judicially but may still insist it to act fairly. The doctirine is based on the principle that good administration demands observance of reasonableness and where it has adopted a particular practice for a long time even in the absence of a provision of law, it should adhere to such practice without depriving its citizens of the benefit enjoyed or privilege exercised."*

16. The Hon'ble Supreme Court in **Sethi Auto Service Station and another** Vs. **Delhi Development Authority and others** (2009) 1 Supreme Court Case 180 has held:

> *"33. It is well settled that the concept of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power. The court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. Therefore, a legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited. [Vide Hindustan Development Corporation}"*

17. The Hon'ble Supreme Court in **Jasbir Singh Chhabra and others** Vs. **State of Punjab and others** (2010) 4 Supreme Court Cases 192 while tracing the earlier law laid down by the Hon'ble Supreme Court on the doctrine of promissory estoppel and legitimate expectations has held:

> *"41. In Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409, a two-Judge Bench of this Court discussed the doctrine of promissory estoppel in great detail and laid down the various propositions including the following:*
>
> *"8….. The true principle of promissory estoppel, therefore, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and*

this would be so irrespective of whether there is any pre-existing relationship between the parties or not."

"24. The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution.

42. A contrary view was expressed by another two-Judge Bench in Jit Ram v. State of Haryana (1981) 1 SCC 11, but the law laid down in Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. (supra) was reiterated in Union of India v. Godfrey Philips India Ltd. (1985) 4 SCC 369, which was decided by a three-Judge Bench. Bhagwati, C.J. with whom the other two members of the Bench agreed on the exposition of law relating to the doctrine of promissory estoppel, observed:

"13. Of course we must make it clear, and that is also laid down in Motilal Sugar Mills case that there can be no promissory estoppel against the Legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or, power of the officer of the Government or of the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires; if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it. This aspect has been dealt with fully in Motilal Sugar Mills case and we find ourselves wholly in agreement with what has been said in that decision on this point."

43. In Hira Tikoo v. Union Territory, Chandigarh (2004) 6 SCC 765, this Court considered whether the High Court was justified in refusing to invoke the doctrine of promissory estoppel for issuing a mandamus to the respondent-Chandigarh Administration to allot industrial plots to the petitioners, who had applied in response to an advertisement issued in 1981. The Court noted that some of the successful applicants were given possession of the plots but majority of them were not given allotment letters on the ground that the land formed part of the reserved forest and partially approved the decision of the High Court by making the following observations:

"25. Surely, the doctrine of estoppel cannot be applied against public authorities when their mistaken advice or representation is found to be in breach of a statute and therefore, against general public interest. The question, however, is whether the parties or individuals, who had suffered because of the mistake and negligence on the part of the statutory public authorities, would have any remedy of redressal for the loss they have suffered. The "rules of fairness" by which every public authority is bound, require them to compensate

loss occasioned to private parties or citizens who were misled in acting on such mistaken or negligent advice of the public authority. There are no allegations and material in these cases to come to a conclusion that the action of the authorities was mala fide. It may be held to be careless or negligent. In some of the English cases, the view taken is that the public authorities cannot be absolved of their liability to provide adequate monetary compensation to the parties who are adversely affected by their erroneous decisions and actions. But in these cases, any directions to the public authorities to pay monetary compensation or damages would also indirectly harm general public interest. The public authorities are entrusted with public fund raised from public money. The funds are in trust with them for utilisation in public interest and strictly for the purposes of the statute under which they are created with specific statutory duties imposed on them. In such a situation when a party or citizen has relied, to his detriment, on an erroneous representation made by public authorities and suffered loss and where the doctrine of "estoppel" will not be invoked to his aid, directing administrative redressal would be a more appropriate remedy than payment of monetary compensation for the loss caused by non-delivery of the possession of the plots and consequent delay caused in setting up industries by the allottees."

44. The plea of the writ petitioners that they had legitimate expectation of being allotted residential plots in Phases VIII-A and VIII-B in Mohali because in 2002 138 plots were allotted to the successful applicants sans merit. At the cost of repetition, it is necessary to mention that the writ petitioners had submitted applications knowing fully well that the same would not obligate the Corporation to allot plots to them. It is rather intriguing that even though approval of the layouts of residential pockets in Phases VIII-A and VIII-B, Mohali by Plan Approval Committee of the Corporation was subject to approval being accorded by the competent authority under the 1995 Act for change of land use from industrial to residential, and the Allotment Committee in which Managing Director of the Corporation had taken part, made a negative recommendation in the matter of allotment of land for housing purposes, the same officer authorized issue of advertisement dated 23.3.2004 for holding provisional draw of lots. In our view, this exercise was wholly unnecessary and uncalled for. If the concerned officer had not acted in haste and waited for the decision of the competent authority on the issue of change of land use, the parties may not have been forced to fight this unwarranted litigation. Be that as it may, the writ petitioners cannot, by any stretch of imagination, claim that they had a legitimate expectation in the matter of allotment of plots despite the fact that change of land use was yet to be sanctioned.

45. The doctrine of legitimate expectation has been described in Halsbury's Laws of England 4th Edn. in the following words:

"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice."

46. In Food Corporation of India v. Kamdhenu Cattle Feed Industries (supra), this Court considered whether by submitting tender in response to notice issued by the Food Corporation of India for sale of stocks of damaged food grains, the respondent had acquired a right to have its tender accepted and the appellant was not entitled to reject the same. While approving the view expressed by the High Court that rejection of the highest tender of the writ petitioner-respondent was legally correct, this Court observed: "The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but

failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

47. In Union of India v. Hindustan Development Corporation (supra), the doctrine of legitimate expectation was explained in the following words: "

28. For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."

The same principle has been stated and reiterated in Punjab Communications Ltd. v. Union of India (1999) 4 SCC 727, Dr. Chanchal Goyal v. State of Rajasthan (2003) 3 SCC 485, J.P. Bansal v. State of Rajasthan (2003) 5 SCC 134, State of Karnataka v. Uma Devi (2006) 4 SCC 1, Kuldeep Singh v. Government of NCT of Delhi (2006) 5 SCC 702, Ram Pravesh Singh v. State of Bihar (2006) 8 SCC 381 and Sethi Auto Service Station v. DDA (2009) 1 SCC 180.

48. In the last mentioned judgment, the Court referred to various precedents and observed:

".................the golden thread running through all these decisions is that a case for applicability of the doctrine of legitimate expectation, now accepted in the subjective sense as part of our legal jurisprudence, arises when an administrative body by reason of a representation or by past practice or conduct aroused an expectation which it would be within its powers to fulfil unless some overriding public interest comes in the way. However, a person who bases his claim on the doctrine of legitimate expectation, in the first instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. The Court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest. But a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles."

49. The plea of discrimination raised by the appellants is being mentioned only to be rejected because no similarity has been pointed out between their cases and the cases of those who had applied for allotment of plots in focal

point, Patiala and Phase VIII (Jeevan Nagar), Ludhiana except that a common draw was held in furtherance of advertisement dated 23.3.2004. In any case, in view of our interpretation of the policy decision contained in Memo dated 26.12.2001, the allotment made in two other focal points, cannot enure to the appellants' advantage and a mandamus cannot be issued in their favour because that would result in compelling the competent authority to sanction change of land use from industrial to residential in contravention of the policy decision taken by the State Government."

18. The Hon'ble Supreme Court in **Monnet Ispat and Energy Limited** Vs. **Union of India and others** (2012) 11 SCC 1 has held that for invocation of the doctrine of promissory estoppel it is necessary that:

"(i) Where one party has by his words or conduct made to the other clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is, in fact, so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not.

(ii) The doctrine of promissory estoppel may be applied against the Government where the interest of justice, morality and common fairness dictate such a course. The doctrine is applicable against the State even in its governmental, public or sovereign capacity where it is necessary to prevent fraud or manifest injustice. However, the Government or even a private party under the doctrine of promissory estoppel cannot be asked to do an act prohibited in law. The nature and function which the Government discharges is not very relevant. The Government is subject to the rule of promissory estoppel and if the essential ingredients of this doctrine are satisfied, the Government can be compelled to carry out the promise made by it.

(iii) The doctrine of promissory estoppel is not limited in its application only to defence but it can also furnish a cause of action. In other words, the doctrine of promissory estoppel can by itself be the basis of action.

(iv) For invocation of the doctrine of promissory estoppel, it is necessary for the promisee to show that by acting on promise made by the other party, he altered his position. The alteration of position by the promisee is a sine qua non for the applicability of the doctrine. However, it is not necessary for him to prove any damage, detriment or prejudice because of alteration of such promise.

(v) In no case, the doctrine of promissory estoppel can be pressed into aid to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. No promise can be enforced which is statutorily prohibited or is against public policy.

(vi) It is necessary for invocation of the doctrine of promissory estoppel that a clear, sound and positive foundation is laid in the petition. Bald assertions, averments or allegations without any supporting material are not sufficient to press into aid the doctrine of promissory estoppel.

(vii) The doctrine of promissory estoppel cannot be invoked in abstract. When it is sought to be invoked, the Court must consider all aspects including the result sought to be achieved and the public good at large. The fundamental principle of equity must forever be present to the mind of the court. Absence of it

must not hold the Government or the public authority to its promise, assurance or representation."

19. The Hon'ble Supreme Court recently in **State of Kerala and others** Vs. **Kerala Rare Earth and Minerals Limited and others** (2016) 6 Supreme Court Cases 323 in a matter pertaining to grant of mining lease has held that mere disappointment of expectation cannot be a ground for interfering with the policy of the State.

20. As far as the issue of maintainability of the writ petition is concerned, we may observe that this writ petition has been filed by All Himachal Micro Hydel (100 KW) NGOs. and Societies Association through its President Sh. Varinder Thakur. In the body of the petition, there is no mention as to what is the legal status of this association and who all are the members of this association and what are its aims and objectives. No list of its members is appended with the petition. Communication dated 02.08.2010, which is appended with the petition as Annexure P-3 and which as per the petitioner is a representation made by it to Secretary (Power), to the Government of Himachal Pradesh is also signed by only 7 Societies/NGOs. has also been pointed out in its reply by respondents No. 1 to 3. Annexure P-8, which is list of Societies/NGOs. who applied for 100 KW projects and whose applications were rejected in terms of Clause 6.1 of the approved policy of the Government of Himachal Pradesh contains the names of 90 Societies/NGOs. In addition, the petition is filed on the affidavit of one Shri Varinder Thakur in his capacity as President of 'All Himachal Micro Hydel (100 KW) NGOs. and Societies Association' and the contents of the petition have been sworn by the said deponent to be true and correct to the best of his personal knowledge and belief. Therefore, we doubt as to whether the writ petition in its present form is maintainable or not. However, keeping in view the directions we propose to pass in the present writ petition, we do not deem it proper to dwell any further on the issue of maintainability of the writ petition.

21. Therefore, in view of the discussion held above, while we hold that the petitioner-association is not entitled for any of the reliefs prayed for, however, taking into consideration the averments made in the affidavit dated 11th March, 2016 filed by Additional Chief Secretary (NES) to the Government of Himachal Pradesh, we dispose of this writ petition by passing the following directions:

> "1. Respondent-State is at liberty to proceed with allocation of projects as per its policy dated 12.03.2012 as well as subsequent notification issued in this regard by the Government of India dated 2nd July, 2014 forthwith by inviting applications in this regard from all eligible parties, if not already invited.
>
> 2. Liberty is also granted to the respondents to invite fresh applications in this regard if so desired from all eligible and NGOs./Societies who had earlier applied pursuant to Scheme floated by the Government of India (Annexure P-2) shall be at liberty to apply for the same if otherwise eligible and respondent-State may, if it so desires, provide for some preference for such like applicants.
>
> 3. We are constrained to observe that despite the fact that Ministry of New and Renewable Energy, Small Hydro Power Division, Government of India introduced the Scheme for development/up-gradation of Watermills and setting up Micro Hydel Projects up to 100 KW capacity in the year 2009, the respondent-State woke up from its slumber after three years by issuing notification dated 12.03.2012, vide which it notified the policy for setting up Micro Hydel Projects up to 100 KW in the State. On account of said inaction on the part of the State, colossal loss has been caused by way of the respondent-State not being able to gain the advantage which would have had floated to the State as per the Scheme envisaged by the Government of India. Even now, it is only communication dated 2nd July, 2014 issued by Government of India, vide which implementation of Small Hydro Power Programme with Central Financial Assistance has been

extended/sanctioned up to 31st March, 2017 under the 12th Plan that the same has come to the rescue of the respondent-State.

Accordingly, keeping into consideration the fact that the said sanction, as conveyed by the Government of India is up to 31st March, 2017, we direct the respondent-State to complete the entire process of allocation of the projects as expeditiously as possible and no latter than 31st January, 2017, so that the benefits flowing from the Scheme are harvested by the respondent-State. Chief Secretary to the Government of Himachal Pradesh is directed to ensure that the allocation of projects is completed on all counts before 31.01.2017, failing which, he shall be personally liable for non implementation of the directions passed by this Court.

With these directions, the writ petition is disposed of. Interim order stands vacated. No order as to costs.

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

Bhawani Devi …..Appellant.
Vs.
Deo, S/o Gainda and others …..Respondents.

RSA No.: 294 of 2008
Reserved on : 11.11.2016
Date of Decision: 30.11.2016

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit seeking specific performance of the agreement executed by defendant No.1- it was pleaded that possession was handed over after receiving sale consideration of Rs.10,000/- - the land was a tenancy land and therefore, sale deed could not be executed – it was agreed that sale deed would be executed on the conferment of proprietary rights – defendant No.1 failed to execute the sale deed and after the receipt of the notice, executed a gift deed in favour of defendant No.1- the defendant No.1 denied the execution of the agreement - the suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal that marginal witnesses to the agreement were not produced- there were contradictions regarding the name of the person in whose presence the money was paid- sale deed was executed on the same day, which probablized the version that the agreement was got executed by way of misrepresentation- the delivery of possession was also not established- the suit was rightly dismissed by the Court- appeal dismissed. (Para- 11 to 16)

For the appellant: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate.
For the respondents: Mr. Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this appeal, the appellant/plaintiff has challenged the judgment and decree passed by the Court of learned Additional District Judge, Mandi in Civil Appeal No. 63/2005 dated 25.03.2008, 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 (Senior Division), Mandi in Civil Suit No. 76/2003 dated 01.07.2005, whereby learned Civil Judge (Senior Division), Mandi dismissed the suit for specific performance of contract filed by the present appellant.

2. Brief facts necessary for the adjudication of the present case are that the appellant/plaintiff filed a suit to the effect that on 1st July, 1981 by way of a written agreement of sale, defendant No. 1 sold his land, i.e. 1/6th share measuring 4-15-17 bighas, comprised in Khewat Khatauni No. 40/99 to 107, Kitas 93, measuring 25-15-2 bighas, situated in Mauja Galu/91, illaqua Baggi Tungal, Tehsil Sadar, District Mandi, H.P., as per jamabandi for the year 1975-76 alongwith house in dilapidated condition, situated in Mauza Galu/91 for a sale consideration of Rs.10,000/- to the plaintiff. As per the plaintiff, the agreement was executed by defendant No. 1 on 01.07.1981 in the presence of witnesses and on that date, defendant No. 1 received entire sale consideration of Rs.10,000/- from the plaintiff and defendant No. 1 handed over the possession of the land as well as house to plaintiff and till the filing of the suit, plaintiff was in possession and enjoying land as well as house. It was further the case of the plaintiff that the said land being tenancy land and defendant No. 1 being non-occupancy tenant alongwith other co-sharers, as such registration of sale deed could not be carried out, however, defendant No. 1 had agreed to execute sale deed and register the land in the name of plaintiff as soon as the proprietary rights were conferred upon him and as soon as he become legally competent to effect sale deed of the land as well as the house. It was further the case of the plaintiff that on 25th May, 2003, she came to know that proprietary rights of the said land had been conferred upon defendant No. 1 vide mutation No. 152 and, as such, defendant No. 1 was competent to execute and register the sale deed in her favour. It was further the case of the plaintiff that she was always ready and willing to perform her terms of the contract and she verbally asked defendant No. 1 to execute the sale deed as per agreement dated 01.07.1981. Further, as per the plaintiff, defendant No. 1 initially avoided to execute and register the sale deed in her favour, so plaintiff through her counsel sent a legal notice on 06.06.2003, which was replied to by defendant No. 1 through his counsel. According to plaintiff, the reply was wrong and illegal and defendant No. 1 had wrongly and illegally refused to register the sale deed in her favour. It was further the case of the plaintiff that after the receipt of notice sent by her to defendant No. 1, he had executed a gift deed in favour of defendants No. 2 and 3 of the suit land to the extent of 4-6-1 bighas of land, which gift deed was bad and illegal and in violation of the terms and conditions of agreement dated 01.07.1981. It was on these bases that the plaintiff filed the suit praying for the following reliefs:

> *"(a) the decree for specific performance of contract may kindly be passed in favour of plaintiff and against the defendant No. 1 and the defendant No. 1 be directed to execute and register the sale deed of the land in question in consonance with the agreement dated 01.07.1981 in favour of the plaintiff;*
>
> *(b) it be declared that the gift deed dated 19.09.2003 is wrong and illegal, null and void;*
>
> *(c) the defendants may kindly be restrained by way of permanent prohibitory injunction from causing any interference in the possession and enjoyment of the plaintiff in the land in question; and*
>
> *(d) in the alternative, if the plaintiff is dispossessed forcibly by the defendants during the pendency of the suit and the plaintiff is found put of possession in that event, decree for possession of the land in question may kindly be passed in favour of the plaintiff and against the defendants and as such the suit of the plaintiff may kindly be decreed with costs and justice be done."*

3. The claim of the plaintiff was contested by the defendants. Execution of agreement to sell dated 01.07.1981 was denied by defendant No. 1 and it was also denied by defendant No. 1 that any consideration was received by him as alleged by the plaintiff or that the possession of the suit land was delivered to the plaintiff as alleged. As per defendant No. 1, he was an illiterate old man and simple villager and had never agreed to sell the suit land and register the same in the name of the plaintiff. It was further mentioned in the written statement that legal notice issued by the plaintiff was correctly replied by defendant No. 1 and the gift deed executed by defendant No. 1 in favour of defendants No. 2 and 3, who were his grandsons, was a

valid gift deed as neither defendant No. 1 had agreed to sell the suit land to the plaintiff nor he had parted the possession of the same to the plaintiff. It was further mentioned in the written statement that as the house was jointly owned and possessed by plaintiff and other co-sharers in the year 1981, there was no question of selling the same as alleged by the plaintiff. It was further mentioned in the written statement that plaintiff had no right to file a suit for specific performance and the right of the plaintiff was waived, abandoned and barred by limitation.

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

> "1. Whether the defendant No. 1 through an agreement dated 01.07.1981 agreed to sell his entire 1/6th share in the suit land alongwith a house situated over the suit land for a consideration of Rs.10,000/- to plaintiff as alleged?OPP
>
> 2. Whether the plaintiff who performed and still willing to perform his part of the agreement as alleged? OPP
>
> 3. If issues No. 1 and 2 are proved in affirmative whether the plaintiff is entitled for the relief of specific performance of contract as alleged?OPP
>
> 4. Whether the plaintiff is entitled for possession as alleged? OPP
>
> 5. Whether the gift deed dated 19.09.2003 executed by defendant No. 1 in favour of defendants Nos. 2 and 3 is wrong, null and void as alleged? OPP
>
> 6. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction? OPP
>
> 7. Whether the suit is barred by limitation? OPD
>
> 8. Whether the suit is not maintainable? OPD.
>
> 9. Relief.

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

> "Issue No. 1: No.
> Issue No. 2: No.
> Issue No. 3: No.
> Issue No. 4: No.
> Issue No. 5: No.
> Issue No. 6: No.
> Issue No. 7: Yes.
> Issue No. 8: No.
> Relief: Suit dismissed as per operative part of judgment."

6. While dismissing the suit filed by the plaintiff, it was held by the learned trial Court that remedy of specific performance was an equitable remedy and under Section 20 of the Specific Relief Act, Court was not bound to grant the relief just because there was an agreement to sell. It was further held by the learned trial Court that it stood proved from records that defendant No. 1 was illiterate person and as per him, contents of agreement Ex. PW1/A were never disclosed to him and his signatures were in fact obtained on the said agreement while obtaining his signatures on the sale deed Ex. PW2/A, which was executed between him and the plaintiff with respect to some other land, owned by defendant No. 1 for an amount of Rs.11,000/-. Learned trial Court further held that in these circumstances, burden was heavily on the plaintiff to prove that defendant No. 1 had put his signatures on the agreement to sell with full knowledge of the contents thereof, which the plaintiff had failed to prove on the basis of evidence led by her.

Learned trial Court further held that in fact evidence proved that signatures obtained on the said agreement were obtained alongwith sale deed Ex. PW2/A, which was executed by defendant No. 1 in favour of the plaintiff on the same day, by the Document Writer who drafted the sale deed. It was further held by the learned trial Court that according to the plaintiff, a sum of Rs.10,000/- which was the sale consideration of the agreement to sell was paid to defendant No. 1 by her in the presence of Jatia Ram and Khem Singh. Learned trial Court held that Khem Singh in his statement has specifically denied that no money was paid to defendant No. 1 by the plaintiff, whereas PW-8 Jatia Ram/J.R. Thakur in his statement had no where stated that an amount of Rs.10,000/- was paid to Deo by the plaintiff in his presence. Learned trial Court also took note of the fact that husband of the plaintiff Kaul Ram, who entered the witness box as PW-6 deposed that the sale consideration was paid to defendant No. 1 by his wife before the execution of sale deed in presence of Chet Ram, Khem Singh and Jatia Ram Thakur. On these bases, it was held by the learned trial Court that there was no evidence on record to show that Rs.10,000/- was in fact paid by the plaintiff to defendant No. 1, as mentioned in Ex. PW1/A. Learned trial Court also held that in ordinary course of business, whenever an agreement to sell is executed, a small part of the total amount is paid and major part of the consideration is paid at the time of registration of the sale deed and thus, execution of agreement Ex. PW1/A suffered from artificiality. On these bases, it was held by the learned trial Court that the plaintiff had failed to prove on record that defendant No. 1 had executed a legal and valid agreement Ex. PW1/A in favour of the plaintiff and had agreed to sell his entire 1/6th share to the plaintiff for consideration of Rs.10,000/-, which had been paid to him at the time of execution of agreement to sell. Learned trial Court also held that there was no evidence on record to prove that defendant No. 1 put his signatures on the agreement with full knowledge of the same. Learned trial Court further held that the plaintiff had also failed to prove on record that possession of the suit land was delivered to her by defendant No. 1 at the time of execution of the sale deed. It was also held by the learned trial Court that as proprietary rights were conferred upon defendant No. 1 through mutation No. 152 dated 18.04.1991 and as per plaintiff, she came to know about this fact on 25.05.2003, however, plaintiff led no evidence to substantiate as to how she came to know about mutation only on 25.05.2003. Learned trial Court also took note of the fact that it was admitted by the plaintiff and her witnesses that the factum of agreement was concealed from every one including defendant for 22 years and even copy of agreement was not given to defendant No. 1 and the agreement was only shown to him by her husband about two years before the filing of the suit. On these bases, it was also held by the learned trial Court that the suit was also barred by limitation.

7. Feeling aggrieved by the judgment and decree passed by the learned trial Court, the plaintiff filed an appeal, which was dismissed by the learned appellate Court vide its judgment and decree dated 25.03.2008. While dismissing the appeal so filed by the plaintiff, it was held by the learned appellate Court that perusal of agreement Ex. PW1/A demonstrated that the same was signed by Chet Ram with different pen and ink, whereas plaintiff Bhawani Devi had signed the same with different pen and ink and attesting witness Khem Singh had signed the agreement with same pen with which the agreement was inscribed. It was held by the learned appellate Court that it was apparent that signatures of the attesting witnesses on agreement were procured at different time with different pen and ink, which rendered the execution of the agreement to be highly doubtful. It was further held by the learned appellate Court that PW-2, D.N. Sharma, who was working as Document Writer had stated that agreement Ex. PW1/A was scribed by him as per the instructions of plaintiff Bhawani Devi and Deo, however, name and address of PW-2, D.N. Sharma was not written on Ex. PW1/A. Learned appellate Court held that being a Document Writer, PW-2 under Rules was required to maintain a register, but he neither entered the agreement in his register nor he had signed the same. As per learned appellate Court, this also rendered execution of the agreement to be doubtful. It was further held by the learned appellate Court that plaintiff could not prove that he had paid sale consideration of Rs.10,000/- to defendant No. 1. It was held by the learned appellate Court that as per recitals of Ex. PW1/A, sale consideration of Rs.10,000/- was already paid to defendant No. 1, whereas PW-1 had stated that sale consideration of Rs.10,000/- was paid to defendant No. 1 in presence of Khem Singh and J.R. Thakur, however, PW-6 Kaul Ram had stated that the same was paid in presence of

attesting witnesses Chet Ram and Khem Singh. Learned appellate Court further held that PW-7 Chet Ram had stated that no sale consideration was paid by plaintiff to defendant No. 1 in his presence or in the presence of other attesting witnesses nor plaintiff had brought any other document on record to substantiate that an amount of Rs.10,0000/- was paid by the plaintiff to defendant No. 1. On these bases, it was held by the learned appellate Court that evidence led by the plaintiff could not prove the execution of agreement Ex. PW1/A by defendant No. 1 in favour of the plaintiff nor it could be proved by the plaintiff that she had paid sale consideration of Rs.10,000/- to defendant No. 1 at the time of execution of the agreement. It was further held by the learned appellate Court that records demonstrated that plaintiff had purchased land measuring 13-9-18 bighas from defendant No. 1 for consideration of Rs.11,000/- vide sale deed Ex. PW2/A and it also stood proved that agreement Ex. PW1/A was prepared by Kaul Ram, husband of plaintiff and signatures of defendant No. 1 and attesting witnesses were obtained at the time of execution of sale deed Ex. PW2/A. Learned appellate Court further held that keeping into consideration the fact that defendant No. 1 was duly recorded as owner in possession of the suit land, he was competent to execute gift deed in favour of defendants No. 2 and 3 and no evidence was led by plaintiff to prove that gift so executed by defendant No. 1 in favour of defendants No. 2 and 3 was illegal. Learned appellate Court also upheld the finding returned by the learned trial Court on the point of limitation by holding that as per the pleadings of the plaintiff, the sale deed was agreed to be executed after acquisition of proprietary rights of the suit land by defendant No. 1, which were acquired by him vide mutation No. 152 dated 18.04.1991 and hence time started from 18.04.1991, whereas plaintiff had not instituted the suit within three years form the said date. On these bases, the appeal so filed by the plaintiff was dismissed by the learned appellate Court.

8. These judgments and decrees passed by both the learned Courts below are under challenge by way of this appeal.

9. This appeal was admitted on 26.06.2008 on the following substantial questions of law:

> *"1. Whether the learned Courts below mis-read and mis-construed the evidence especially the documentary evidence in coming to the conclusion that no agreement to sell has been entered into between the parties?*
>
> *2. Whether the learned Courts below have wrongly come to the conclusion that the suit filed by the plaintiff was time barred?*

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

11. A perusal of Ex. PW1/A demonstrates that it is mentioned therein that in lieu of the said agreement to sell, an amount of Rs.10,000/- stood paid by plaintiff to defendant No. 1 and he has handed over the possession of the land, subject matter of the said agreement to the plaintiff. Plaintiff in Court as PW-1 has stated that she had paid Rs.10,000/- to defendant No. 1 in the presence of her lawyer Jatia Ram and Khem Singh. Khem Singh was not produced as a witness by the plaintiff. Besides this, a perusal of the agreement to sell Ex. PW1/A demonstrates that execution of the same has been witnessed by Chet Ram and Khem Singh. Jatia Ram @ J.R. Thakur has neither appended his signatures on the same as a witness nor he has identified the vendor and vendee. This fact has also been admitted in his cross-examination by Jatia Ram/J.R. Thakur, who entered the witness box as PW-8. Further, Jatia Ram has nowhere stated in his deposition in the Court that in lieu of the execution of agreement to sell Ex. PW1/A, an amount of Rs.10,000/- was in fact paid to defendant by the plaintiff in his presence.

12. Whereas as per the plaintiff, the sale consideration was paid by her to the defendant in the presence of Chet Ram and Jatia Ram, however, her husband who entered the witness box as PW-6 has stated that the amount of Rs.10,000/- was paid by the plaintiff to the defendant before the agreement to sell was scribed and this payment was made in the presence of Chet Ram, Khem Singh and Jatia Ram. Chet Ram, who entered the witness box as PW-7,

however, has stated in his cross-examination that no exchange of money took place in his presence and neither the defendant had agreed in their presence that he had received the sale consideration. Thus, the concurrent finding returned against the plaintiff by both the learned Courts below that there was no evidence on record to show that a sum of Rs.10,000/- was paid by plaintiff to defendant No. 1, as mentioned in Ex. PW1/A, is correct finding which is duly borne out from the records of the case.

13. Besides this, it is an admitted fact that on that very day when the alleged agreement to sell Ex. PW1/A was purportedly entered into between the plaintiff and the defendant, a sale deed was executed between the plaintiff and the defendant, vide which defendant had sold some other land in his ownership to the plaintiff for an amount of Rs.11,000/-. The specific stand of the defendant in the written statement was that he was an illiterate rustic person and was not aware of the contents of the document on which his signatures were obtained by the plaintiff and in fact he had not entered into any agreement to sell the land which was under his tenancy in favour of the plaintiff vide Ex. PW2/A nor he had received any sale consideration in lieu of the same. Both the learned Courts below while disbelieving the case of the plaintiff have held that plaintiff had failed to prove on record that in fact any agreement to sell was actually entered into between the plaintiff and the defendant vide Ex. PW1/A.

14. In my considered view, the findings so returned by both the learned Courts below can neither be said to be perverse nor it can be said that the findings so returned were not borne out from the records of the case. The evidence led by the plaintiff to prove her case is neither cogent nor convincing as held by both the learned Courts below. It otherwise defies logic as to why defendant would have had agreed to enter into an agreement to sell vis-à-vis land which was only under his tenancy on the terms and conditions as are contained in Ex. PW1/A. The factum of the possession of the suit land having been parted by defendant in favour of the plaintiff in lieu of Ex. PW-1/A has also not been substantiated on record by the plaintiff. The execution of Ex. PW1/A in the mode and manner in which the plaintiff wants this Court to believe is shrouded with suspicion, especially in the light of the testimony of PW-2, the Document Writer, who has incidentally stated that though he had scribed the said document, but he neither entered this agreement in his register nor he had signed the same. Further, in my considered view, as the plaintiff was not able to prove the execution of agreement to sell, the findings returned by both the learned Courts below to the effect that as defendant No. 1 was owner-in-possession of the suit land, he was competent to execute gift deed in favour of defendants No. 2 and 3, cannot be faulted with. This gift deed admittedly was executed by defendant No. 1 in favour of defendants No. 2 and 3 after ownership rights were conferred upon him vide mutation No. 152 dated 18.04.1991. Besides this, despite the fact that mutation was attested in favour of defendant No. 1 on 18.04.1991, the suit was filed by the plaintiff in the year 2003. Learned trial Court has categorically held that no evidence was led by the plaintiff to substantiate that she came to know about the mutation which was entered in favour of defendant No. 1 only on 25.05.2003, as stated in the plaint. Learned trial Court while deciding the issue of limitation against the plaintiff has also taken note of the fact that neither there was any copy of agreement Ex. PW1/A handed over to defendant No. 1 and in fact this agreement was brought to the notice of defendant No. 1 by the husband of plaintiff only about two years before filing of the suit. The finding returned by learned appellate Court that signatures of attesting witnesses on agreement were procured at different times, as was evident from different pen and ink used by them, which rendered the execution of the agreement to be highly doubtful is also duly borne out from the records of the case.

15. I have carefully perused the judgments and decrees passed by both the learned Courts below as well as the records of the case and in my considered view, it cannot be said that the findings returned by both the learned Courts below are either contrary to the records or are not borne out from the records of the case. There is no misreading or mis-construction of the evidence on record and the conclusion arrived at by both the Courts below that in fact no agreement to sell was entered into between the parties and no payment was made by plaintiff to defendant No. 1 is duly borne out from the records of the case.

16. Similarly, the fact that the suit filed by the plaintiff being time barred is also duly borne out from the records of the case and it cannot be said that the finding returned to this effect is perverse or contrary to the records as already discussed above. Substantial questions of law are answered accordingly.

In view of the discussion held above, as there is no merit in the appeal, the same is dismissed with costs.

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

Fateh Singh and others ….Petitioners.
Versus
State of H.P. ….Respondent.

Cr.R. No. : 116 of 2008.
Reserved on: 17.11.2016.
Decided on: 30.11.2016.

Indian Forest Act, 1927- Section 41 and 42- **Himachal Pradesh Forest Produce Transit (Land Routes) Rules, 1978**- Rule 20- Accused were found transporting 37 wooden frames of different sizes without any valid permit – accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- the Court can interfere in exercise of revisional jurisdiction only if the findings are perverse, untenable in law, grossly erroneously, glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously- the prosecution case was for non- cognizable offence- however, police carried investigation without an order of the Magistrate – Courts below failed to appreciate that police officer could not have investigated the case against the accused in absence of the order of the Magistrate and entire proceedings were vitiated – further, there was no reference in the notice of acquisition to the Rule 20 of H.P. Produce Transit (Land Routes) Rules, 1978 and the same was defective- revision allowed and the accused acquitted. (Para-9 to 14)

Cases referred:

Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 SCC 123
State of H.P. versus Satpal Singh @ Satta and another and the connected matter, Latest HLJ 2009 (HP) 732
Shiv Narain Bhasin v. State of Himachal Pradeswh 1985 SLC 274

For the petitioners : Mr. G.R. Palsra, Advocate.
For the respondent : Mr. Vikram Thakur and Ms. Parul Negi, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way this revision petition, petitioners have challenged the judgment passed by the Court of learned Additional Sessions Judge, Mandi, District Mandi, in Criminal Appeal No. 3 of 2005, dated 23.05.2008, vide which learned Appellate Court, while dismissing the appeal filed by the present petitioners, affirmed the judgment of conviction and sentence imposed upon the present petitioners by the Court of learned Sub Divisional Judicial Magistrate, Chachiot at Gohar, District Mandi, in Police Challan No. 257-I/2001 (2000), dated 12.01.2005, whereby learned trial Court while convicting the present petitioners for commission of offences punishable under Sections 41 and 42 of the I.F. Act (hereinafter referred to as 'I.F. Act') and Rule 20 of Himachal

Pradesh Forest Produce Transit (Land Routes) Rules, 1978 framed under the said Sections, sentenced each of the petitioners (hereinafter referred to as 'accused' for short) to undergo simple imprisonment for a period of six months and to pay a fine of Rs.1,000/- and in default of payment of fine to undergo simple imprisonment for a period of one month.

2. The case of the prosecution was that on 25.02.2000 at 1:30 p.m. Head Constable Paras Ram alongwith LHC Prem Singh while patrolling at Chel Chowk intercepted one Eicher truck bearing registration No. HP-32-0909 which came from Gohar side and was proceeding towards Mandi. This truck was intercepted for routine checking and three persons were sitting in the same who revealed their names as Fateh Singh S/o Shri Dharam Singh, driver of the truck, Fateh Singh s/o Shri Devi Singh, owner of the truck and Begam Singh s/o Shri Karam Singh. When the truck was checked, the same was found loaded with bories containing maize. These bories of maize were removed on one side with the help of labourers namely Bhimu and Nagnu, which revealed frames wrapped with Jute mat concealed underneath the bories. On this, photographers Pankaj Kumar and Tapender Singh and Forest Guard Bassa were called on the spot. Bories containing maize were got unloaded with the assistance of labourers. Besides sixty six bories of maize, three bundles of wooden frames wrapped with jute mat were found in the truck. On counting, 37 wooden frames of different sizes were recovered. Photographs of the truck and wooden frames were taken and the owner of the truck was enquired about the transportation of the same who told that the frames were from his timber of T.D. He however could not produce any permit qua transportation of recovered wooden frames. In these circumstances, truck as well as the wooden frames were taken into possession and further investigation was carried out. After completion of the investigation, challan was filed in the court and as a prima facie case was found against the accused, notice of accusation was put to them for commission of offences punishable under Sections 41 and 42 of I.F. Act, to which they pleaded not guilty and claimed trial.

3. On the basis of evidence led by the prosecution both ocular as well as documentary, learned trial Court found the accused guilty of having committed offences punishable under Sections 41 and 42 of the I.F. Act and Rule 20 of Himachal Pradesh Forest Produce Transit (Land Routes) Rules 1978 and sentenced each of them to undergo six months' simple imprisonment and to pay a fine of Rs. 1000/-.

4. In appeal, the judgment of conviction and sentence so imposed upon the accused by the learned trial Court was upheld by the learned Appellate Court.

5. Feelings aggrieved by the said judgments, the petitioners have filed the present revision petition.

6. Mr. G.R. Palsra, learned Counsel appearing for the petitioners argued that the judgment of conviction passed against the accused by the learned trial Court and upheld by the learned Appellate Court is perverse and not sustainable in the eyes of law. Mr. Palsra argued that police are debarred from investigating cases under Sections 41 and 42 of the I.F. Act in view of the provisions of Sub Section (2) of Section 155 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C' for short). Mr. Palsra further argued that in the notice of accusation put to the accused, no reference of violation of Rules under Section 41 and 42 of the I.F. Act was stated, which as per him was necessary especially because Section 42 of the I.F Act is merely an enabling section empowering the State government to prescribe by rules, penalties of imprisonment or fine or both for contravention of Rules framed under Section 41 of the I.F. Act. In these circumstances, according to Mr. Palsra, it was necessary for the trial Magistrate to state the precise Rules framed under Section 41 of the I.F. Act, for the violation of which the accused was required to be punished and therefore, notice of accusation was defective. It was submitted by Mr. Palsra that as the entire proceedings initiated against the petitioners were defective and as this very important aspect of the matter had not been taken into consideration by both the learned Courts below, therefore, on these bases, he argued that the judgment of conviction passed by the learned trial Court and upheld by the learned Appellate Court deserved to be set aside.

7. Mr. Vikram Thakur, learned Deputy Advocate General, on the other hand, argued that there was no merit in the contention of Mr. Palsra as both the learned Courts below on the basis of material on record had held that the petitioners were guilty of the offences for which they were convicted and as there was no plea available with the petitioners on merit to assail the judgments so passed by the learned Courts below, therefore, in the revision petition, the petitioners had come out with this contention of the proceedings initiated against them being void abinitio, which contention of the petitioners, according to Mr. Thakur was totally incorrect and not sustainable in law. On these bases, it was prayed by Mr. Thakur that there was no merit in the present appeal and the same be dismissed.

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

9. Before proceeding in the matter, it is relevant to take note of what is the scope of revisional jurisdiction of this Court. It is settled law that the scope of revisional jurisdiction of this Court does not extend to re-appreciation of evidence. It has been held by the Hon'ble Supreme Court that the High Court in exercise of its revisional power can interfere only if the findings of the Court whose decision is sought to be revised is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously. It has been held by Hon'ble Supreme Court in ***Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123***, that unmerited and undeserved prosecution is an infringement of guarantee under Article 21 of the Constitution of India. In this case, Hon'ble Supreme Court has further held that the purpose of revision jurisdiction is to preserve the power in the Court to do justice in cases of criminal jurisprudence.

10. Keeping in view the consideration of law so declared by the Hon'ble Supreme Court, this Court proceeds to adjudicate the revision petition on merit.

11. Sub Section 2 of Section 155 of Cr.P.C provides that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. The exception carved out in Sub Section 4 of said Section is that where a case relates to two or more offences, out of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

12. Admittedly in the present case, the case made out by the prosecution against the accused was for non-cognizable offence. However, rather than following the procedure provided in Sub Section (2) of Section 155 of the Cr.P.C, the police officer carried on with the investigation of the non-cognizable case without there being any order of the Magistrate having power to try such case. This is further evident from the fact that FIR registered in this regard Ext. PW9/A, dated 20.06.2002, nowhere contains that the same has been registered on the basis of directions issued by the concerned Magistrate to carry out investigation in the case. Therefore, there is merit in the contention of Mr. Palsra that the police could not have investigated the non-cognizable offence without the prior permission of the Magistrate and information should have been referred to the Magistrate concerned. This Court in ***State of H.P. versus Satpal Singh @ Satta and another and the connected matter, Latest HLJ 2009 (HP) 732*** has held that offences under Sections 41 and 42 of the Indian Forest Act are non cognizable as per Schedule II of the Criminal Procedure Code and if the police are not permitted by the Magistrate to investigate the case for such offences, the investigation carried out would vitiate entire proceedings being illegal. Accordingly, in view of the statutory provisions as well as law laid down by this Court (supra), in my considered view, the judgment and conviction passed against the accused by the learned trial Court and upheld by the learned Appellate Court are perverse and liable to be set aside. Both the learned Courts below have failed to appreciate that police officer could not have had investigated the case against the accused in the absence of order of Magistrate as contemplated under Sub Section (2) of Section 155 of the Cr.P.C and in the absence of any such order by the Magistrate, the entire proceedings initiated against the petitioners were vitiated.

13. Similarly, there is also merit in the contention of Mr. G .R. Palsra, Advocate that the notice of accusation put to the accused was defective as no reference of violation of Rules framed under Sections 41 and 42 of the I.F. Act has been stated in the notice of accusation so put to the respondents. A perusal of the judgment passed by the learned trial Court demonstrates that the accused have been convicted under Rule 20 of Himachal Pradesh Forest Produce Transit (Land Routes) Rules 1978, framed under Sections 41 and 42 of I.F Act. A perusal of the notice of accusation put to the accused demonstrates that there was no reference of violation of any Rule framed under Section 41 and 42 of the I.F Act put to the present petitioners. This Court in ***State of Himachal Pradesh versus Nagnu Ram and others, Criminal Appeal No. 293 of 2004*** while relying upon the judgment passed in *Shiv Narain Bhasin v. State of Himachal Pradeswh 1985 SLC 274* has held that Section 42 of I.F Act is merely an enabling Section empowering the State government to prescribe by Rules, penalties of imprisonment or fine or both for contravention of Rules framed under Section 41 of the I. F. Act and it was necessary for the trial Magistrate to state the precise Rules framed under Section 41 of the Indian Forest Act for the violation of which the accused was required to be punished and therefore, notice of accusation was held to be defective. This Court further held that where there was allegation of violation of Rules, reference of Rule was necessary and absence of reference of Rules, more particularly, Rule 20 framed under Sections 41 and 42 of the I.F. Act by the State Government in the notice of accusation which was put to the accused who were not given an opportunity to project their defence to the accusation of violation of Rules framed under Section 41 and 42 of the Indian Forest Act caused prejudice to the accused/ respondents. Accordingly, in my view, as there was no reference of Rule 20 framed under Sections 41 and 42 of the I.F. Act by the State Government in the notice of accusation which was put to the accused, the same was defective as per law laid down by this Court.

14. Therefore, in view of the above discussion, the judgment of conviction passed against the petitioners and the sentence imposed upon them by the learned trial Court in Police Challan No. 257-I/2001(2000) dated 12.01.2005 is set aside and judgment passed by the learned Appellate Court in Criminal Appeal No. 3 of 2005 dated 23.05.2008 vide which it affirmed the judgment passed by the learned trial Court is also set aside. The petitioners are acquitted of the offences for which they were tried by the learned trial Court. Fine amount, if any, deposited by the accused/petitioners is ordered to be refunded to them in accordance with law. This petition stands disposed of accordingly. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Santosh Kumar s/o Sh. Dharam Singh ......Petitioner/Co-accused
Versus
State of H.P. ......Non-petitioner

Cr.MP(M) No. 1399 of 2016
Order Reserved on 25.11.2016
Date of Order: 30.11.2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 341, 323, 324, 307 read with Section 34 of I.P.C – petitioner has filed the present petition for bail- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger

interest of the public and State- the petitioner is a student and is not required for investigation – hence, the petition allowed and the petitioner ordered to be released on bail subject to conditions. (Para-5 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 Apex Court 179
The State Vs. Captain Jagjit Singh, AIR 1962 Apex Court 253
Sanjay Chandra Vs. CBI, 2012 Criminal Law Journal 702 Apex Court

For petitioner/Co-accused : Mr. Sanjeev Bhushan, Sr.Advocate with Mr. Rakesh Chauhan, Advocate
For Non-petitioner : Mr. Pankaj Negi, Dy. A.G.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 Cr.PC for grant of bail relating to FIR No.274 of 2016 dated 20.10.2016 registered under Sections 341, 323, 324, 307 read with section 34 IPC in Police Station Hamirpur Distt. Hamirpur (H.P.).

Brief facts of case:

2. On dated 20.10.2016 injured Vishal reported to the investigating agency that on 20.10.2016 he visited Govt. Degree College Hamirpur to appear in a paper and after examination at about 4.15 P.M. he was returning home alongwith Neeraj Sharma on his motorcycle. It is alleged that when injured Vishal came out of the gate of the college then accused persons namely Santosh Kumar, Saurav and Aadesh were standing. It is alleged that accused persons asked the injured to alight from his motorcycle. It is further alleged that as soon as injured alighted from the motorcycle all the accused persons started beating injured with fist and leg blows. It is further alleged that co-accused caught hold the injured from his arms and legs and co-accused Santosh Kumar gave a blow of 'Khukhri' (Sharp edged weapon) on the head of injured. It is further alleged that accused persons also proclaimed that they would kill injured namely Vishal. It is further alleged that after receiving blows of 'Khukhri' (sharp edged weapon) injured Vishal became unconscious and fell down. It is further alleged that injured was saved by Neeraj Sharma, Pankaj Kumar and Tain Singh who brought the injured to hospital for his medical treatment. It is further alleged that 'Khukhri' (Sharp edged weapon) recovered. It is further alleged that Medical Officer has given opinion that injury upon the body of injured was dangerous to life.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Deputy Advocate General appearing on behalf of State and Court also perused the entire record carefully.

4. Following points arises for determination:

(1) Whether bail application filed by co-accused Santosh Kumar is liable to be accepted as mentioned in memorandum of grounds of bail application?

(2) Final Order.

Findings upon Point No.1 with reasons.

5. Submission of learned Advocate appearing on behalf of co-accused Santosh Kumar that Santosh Kumar did not commit any offence as alleged by the investigating agency cannot be decided at this stage of the case. Same fact will be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

6. Submission of learned Advocate appearing on behalf of co-accused Santosh Kumar that investigation is completed in the present case and petitioner is not required for investigation purpose and petitioner is a student of BA-IInd year and he has to appear in coming

examination and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered (1) Nature and seriousness of offence. (2) Character of evidence. (3) Reasonable possibility of the presence of accused in trial or investigation. (4) Reasonable apprehension of witnesses being tampered with. (5) Larger interest of the public or State. See AIR 1978 Apex Court 179 ***Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see AIR 1962 Apex Court 253 ***The State Vs. Captain Jagjit Singh.*** It is well settled law that grant of bail is rule and committal to jail is an exception. It is also well settled law that refusal of bail is restriction on the personal liberty of individual guaranteed under Article 21 of the Constitution of India. It is well settled law that it is not in the interest of justice that accused should be kept in jail for an indefinite period. See **2012 Criminal Law Journal 702 Apex Court Sanjay Chandra Vs. CBI.** In the present case accused is in judicial custody and accused is not required for investigation purpose. In the present case weapon is also recovered by the investigating agency. There is no report of investigating agency that injured namely Vishal is admitted in the hospital as in-door patient as of today. In view of the fact that petitioner is a student and in view of the fact that petitioner is not required for investigation purpose by the investigating agency and in view of the fact that trial will be concluded in due course of time Court is of the opinion that it is expedient in the ends of justice to release the petitioner on bail.

7. Submission of learned Deputy Advocate General appearing on behalf of the State that if petitioner is released on bail at this stage then petitioner will induce and threat prosecution witnesses and on this ground bail application be declined is rejected being devoid of merits for reasons hereinafter mentioned. Co-accused Santosh Kumar has given undertaking that he would not induce or threat prosecution witnesses. It is held that conditional bail will be granted to co-accused Santosh Kumar. It is held that if co-accused Santosh Kumar will flout terms and conditions of conditional bail then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail as provided under section 439(2) Code of Criminal Procedure 1973. In view of the above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order).

8. In view of my findings on point No.1 above bail application filed by co-accused Santosh Kumar under Section 439 of Code of Criminal Procedure 1973 is allowed on furnishing personal bond in the sum of Rupees One lac with two sureties in the like amount to the satisfaction of learned Trial Court on following terms and conditions. (1) That co-accused Santosh Kumar will join investigation whenever and wherever directed by investigating officer in accordance with law. (2) That co-accused Santosh Kumar will regularly attend proceedings of learned Trial Court till conclusion of trial. (3) That co-accused Santosh Kumar shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing facts to the investigating officer or to the Court. (4) That co-accused Santosh Kumar will not leave India without prior permission of the Court. (5) That co-accused Santosh Kumar will not commit similar offence qua which he is accused. Observations made hereinabove will not effect merits of the case in any manner and will be strictly confined for disposal of present bail application. Cr.MP(M) No.1399/2016 is disposed of.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Saurav s/o Sh. Braham Dass ……Petitioner/Co-accused
Versus
State of H.P. ……..Non-petitioner

Cr.MP(M) No. 1400 of 2016
Order Reserved on 25.11.2016
Date of Order: 30.11.2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 341, 323, 324, 307 read with Section 34 of I.P.C – petitioner has filed the present petition for bail- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- the petitioner is a student and is not required for investigation – hence, the petition allowed and the petitioner ordered to be released on bail subject to conditions. (Para-5 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 Apex Court 179
The State Vs. Captain Jagjit Singh, AIR 1962 Apex Court 253
Sanjay Chandra Vs. CBI, 2012 Criminal Law Journal 702 Apex Court

For petitioner/Co-accused : Mr. Sanjeev Bhushan, Sr.Advocate with Mr. Rakesh Chauhan, Advocate
For Non-petitioner : Mr. Pankaj Negi, Dy. A.G.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 Cr.PC for grant of bail relating to FIR No.274 of 2016 dated 20.10.2016 registered under Sections 341, 323, 324, 307 read with section 34 IPC in Police Station Hamirpur Distt. Hamirpur (H.P.).

Brief facts of case:

2. On dated 20.10.2016 injured Vishal reported to the investigating agency that on 20.10.2016 he visited Govt. Degree College Hamirpur to appear in a paper and after examination at about 4.15 P.M. he was returning home alongwith Neeraj Sharma on his motorcycle. It is alleged that when injured Vishal came out of the gate of the college then accused persons namely Santosh Kumar, Saurav and Aadesh were standing. It is alleged that accused persons asked the injured to alight from his motorcycle. It is further alleged that as soon as injured alighted from the motorcycle all the accused persons started beating injured with fist and leg blows. It is further alleged that co-accused caught hold the injured from his arms and legs and co-accused Santosh Kumar gave a blow of 'Khukhri' (Sharp edged weapon) on the head of injured. It is further alleged that accused persons also proclaimed that they would kill injured namely Vishal. It is further alleged that after receiving blows of 'Khukhri' (Sharp edged weapon) injured Vishal became unconscious and fell down. It is further alleged that injured was saved by Neeraj Sharma, Pankaj Kumar and Tain Singh who brought the injured to hospital for his medical treatment. It is further alleged that 'Khukhri' (Sharp edged weapon) recovered. It is further alleged that Medical Officer has given opinion that injury upon the body of injured was dangerous to life.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Deputy Advocate General appearing on behalf of State and Court also perused the entire record carefully.

4. Following points arises for determination:

(1) Whether bail application filed by co-accused Saurav is liable to be accepted as mentioned in memorandum of grounds of bail application?

(2) Final Order.

Findings upon Point No.1 with reasons.

5. Submission of learned Advocate appearing on behalf of co-accused Saurav Kumar that Saurav did not commit any offence as alleged by the investigating agency cannot be decided at this stage of the case. Same fact will be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

6. Submission of learned Advocate appearing on behalf of co-accused Saurav that investigation is completed in the present case and petitioner is not required for investigation purpose and petitioner is a student of BA-IIIrd year and he has to appear in coming examination and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered (1) Nature and seriousness of offence. (2) Character of evidence. (3) Reasonable possibility of the presence of accused in trial or investigation. (4) Reasonable apprehension of witnesses being tampered with. (5) Larger interest of the public or State. See AIR 1978 Apex Court 179 ***Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see AIR 1962 Apex Court 253 ***The State Vs. Captain Jagjit Singh.*** It is well settled law that grant of bail is rule and committal to jail is an exception. It is also well settled law that refusal of bail is restriction on the personal liberty of individual guaranteed under Article 21 of the Constitution of India. It is well settled law that it is not in the interest of justice that accused should be kept in jail for an indefinite period. See **2012 Criminal Law Journal 702 Apex Court Sanjay Chandra Vs. CBI.** In the present case accused is in judicial custody and accused is not required for investigation purpose. In the present case weapon is also recovered by the investigating agency. There is no report of investigating agency that injured namely Vishal is admitted in the hospital as in-door patient as of today. In view of the fact that petitioner is a student and in view of the fact that petitioner is not required for investigation purpose by the investigating agency and in view of the fact that trial will be concluded in due course of time Court is of the opinion that it is expedient in the ends of justice to release the petitioner on bail.

7. Submission of learned Deputy Advocate General appearing on behalf of the State that if petitioner is released on bail at this stage then petitioner will induce and threat prosecution witnesses and on this ground bail application be declined is rejected being devoid of merits for reasons hereinafter mentioned. Co-accused Saurav has given undertaking that he would not induce or threat prosecution witnesses. It is held that conditional bail will be granted to co-accused Saurav. It is held that if co-accused Saurav will flout terms and conditions of conditional bail then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail as provided under section 439(2) Code of Criminal Procedure 1973. In view of the above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order).

8. In view of my findings on point No.1 above bail application filed by co-accused Saurav under Section 439 of Code of Criminal Procedure 1973 is allowed on furnishing personal bond in the sum of Rupees One lac with two sureties in the like amount to the satisfaction of learned Trial Court on following terms and conditions. (1) That co-accused Saurav will join investigation whenever and wherever directed by investigating officer in accordance with law. (2) That co-accused Saurav will regularly attend proceedings of learned Trial Court till conclusion of trial. (3) That co-accused Saurav shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing facts to the investigating officer or to the Court. (4) That co-accused Saurav will not leave India without prior permission of the Court. (5) That co-accused Saurav will not commit similar offence qua which he is accused. Observations made hereinabove will not effect merits of the case in any manner and will be strictly confined for disposal of present bail application. Cr.MP(M) No.1400/2016 is disposed of.

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

State of Himachal Pradesh and another ….Appellants.
Versus
Shakuntla Devi and others ….Respondents.

RSA No.: 562 of 2007
Reserved on:16.11.2016
Decided on: 30.11.2016

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs pleaded that suit land was jointly possessed by S and D as tenants – it was succeeded by the plaintiffs after the death of S and D- proceedings for ejectment were initiated against the plaintiffs on the basis of ejectment order passed by SDO (Civil) against D- the order was a nullity as no notice was issued to D – the defendants pleaded that the suit land was granted to S and D but the allotment was cancelled on the ground that land was not utilized for the purpose for which it was granted- suit was dismissed by the Trial Court- an appeal was preferred, which was allowed – held in second appeal that the possession of the plaintiffs and the fact that ejectment proceedings were initiated against the plaintiffs were not disputed – plaintiffs were not parties to the earlier ejectment proceedings- even if the plaintiffs are tress passers, they cannot be ejected except in accordance with law- Appellate Court had rightly restrained the defendants from ejecting the plaintiffs – appeal dismissed. (Para-11 to 14)

For the appellants. : Ms. Parul Negi, Dy. Advocate General.
For the respondents : Mr. S.C. Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, the State has challenged the judgment and decree passed by the Court of learned Additional District Judge, Solan, in Civil Appeal No. 3-S/13 of 2006, dated 28.04.2006, vide which, learned Appellate Court while accepting the appeal filed by the plaintiffs set aside the judgment and decree passed by the Court of learned Civil Judge (Sr. Divn.) Kandaghat, District Solan, in Civil Suit No. 18-K/1 of 2001 dated 24.10.2005.

2. Brief facts necessary for the adjudication of this case are that respondents/plaintiffs (hereinafter referred to as 'plaintiffs') filed a suit for declaration and permanent prohibitory injunction to the effect that Shivia and Dayal Chand were real brothers and inducted as tenants by Gram Panchayat Satrol, Tehsil Kandaghat in the year 1956 as they were possessing land comprised in Khasra No. 833/8 min, measuring 10-00 bighas, situated in Mauza Satrol, Tehsil Kandaghat, District Solan, H.P. (hereinafter referred to as 'suit land'). Further as per the plaintiffs, the suit land was jointly possessed by Shivia and Dayal Chand. Shivia died in the year 1974 and after his death, he was succeeded by Smt. Prago Devi. Shivia had no children. Smt. Prago Devi who possessed the suit land jointly with Dayal Chand died about nine months back (from the filing of suit) and she being issueless was succeeded by the plaintiffs and proforma defendants. It was further the case of the plaintiffs that after the death of Smt. Prago Devi, suit land came to be jointly possessed by the plaintiffs and proforma defendants, as such, plaintiffs were also tenants in possession of the suit land and the defendants had no right to dispossess the plaintiffs from the suit land except in due course of law. As per plaintiffs, learned A.C. 2nd Grade, Kandaghat had initiated ejectment proceedings for dispossessing the plaintiffs from the suit land without issuing any process to the plaintiffs or their predecessor in interest Smt. Prago and /or Shivia alia Shiv Ram. Further, as per plaintiffs, it had come to their notice that said proceedings had been initiated on the basis of a ejectment order which was

passed against Dayal Chand (proforma defendant) by Sub Divisional Collector in case No. 2-8/98 dated 20.01.2001 as well as on the basis of order dated 24.11.1997 passed by A.C. 2nd Grade Kandaghat in case No. 5/13 of 1997 dated 24.11.1997. It was further the case of the plaintiffs that the said order was illegal as at no point of time, plaintiffs or their predecessor in interest Smt. Prago or Shivia were issued notice under Section 163 of the H.P. Land Revenue Act. On these bases, it was urged by the plaintiffs that order dated 20.01.2001 passed by Sub Divisional Collector Kandaghat and order dated 24.11.1997 passed by A.C. 2nd Grade, Kandaghat were illegal, null and void and not binding on the rights, title or interests of the plaintiffs and same cannot be executed against the plaintiffs and the plaintiffs cannot be disposed from the suit land on the basis of said orders. The plaintiffs thus prayed for the following reliefs

> *"a) a decree for declaration to the effect that the judgments/orders dated 20.01.2001 passed in case No. 2/8 of 1998 by the Sub Divisional Collector Kandaghat and the order dt. 24.11.1997 passed by A.C. 2nd Grade Kandaghat in case No. 5/13 of 1997 are wrong, illegal, null and void abinitio and are not binding on the rights, title and interests of the plaintiffs and the same cannot be executed against the plaintiffs and the plaintiffs cannot be dispossessed from the suit land which is joint one under the garb of said orders;*
>
> *b) a decree for permanent prohibitory injuncti9on restraining the defendants from interfering in the suit land, and ousting/dispossessing the plaintiffs from the suit land comprised in Khasra No. 833/min, measuring 10-00 bighas, situated in Mauza Satrol, Tehsil Kandaghat, District Solan, except in due process of law either by themselves or through their agents, servants, assigns, officials whosoever in any manner whatsoever;*
>
> *c) the costs of the suit."*

3. The suit so filed by the plaintiffs was contested by the defendants. It was denied by the defendants that orders challenged in the civil suit were illegal. It was further mentioned in the written statement that the orders passed by the Revenue Officers were binding upon all concerned as plaintiffs had no right, title or interest over the land in dispute granted to Shivia and Dayal Chand was cancelled by learned Collector, Kandaghat, vide order dated 20.03.1991, on the ground that the land was not put to use by the lessee for the purpose for which it was leased out and Department of Forest had already planted 'Cheel' trees on the said land. It was further mentioned in the written statement that Dayal Chand had also approached the High Court by filing a writ petition which was dismissed as infructuous on 27.05.1993 and, therefore, it was contended by defendants No. 1 and 2 specifically that plaintiffs were estopped to file the suit.

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

> *"1. Whether the plaintiffs are entitled for the declaration that the order dated 20.1.2001 in case No. 2/8/98 by Sub Divisional Collector, Kandaghat and order dated 24.11.1997 passed in case No. 5/13 by A.C. IInd Grade, Kandaghat, are illegal and void, as alleged? OPP.*
>
> *2. In case, Issue No. 1 is held to be in affirmative, whether the plaintiffs are entitled for the relief of prohibitory/ permanent injunction, as claimed? OPP*
>
> *3. Whether the suit is not maintainable for want of service of legal notice under Section 80 C.P.C? OPD 1 and 2.*
>
> *4. Whether the plaintiffs are not competent to maintain the present suit? OPD 1 and 2.*
>
> *5. Whether the plaintiffs have no locus standi to file the present suit? OPD 1 and 2.*
>
> *6. Relief."*

5. On the basis of evidence led by the parties both ocular as well as documentary in support of their respective cases, the issues so framed were answered by the learned trial Court as under.

"Issue No.1	*: No.*
Issue No. 2	*: No.*
Issue No. 3	*: No.*
Issue No. 4	*: Yes.*
Issue No. 5	*: Yes*
Issue No. 6 (Relief)	*: Suit dismissed as per operative part of Judgment."*

6. Learned trial Court while dismissing the suit filed by the plaintiffs held that Ext. DW3/G, copy of Jamabandi for the year 1986-87, demonstrated that five bighas of land for five years i.e. from 1984 to 1989 was leased to Dayal Chand on Rs. 5/- as rent and order of Collector Ext. DW2/C demonstrated that said lease was cancelled by the Collector vide order dated 20.03.1991. Learned trial Court further held that land had not been reclaimed by the lessee, so the lease had been cancelled by the Collector and as Shivia died in the year 1974, therefore, when he passed away, at that time, he was having no right, title or interest over the suit property. Learned trial Court further held that matter was in fact not even agitated in the years between 1979 to 1984 when fresh lease was granted in favour of Dayal Chand by the State of H.P and none of the plaintiffs or proforma defendants had prayed to the revenue agencies that share of Shivia had devolved upon them. It was further held by the learned trial Court that plaintiffs alongwith proforma defendants remained silent during the eviction proceedings regarding the share of Shivia and after the final order was passed by Sub Divisional Collector, Kandaghat in the year 2001, the present suit was filed rather than taking recourse against the said eviction proceedings/orders. Learned trial Court further held that there was no evidence on record to show that Shivia was lessee after the year 1974 over the suit land, therefore, plaintiffs could not agitate the matter regarding eviction qua the land which was allotted to Dayal Chand as Shivia was not in picture after the year 1974. On these bases, it was held by the learned trial Court that orders dated 24.11.1997 and 20.01.2001, passed by Assistant Collector 2nd Grade and Sub Divisional Collector, Kandaghat respectively were neither illegal nor void. It was further held by the learned trial Court that as Dayal Chand was the only lessee of the suit land after the year 1978, therefore, plaintiffs could not be permitted to agitate their rights under the principles of natural justice also. Learned trial Court also held that after the death of Shivia, initially his wife succeeded him but as she died issueless, therefore, next line of legal heirs, i.e. plaintiffs and proforma defendants succeeded the estate of Shivia. It further held that as Shivia had no right, title or interest in the suit property as only five bighas of land was allotted to Dayal Chand and he had not succeeded Shivia but a new lease was granted in his favour and same stood cancelled by the competent authority in due course of law, therefore, plaintiffs although were legal heirs of Shivia but they had no right, title or interest to agitate the orders dated 24.11.1997 and 20.01.2001, passed by Assistant Collector 2nd Grade and Sub Divisional Collector, Kandaghat respectively. On these bases, learned trial Court dismissed the suit.

7. Feeling aggrieved by the said judgment and decree, the plaintiffs filed an appeal. Learned Appellate Court vide its judgment and decree dated 28.04.2006 allowed the appeal so filed and reversed the judgment and decree passed by the learned trial Court.

8. While allowing the appeal, it was held by the learned Appellate Court that learned trial Court committed grave error by holding that orders dated 24.11.1997 and 20.01.2001, passed by Assistant Collector 2nd Grade and Sub Divisional Collector, Kandaghat could not be declared illegal, null and void because these orders were passed behind the back of plaintiffs who were not parties to the said proceedings and hence, plaintiffs were not bound by them. Learned Appellate Court further held that learned trial Court committed grave error in declining relief of permanent prohibitory injunction to the plaintiffs as the findings returned by the learned trail Court on issues No. 1 and 2 were contrary to the evidence adduced on record and law point involved therein. While arriving at the said conclusion, it was held by the learned Appellate Court that evidence produced on record by the plaintiffs established that Shivia and Dayal Chand were inducted as tenants over the suit land by Gram Panchayat Satrol and after the death of Shivia,

his share was succeeded by Smt. Prago Devi and after her death, estate of Shivia was succeeded by plaintiffs and proforma defendants and they were coming in join possession over the suit land. Learned Appellate Court further held that it stood proved on record that no ejectment proceedings were initiated by Assistant Collector 2nd Grade against the plaintiffs nor they were made party in the ejectment proceedings initiated against proforma defendant Dayal Chand. It was further held by the learned Appellate Court that while DW3 proforma defendant Dayal Chand had admitted the claim of plaintiffs, DW1 Govind Ram, Patwari had stated that he had issued certificate Ext. DW1/A, as per which, after the death of Shivia, his property was succeeded by his wife Smt. Prago Devi. It was further held by the learned Appellate court that DW3 had stated that after the death of Shivia in the year 1974, his share was inherited by his wife Smt. Prago Devi and after her death, her share was succeeded by the plaintiffs and the proforma defendants and he also admitted that plaintiffs and proforma defendants were in joint possession of the suit land. Learned Appellate Court further held that plaintiffs were never ordered to be ejected from the suit land by any revenue authority as no ejectment proceeding was initiated against them and further they being in joint possession of the suit land could not be dispossessed forcibly from the suit land by the defendants except in due course of law and on these bases, it allowed the appeal and decreed the suit in the following terms

> *"The Judgement and decree passed by the learned lower Court is not in accordance with law and is not in accordance with the pleadings of plaintiffs and defendants. As such, the same judgment and decree is to be set aside and suit of the plaintiffs is to be decreed as a whole. Appeal is as such allowed with no order as to cost. Accordingly the impugned judgment and decree dated 24.10.2005 passed by learned trial Court are set aside and findings are quashed. As such decree for declaration and permanent prohibitory injunction is passed in favour of plaintiffs and against defendants No. 1 and 2. The impugned orders dated 20.01.2001 passed by Sub Divisional Collector Kandaghat and order dated 24.11.1997 passed by A.C-II Kandaghat being illegal, null and void are set aside having no binding effects on the rights of plaintiffs qua the suit land. Consequently the decree for permanent prohibitory injunction restraining defendants from interfering over land or dispossessing the plaintiffs forcibly from suit land bearing Khasra No. 833/8 min, measuring 10 bighas situated at Mauja Satrol, Teh. Kandaghat is passed in favour of the plaintiffs and against the defendants No. 1 and 2."*

9. Feeling aggrieved by the said judgment and decree passed by learned Appellate Court, State has filed this appeal, which appeal was admitted on 16.07.2008 on the following substantial questions of law

> *"1. Whether after expiry of lease period or its cancellation the legal representatives of original Lessee can claim any right over the leased property by way of inheritance that too without challenging the cancellation order passed by the competent authorities during the life time of original lessee?*
>
> *2. Whether the Civil Suit filed by the plaintiffs is sheer abuse of the process of law especially when ejectment orders passed in respect of the lease property have been unsuccessfully challenged upto the Hon'ble High Court by the Original lessee?"*

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

11. The factum of plaintiffs being in possession of the suit land has not been denied by the defendants/State. It is also not a disputed factual position that the State sought the eviction of the plaintiffs on the basis of orders dated 24.11.1997 and 20.01.2001, passed by Assistant Collector 2nd Grade and Sub Divisional Collector, Kandaghat respectively and the proceedings out of which the said orders have culminated were filed against Dayal Chand and not against plaintiffs. The factum of plaintiffs having succeeded the estate of Shivia after the death of

Shivia and thereafter Smt. Prago Devi is also not disputed by the State. However, as per the appellants/State, the suit land was never leased out to Shivia but was only leased out to Dayal Chand and it is on these bases that the State has defended the orders passed by the revenue authorities which were challenged by way of civil suit filed by the plaintiffs.

12. In my considered view, taking into consideration the fact that plaintiffs were not the party in the eviction proceedings which culminated into orders dated 24.11.1997 and 20.01.2001, passed by Assistant Collector 2nd Grade and Sub Divisional Collector, Kandaghat respectively, by no stretch of imagination, the eviction of the plaintiffs from the suit property could have been sought by the State on the strength of the said orders. These orders having been passed against Dayal Chand were enforceable only against Dayal Chand. It is not the case of the State that the plaintiffs were also impleaded as party in the said eviction proceedings. In these circumstances, it is not understood as to how the orders which have been passed by the revenue authorities in proceedings initiated against Dayal Chand can be enforced against the plaintiffs. When as per the appellants/State, plaintiffs were coming in joint possession of the suit land then it is but obvious that the plaintiffs are to be dispossessed from the suit land by due process of law. Adjudication in eviction proceedings against Dayal Chand cannot be termed to be "due process of law" for the purpose of evicting the plaintiffs from the suit land when the plaintiffs were not party to the said eviction proceedings. This Court is not even remotely suggesting that the plaintiffs have a right to remain in possession over the suit property on the grounds which have been taken by them in civil suit. However, law demands that even if plaintiffs are trespassers over the suit land and have no right, title or interest over the same, even then they have to be evicted from the same by following the procedure established by the law. Whether after the expiry of lease period or cancellation of the lease deed, legal representatives of the original lessee can claim right over the leased property by way of inheritance is an issue which can be decided by the competent authority once appropriate proceedings are initiated against the plaintiffs before it. Similarly, it cannot be said that civil suit filed by the plaintiffs was abuse of the process of law because the ejectment orders on the basis of which the appellants/State was seeking the ejectment of the plaintiffs were admittedly not passed against the plaintiffs nor were the plaintiffs party in the said ejectment proceedings.

13. A perusal of the judgment passed by the learned Appellate Court demonstrates that it has taken into consideration all these aspects of the matter while concluding that the plaintiffs were never ordered to be ejected from the suit land by any revenue authority as no ejectment proceedings were initiated against them. Similarly, learned Appellate Court correctly held that plaintiffs being in joint possession of the suit land could not be forcibly dispossessed from the suit land by the appellants/State except in due course of law. However, in my considered view, the declaration given by learned Appellate Court to the effect that order dated 20.01.2001 passed by the Sub Divisional Collector, Kandaghat and order dated 24.11.1997 passed by A.C. 2nd Grade are illegal, null and void and are set aside, is not sustainable because these orders are not illegal, null and void as far as Dayal Chand is concerned though they are not enforceable against the plaintiffs. The findings returned by the learned trial Court that these orders have no binding on the rights of the plaintiffs qua the suit land is the correct finding.

14. Therefore, while upholding the judgment and decree passed by the learned Appellate Court to the extent that decree for declaration and permanent prohibitory injunction is passed in favour of the plaintiffs and against defendants No. 1 and 2 restraining them from interfering over land or dispossessing the plaintiffs from the suit land except in due process of law, decree passed by the learned Appellate Court to the extent that order dated 20.01.2001 passed by the Sub Divisional Collector, Kandaghat and order dated 24.11.1997 passed by A.C. 2nd Grade are illegal, null and void is set aside. It is held that these two orders have no binding effect on the rights of the plaintiffs qua the suit land and that the plaintiffs cannot be forcibly dispossessed from the suit land except by following the procedure established by law. Substantial questions of law are answered accordingly. With the said modification in the judgment and decree passed by the learned Appellate Court, appeal is partly allowed to the extent mentioned

hereinabove. No order as to costs. Pending miscellaneous application(s), if any, also stands disposed of.

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

Tara Singh …Petitioner.
Versus
Govind Singh (deceased) through LRs. …Respondent.

CMPMO No. 313/2016
Reserved on: 24.11.2016
Decided on: 30.11. 2016

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree for permanent prohibitory injunction was passed- original judgment debtor was stated to have violated the judgement and decree – he died and an application was filed for bringing on record his legal representatives, which was dismissed by the Executing Court- held, that a decree for permanent prohibitory injunction can be executed by the decree holder or his legal representatives against the judgment debtor or his heirs or even the transferee of the judgment debtor, who is the purchaser pendent lite- the order passed by the Trial Court set aside and the application allowed- Court directed to decide the execution petition afresh. (Para-6 to 27)

Cases referred:
Amritlal Vadilal vs. Kantilal Lalbhai, AIR 1931 Bombay 280
Manilal Lallubhai Patel vs Kikabhai Lallubhai, AIR 1931 Bombay 482
Mubarak Begam and another vs Sushil Kumar and others, AIR 1957 Rajasthan 154
Minor Smt. Shanti Devi vs. Khandubala Dasi and others, AIR 1961 Calcutta 336
Ramchandra Deshpande vs. Laxmana Rao Kulkarni, AIR 2000 Karnataka 298
Kathiyammakutty Umma vs. Thalakkadath Kattil Karappan and others, AIR 1989 Kerala 133
Idrish vs. Jaikam and others, (2009) 156 PLR 32
Shivappa Basavantappa Devaravar vs. Babajan, 1999 (Suppl.) Civil Court Cases 98 (Karnataka)
Mohd. Osman vs. Dr. Devid, 2011 (3) Civil Court Cases 42 (Bombay)

For the Petitioner: Mr. Ashok Kumar Tyagi, Advocate.
For the Respondent: Mr. Desh Raj Thakur, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

This petition, under Article 227 of the Constitution of India, is directed against the order passed by the Executing Court on 3.5.2016 whereby it dismissed the application filed by the petitioner-decree holder for substituting the legal heirs of the judgment debtor on account of his death.

2. The proceedings before the learned Executing Court emanate from the judgment and decree passed in favour of the petitioner-decree holder whereby the original judgment debtor Govind Singh was permanently restrained from interfering in the suit land comprised in Khata Khatauni No.397/681 bearing Khasra No.1675/112/4 measuring 14 biswa situated in Mauza Bhagani, Tehsil Paonta Sahib District Sirmaur, H.P.

3. The original debtor Govind Singh was alleged to have violated the judgment and decree leading to file the execution petition under order 21 rule 32 of the Code of Civil Procedure.

He, however, died and after his death, the petitioner moved an application for bringing on record his legal representatives, which has been dismissed by the learned Executing Court on the ground that wilful disobedience and violation of judgment and decree is a penal provision and its cause of action dies with the defaulter.

4. It is against this order that the present petition has been filed on the ground that the findings recorded by the learned Executing Court are totally perverse and based on misconstruction of law on the subject.

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

6. At the outset, it would be necessary to refer to certain provisions of the Code of Civil Procedure:

> **"Section 50. Legal representative.**
>
> (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.
>
> (2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.
>
> **Section 146. Proceedings by or against**
>
> **representatives.**
>
> Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person then the proceeding may be taken or the application may be made by or against any person claiming under him.
>
> **Order 21 Rule 32 - Decree for specific performance for restitution of conjugal rights, or for an injunction**
>
> > (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.
> >
> > (2) Where the party against whom a decree for specific performance or for an injunctions been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.
> >
> > (3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for [six months] if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

> (4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or here, at the end of [six months] from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.
>
> (5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.
>
> [Explanation.-For the removal of doubts, it is hereby declared that the expression "the act required to be done" covers prohibitory as well as mandatory injunctions.]

7. The moot question, as observed earlier, is as to whether learned Executing Court was right in observing that the wilful disobedience and violation of judgment and decree dies with the defaulter.

For deciding this issue, certain judgments on the subject may be noticed:

8. At the earliest point of time is the judgment rendered by the Bombay High Court in ***Amritlal Vadilal*** vs. ***Kantilal Lalbhai***, AIR 1931 Bombay 280 wherein it was held that the decree for injunction does not run with the land and in the absence of any statutory provision, such a decree cannot be enforced against the surviving members of a joint family or against a purchaser from a judgment-debtor. But where the sons of the judgment debtor are brought on record as his legal representatives under section 50 of the Code the decree can be executed against them and so also against the transferees from the legal representatives.

9. In ***Manilal Lallubhai Patel*** vs ***Kikabhai Lallubhai***, AIR 1931 Bombay 482, the Bombay High Court held that where a decree for an injunction had been obtained against the father and the son had not been joined as a party and the father died during the pendency of the execution petition, the decree can be enforced under section 50 of the Code against the son as his legal representative by proceeding under order 21 rule 32 of the Code.

10. A Division Bench of Rajasthan High Court in ***Mubarak Begam and another*** vs ***Sushil Kumar and others***, AIR 1957 Rajasthan 154 held that since the judgment debtor dies, his property devolves upon his heirs, and therefore, if the decree holder wants to satisfy the decree from the property which is inherited by them, then he must bring on record the legal representatives of the judgment debtor and so long as they are not impleaded, he cannot take steps which would effect their rights adversely.

11. Similar reiteration of law is found in the full Bench judgment of the Hon'ble Calcutta High Court in ***Minor Smt. Shanti Devi*** vs. ***Khandubala Dasi and others***, AIR 1961 Calcutta 336.

12. A Division Bench of the Hon'ble Karnataka High Court in ***Ramchandra Deshpande*** vs. ***Laxmana Rao Kulkarni***, AIR 2000 Karnataka 298 has held that the transferee judgment debtor is a person claiming under the original judgment debtors as their successor-in interest within the meaning of section 146 CPC and, as such, the decree holder can maintain an application for execution of the decree against him.

13. Hon'ble High Court of Kerala in ***Kathiyammakutty Umma*** vs. ***Thalakkadath Kattil Karappan and others***, AIR 1989 Kerala 133, while relying upon section 50 of the Code, held that where a judgment debtor dies before a decree is fully satisfied, the decree holder can apply to the executing court for implementation of the same against the legal representatives of

the deceased and such legal representatives shall be liable to the extent of the property which has come to their hands by way of inheritance.

14. Similar reiteration of law is found in the judgment of the Hon'ble Punjab and Haryana High Court in ***Idrish*** vs. ***Jaikam and others***, (2009) 156 PLR 32.

15. Learned Single Judge of the Punjab and Haryana High Court in ***Lajwanti*** vs. ***Anoop Kumar***, Civil Revision No. 6983/2013 decided on 24.9.2014 after placing reliance upon the judgment rendered by the Karnataka High Court in ***Ramachandra Deshpande***'s and its own High Court judgment in ***Idrish's*** case (supra) held that where the judgment debtor dies before the decree has been fully satisfied, the decree holder can apply to the Executing Court for implementation of the same against the legal representatives of the deceased.

16. Relying upon the aforesaid exposition of law, Mr. Ashok Kumar Tyagi, learned counsel for the petitioner, would vehemently argue that the findings recorded by the learned executing court are clearly erroneous as the same are based on a total misconception of law, and therefore, deserve to the set aside.

17. As against the aforesaid contention, Mr. Desh Raj Thakur, learned counsel for the respondent, would rely upon the judgment rendered by the ***Shivappa Basavantappa Devaravar*** vs. ***Babajan***, 1999 (Suppl.) Civil Court Cases 98 (Karnataka) to contend that the injunction is a personal remedy against a person, in particular, and therefore, once the person dies, the cause of action dies with him and does not pass on to the legal representatives.

18. In addition thereto, he would also contend that even on earlier occasion, the respondent had been arrayed as one of the judgment debtors in the Execution Petition and the same was held to be not maintainable by the Executing Court vide its decision dated 29.1.2011 and in view of said decision having attained finality, the present petition is not maintainable.

19. Reliance is further placed on the judgment rendered by the Hon'ble Bombay High Court in ***Mohd. Osman*** vs. ***Dr. Devid***, 2011 (3) Civil Court Cases 42 (Bombay) to contend that a decree in injunction is a decree in *personam* and the order of injunction does not run with the land, and therefore, it would be impermissible to execute the decree against the legal representatives of the deceased judgment debtor or transferee of judgment debtor, who is the purchaser *pendente lite*.

20. Having considered the rival submissions of the learned counsel for the parties, it can be taken to be more than settled that a decree for permanent injunction can be executed by the decree holder or his legal representatives against the judgment debtor or his heirs or even the transferee of the judgment debtor, who is the purchaser *pendente lite*.

21. As regards the judgments relied upon by the learned counsel for the respondent, after having gone through the same, I find that the ratio laid down therein has been totally misconstrued and misinterpreted.

22. In ***Shivappa's*** case(supra), the case was still at the appellate stage when the defendant-appellant died and it was under these peculiar facts and circumstances that the Hon'ble High Court of Kerala held that once a man dies, the cause of action dies with him and does not pass on to his legal representatives.

23. Now adverting to the judgment rendered by the Hon'ble Bombay High Court in ***Mohd. Osman's*** case (supra), it would be noticed that the ratio laid down in ***Amritlal Vadilal's*** case (supra) was re-affirmed and in fact supports the contention of the petitioner. Relevant observations read as under:

> "[7] The Division Bench of this Court in a case of"Krishnabai PandurangSalagare and others Vs. Savlaram Gangaram Kumtekar, 1927 AIR(Bom) 93, has held thus:

"Here the transfer was not under the authority of the Court, and it was made during the pendency of a contentious proceeding in execution of this decree. It seems to me that this transfer cannot be allowed to affect the rights of the present plaintiff. He is entitled to such order as he would have obtained under the darkhast if there had been no transfer. If the mere fact of the transfer were accepted as a ground for disallowing his application for execution, it would mean that the transfer is allowed to affect the rights of the plaintiff, which would be contrary to the provisions of S.52 of the Transfer of Property Act."

Even the Division Bench of this Court in a case of "Amritlal Vadilal Vs. Kantilal Lalbhai, 1931 AIR (Bom) 280, which the learned counsel for the appellant has relied has observed thus:

"The decree for injunction does not run with the land and in the absence of any statutory provision, such a decree can not be enforced against the surviving members of a joint family or against a purchaser from a judgment-debtor. But where the sons of the judgment debtor are brought on record as his legal representatives under Section 50 the decree can be executed against them and so also against the transferees from the legal representatives, under Section 52, T.P. Act. On the same principle, viz., that they are bound by the result of the execution proceedings under S.52, T.P. Act. The transferees from the original judgment-debtor during the pendency of execution proceedings against him, can be held to be similarly bound and are liable to be proceeded against in execution."

[8] The Division Bench of the Karnataka High Court in a case of "Ramachandra Deshpande Vs. Laxmana Rao Kulkarni, 2000 AIR(Kar) 298, relying on the aforesaid judgment of our High Court has held that a decree for injunction could be executed against the successor in interest of the deceased judgment debtor as well. Transferee pendente lite for all puiposes be the representative in interest of the judgment debtor."

24. Adverting to the second contention raised by the learned counsel for the respondent that the execution petition against the respondent is not maintainable as the execution petition against him already stands dismissed on 29.1.2011, I find that respondent was impleaded in the execution petition when his father was very much alive. Obviously, once the suit was only against the father of the respondent Sh. Govind Singh, therefore, the execution petition against the son, i.e. the present respondent was not at all maintainable at that stage.

25. Therefore, the order passed by the Executing Court at an earlier occasion on 29.1.2011 dismissing the Execution Petition against the present respondent is of no consequences, as the respondent is now sought to be impleaded in an entirely new capacity as legal representative in place of the original judgment debtor, who had died during the pendency of the execution petition.

26. In view of aforesaid discussion, the view taken by the learned court below is clearly erroneous, and therefore, not sustainable in the eyes of law and is accordingly set aside.

27. Learned court below shall restore the Execution Petition and the Application to its original numbers and then proceed to decide the same in accordance with law.

28. Having said so, the present petition is disposed of, so also the pending application(s), if any, leaving the parties to bear their own costs.

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